

# Mediation Without Litigation

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Creating some kind of ombudsman-like office within the federal government to help requesters resolve problems with Freedom of Information Act requests has been a primary recommendation for amending FOIA in the past few years. The small newspaper community has been particularly supportive of the idea and bills to amend FOIA in both the Senate and the House incorporate the concept, establishing a national information office at the National Archives.

Regardless of the ultimate details, the push for an ombudsman reflects a frustration with the inability of many individuals and small organizations to press their case in the face of agency denials or delays. The FOIA, passed by Congress in 1966, set up the federal courts as the final arbiter for resolution of disputes between requesters and government agencies. While the courts are respected for their independence, forcing requesters to go to court if they are dissatisfied has prolonged an already arduous process, often adding years to the final resolution. Both the cost and time of litigation has discouraged requesters from litigating.

Now, some 40 years later, access advocates are turning to state models for examples of how access to information disputes can be resolved short of litigation. While litigation is still the ultimate resolution even in the states, a number of states have both formal and informal processes that provide opportunities for dispute resolution without going to court. This report will survey the approaches taken by those states with both specific and informal dispute resolution as a way of better understanding what currently exists and what models might be adopted at both the federal level and for those states that currently do not have a mediation system of their own.

## Formal Resolution

Several states have formal resolution models. The best known of these is the Freedom of Information Commission in Connecticut. New Jersey overhauled its access law several years ago and instituted a system that is directly based on the Connecticut system. The provisions of both systems are described below.

### Connecticut

The Connecticut Freedom of Information Commission<sup>1</sup> is a quasi-judicial administrative agency created by the state's Freedom of Information Act,<sup>2</sup> which covers both access to government records<sup>3</sup> and access to public meetings.<sup>4</sup>

The Commission is composed of five members, of whom no more than three can be members of the same political party. The members are nominated by the Governor and confirmed by one house of the state legislature. Commissioners serve part-time with a per diem allowance (\$200) to avoid political patronage concerns. They are appointed for four years with staggered terms. Typically, the background of commissioners has been balanced. Some have been journalists, while others have served in the public sector. Still others have come from academia and the clergy.

The Commission is run by an executive director and general counsel with a current staff of 20, including the executive director and general counsel; the staff is likely to increase to 22 later this year. It is authorized to hear complaints from anyone who has been denied access to records or to meetings of public bodies, both state and municipal. Individuals who believe they may be adversely affected by the disclosure of personal information by a public body may be permitted to have their positions presented to the

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<sup>1</sup> Conn. Gen. Stat. §§1-205 and 1-206

<sup>2</sup> Conn. Gen. Stat. §1-200 et seq.

<sup>3</sup> Conn. Gen. Stat. §1-210 et seq.

<sup>4</sup> Conn. Gen. Stat. §1-225 et seq.

Commission. While complaints filed with the FOI Commission may be resolved to the satisfaction of the complainant, the Commission's decision can be appealed to a superior court if the complainant, the public body, or certain affected third parties are dissatisfied with the Commission's decision. For complainants, the Commission is a necessary first step, since a denial of access cannot be heard by the superior court until the Commission has first ruled on the complaint.

The Commission disposes of approximately 600-700 complaints each year in a state with a population of 3.5 million. It also responds to a varying number of requests for declaratory rulings or advisory opinions. When the Commission receives a complaint, verified as such by a staff member, it simultaneously schedules the matter for hearing and refers it to a staff "ombudsman" or mediator, who attempts to settle the case without the need for a hearing. Historically, in excess of 50 percent of the complaints filed each year are settled without a hearing, either through mediation or administrative dismissals where the complainant assents to dismissal based on previous definitive rulings or a lack of subject matter jurisdiction.

When a complaint is set down for a hearing, the case is also assigned to another staff attorney who shepherds the case through the administrative process. That would normally include receiving written submissions from the complainant, the public body, or a third party explaining in greater detail the facts of the case and providing an opportunity for the parties to argue the legal issues involved. The parties then appear before a hearing officer, who is either a Commissioner or a staff attorney, at which time the parties are provided an opportunity to present witnesses, physical evidence and legal arguments. The hearing officer presides over the hearing in much the same way as would a judge in a court proceeding, but the hearing officer can also be a more active participant in questioning witnesses and directing the flow of discussion than would typically be the case in a court proceeding.

After a hearing has been completed, the hearing officer begins the process of deciding the complaint. This may require more submissions from the party and can even include another hearing. The hearing officer then prepares a draft decision that is submitted to the Commissioners for approval, disapproval or revision. The Commissioners then vote to accept or reject the hearing officer's decision, at which time it becomes the official Commission decision if accepted. If rejected, the decision goes back to the hearing officer for further consideration.

All complaints that are not resolved before hearing are heard and determined as contested cases under procedures set forth in the state version of the Uniform Administrative Procedure Act<sup>5</sup> and the Commission's regulations,<sup>6</sup> usually in less than eight weeks, and, if necessary, in less than one week. These proceedings are on the record and any court appeal is limited to a review of the record for substantial evidence supporting the decision (an extremely low standard for the Commission to meet) or other legal error.<sup>7</sup> There is no *de novo* judicial review. Appeals go to the state's court of general jurisdiction with a further limited right to appeal to the state's intermediate appellate court. Further review by the state Supreme Court would be considered under a process similar to that for certiorari by the U.S. Supreme Court. Generally, only 10 to 25 Commission cases are appealed each year. Thus, litigation costs are relatively low.

Although administrative adjudication must comply with certain prescribed requirements, its practice is designed to be used by parties without the need for counsel. While virtually all public agencies are represented by counsel, usually an Assistant Attorney General or municipal attorney, the vast majority of complainants appear without counsel. A party is usually not disadvantaged by appearing without counsel because a staff attorney for the Commission is present to ensure that a full record is developed which supports a fair determination of all issues. Again, this saves Connecticut citizens a great deal of money.

Pursuant to Conn. Gen. Stat. §§1-2-5 and 1-206, the Commission has the power to hold hearings and issue subpoenas. Upon finding a violation of the FOI Act, the commission has the power to order the

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<sup>5</sup> Conn. Gen. Stat. §4-166 et seq.

<sup>6</sup> §§et seq. of the Regulations of Connecticut State Agencies

<sup>7</sup> Conn. Gen. Stat. §4-186

disclosure of public records, declare null and void actions taken at meetings, impose civil penalties up to \$1,000 for violations without reasonable grounds, and to fashion appropriate remedies to rectify violations of the Act. Failure to comply with a commission order is a misdemeanor and the commission has some civil enforcement authority.

Besides its formal hearing role, the Commission plays an important part in providing continuing education to state and municipal agencies on their obligations under the law. Commission staff also fields questions from citizens and public bodies, frequently resolving issues informally that might have become formal complaints otherwise. The Commission also takes the lead in promoting legislation designed to improve access and is actively involved in opposing legislative proposals that restrict the right of access.

## New Jersey

The Open Public Records Act, passed in 2002, replaced the antiquated Right to Know Law<sup>8</sup>, where access to records was so limited by a narrow definition of what constituted a public record that the courts had to resort to falling back on the common law right of access to provide disclosure to many records that might be routinely available under similar laws in other jurisdictions. The Right to Know Law was completely overhauled in 2002<sup>9</sup>. Part of the revisions created a Government Records Council based on the model of Connecticut's FOI Commission. Under OPRA, a requester denied access to records may bring a lawsuit in superior court or file a complaint with the GRC, a state agency within the Department of Community Affairs. The GRC consists of the Commissioner of Community Affairs and the Commissioner of Education or their delegates, as well as three public members, no more than two of whom can be from the same political party. The public members are appointed by the Governor. The GRC is empowered to employ its own staff, but may also ask the Department of Community Affairs for support assistance.

According to OPRA, the powers and duties of the GRC include establishing an informal mediation program for facilitating resolution of records disputes, hearing and adjudicating complaints filed pertaining to denials of access, and issuing advisory opinions concerning the public availability of particular types of records.<sup>10</sup> The Council operates by majority vote of its members. The GRC staff consists of an executive director, an operations manager; five case managers; a secretary; a Deputy Attorney General; and a mediator provided by the Office of Dispute Resolution. The annual budget is currently \$771,000.

Record requesters who believe they have been denied access to all or part of the records requested may file a complaint with the GRC. As part of the hearing process, the GRC may order a public agency to provide the records for review. Once those complaints are heard and considered, the GRC has the power to order a public body to disclose all or part of the records. The Council's decision may be appealed to superior court by either party. Although the case law under OPRA so far is limited, the Council has ordered law enforcement agencies in several instances to disclose investigative reports and those decisions have been upheld on appeal.<sup>11</sup> In what appears to have been a frontal assault on the time limits, a coalition of plaintiffs sued to enforce penalties against a small agency that was unable to respond in time. The GRC took the position that a flexible reasonableness standard should be applied in such cases, a position, that, again, was upheld by the court.<sup>12</sup>

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<sup>8</sup> P.L. 1963, c. 73

<sup>9</sup> P.L. 2001, c 404

<sup>10</sup> N.J.S. Ann § 47:1A-1-7b

<sup>11</sup> *Courier News v. Hunterdon County Prosecutor's Office*, 876 A.2d 806 (N.J. Super. A.D., June 28, 2005); *Serrano v. South Brunswick Township*, 817 A.2d 1004 (N.J. Super. A.D., March 19, 2003)

<sup>12</sup> *New Jersey Builders Association v. New Jersey Council on Affordable Housing*, 915 A.2d 23 (N.J. Super. A.D., Jan. 24, 2007)

## Informal Resolution

### New York

The Committee on Open Government was created in 1974 as part of the New York Freedom of Information Law.<sup>13</sup> The Committee's statutory role is to provide any agency or person with advisory opinions regarding the FOIL, as well as the state's Open Meetings Law<sup>14</sup> and the Personal Privacy Protection Law,<sup>15</sup> enacted respectively in 1977 and 1984. Under its executive director, Bob Freeman, the Committee has prepared more than 20,000 written opinions and fields more than 6,000 telephone inquiries annually. While its services are available to both local and state agencies and the public, according to its annual statistics, more than 60 percent of written opinions were the result of public inquiries. Local government accounted for 17 percent and state government for a mere .75 percent. The Committee's opinions are non-binding, but are frequently accepted by courts for their persuasive value. While the Committee's purpose is to both mediate problems arising under FOIL and to educate government agencies and the public concerning the requirements of the statute, an individual who feels that a public body has violated provisions regarding access to records under FOIL or public meetings under the Open Meetings Law is not bound by the advice of the committee and may proceed to bring suit against the public body at the trial court level. The committee also plays an educational function and its staff travels extensively to talk to government agencies, public organizations, and the media.

The committee is also charged with providing an annual report to the governor and the legislature by December 15 of each year. The report catalogues the committee's activities and findings during the year and may make recommendations for amending the law.

The committee itself is made up of eleven members. Four *ex officio* members are the lieutenant governor, the secretary of state, the director of the budget, and the commissioner of general services. The other seven members must be non-governmental except for the representative of local government. Five of the seven are appointed by the governor, at least two of whom must be or have been representatives of the media, and one of whom shall represent local government. The other two members are appointed by the temporary president of the senate and the speaker of the assembly. Members are appointed for four-year terms. The committee is required to meet at least twice annually but the meetings may take place at any time.

### Minnesota

In Minnesota, the Commissioner of Administration has statutory authority to provide guidance on data practices and Open Meeting Law issues.<sup>16</sup> These are known as advisory opinions and, as the name suggests, the opinions are not binding on the government entity (data practices) or public body (Open Meeting Law) involved. While the process for issuing the two types of advisory opinions is the same, the differences are better understood when they are presented separately.

Advisory opinions involving data practices issues can be requested by either a government entity, including state and local government but excluding most townships, or a member of the public. The Commissioner's jurisdiction is different depending on the requester. A government entity can request an advisory opinion about public access to government data, the rights of subjects of data or classification of data. A member of the public may only request an advisory opinion when he or she disagrees with a determination regarding data practices made by a government entity.

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<sup>13</sup> Public Officers Law, Article 6 §§84-90

<sup>14</sup> Public Officers Law, Article 7 §§100-111

<sup>15</sup> Public Officers Law, Article 6-A, §§91-99

<sup>16</sup> Minnesota Statutes, section 13.072

There is no cost for a data practices advisory opinion. The commissioner's opinions are non-binding, but an opinion must be given deference by a court in a proceeding involving the data. The disputed government data may be provided to the commissioner for purposes of responding to a request for an opinion. When government data are provided to the commissioner they retain the same classification as the data would have when held by the governmental entity. If the nature of the opinion is such that release of the opinion would reveal non-public data, the commissioner may use pseudonyms for individuals.

An advisory opinion involving an Open Meeting Law issue may be given to a public body on any question relating to the public body's duties under the Open Meeting Law.<sup>17</sup> A person who disagrees with the manner in which members of a public body have performed their duties under the Open Meeting Law may also request an advisory opinion. Both government entities and members of the public must pay a \$200 fee to the commissioner for such an opinion.

The process for both types of advisory opinion is the same. Once an advisory opinion request is received, the commissioner must decide whether to issue an opinion within five business days. If the opinion request will not be accepted, the requester must be notified. If the opinion request is from a member of the public and is accepted, the government entity or public body is given an opportunity to explain its data practices determination or how it performs its duties. Either the commissioner or the public body concerned may choose to give notice to the subject of the disputed data regarding disclosure or compliance with the statute. A written, numbered and published opinion of the attorney general takes precedence over an opinion of the commissioner.

If the commissioner decides to issue an opinion, the opinion shall be issued within 20 days of receipt of the request for an opinion. The commissioner may extend the 20-day period for preparing an opinion one additional 30-day period by providing the requester written notice stating the reasons for the delay. The opinions are prepared by staff members in the Information Policy Analysis Division of the Department of Administration.

An individual may bring an action in court if he or she disagrees with the commissioner's opinion or the government entity or public body refuses to comply with such an opinion. However, a government entity or members of a public body acting in conformity with a commissioner's opinion are not liable for compensatory or exemplary damages or awards of attorney's fees. Further, a member of a public body is not subject to forfeiture of office if the member was relying on a commissioner's opinion.

## **Hawaii**

The Office of Information Practices was created by the Uniform Information Practices Act.<sup>18</sup> Originally located in the Office of the Attorney General, OIP has since been moved and now resides in the Office of the Lieutenant Governor. The Office is headed by a chief executive officer appointed by the governor. OIP is charged with reviewing and ruling on an agency denial of access to information, or an agency's granting of access, but may not provide such a ruling when the case is currently in litigation. Upon request of an agency, OIP shall provide advisory guidelines, opinions or other information concerning the agency's functions and responsibilities. Upon request by any person, OIP may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under the UIPA. OIP may also issue advisory opinions concerning potential violations of the Sunshine Act, the state's open meetings law. In addition, OIP may conduct inquiries regarding compliance by agencies and may investigate possible violations by any agency. It may examine records of any agency during an investigation and may recommend disciplinary action to appropriate officers of an agency. OIP solicits and receives complaints from the public concerning implementation of the UIPA and assists agencies in complying with the statute. OIP must report annually to the governor and legislature on its activities and findings, including recommendations for legislative changes.

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<sup>17</sup> Minnesota Statutes, Chapter 13D

<sup>18</sup> Hawaii Chapter 92F

OIP is charged with adopting rules for an administrative appeals structure, including agency procedures for processing records requests; direct appeal from an agency denial; and time limits for action by agencies. OIP also must adopt rules on fees and other charges.

As part of its duties pertaining to individual privacy, OIP is required to inform the public of its rights and the procedures for exercising them, including the right of access to records pertaining to the individual; the right to obtain a copy of the records; the right to know the purposes for which the records are kept; the right to be informed of uses and disclosures of the records; the right to correct or amend the records; and the right to place a statement of disagreement in the records.

## Virginia

After extensive study of existing ombudsman models in other states, Virginia borrowed from the New York model in creating the FOI Advisory Council in 2000. The Council is part of the legislative branch and Maria Everett, its executive director, works for the Division of Legislative Services. The staff may provide interpretations of any provisions of the Freedom of Information Act, which includes access to both records and meetings, to state and local government or members of the public. While requests for opinions are limited to state institutions or citizens, the staff has chosen to respond to requests from outside the state, particularly from media covering matters in Virginia. Like New York, the staff's opinions are not binding, but can be used for their persuasive value. Requesters may still file suit in district court if not satisfied with the staff's opinion or if the public body accused of a violation of FOIA continues to ignore the staff opinion. In 2006, the staff issued 10 written opinions, but responded to more than 1,700 inquiries.

The staff also plays an important educational role. The statute requires government officials to have knowledge of the provisions of FOIA<sup>19</sup> and, thus, the staff participates in educational efforts throughout the state on the state and local government level. The staff also provides educational opportunities for members of the public, civic, and public interest organizations. In 2006, the staff conducted 55 training sessions throughout the state.

The FOI Advisory Council consists of 12 members. Permanent members include the Attorney General, the Librarian of Virginia, and the Director of the Division of Legislative Services. Four other members are appointed by the Speaker of the House of Delegates, one of whom must be a member of the House of Delegates, and three non-legislative citizen members, one of whom shall be or have been a representative of the news media. Three members are appointed by the Senate Rules Committee, one of whom shall be a member of the Senate, one of whom shall be an officer or have been an officer of local government, and one of whom shall be a citizen at-large member. Two non-legislative citizen members shall be appointed by the Governor, one of whom shall not be a state employee.<sup>20</sup> The Council meets four times annually and discusses current problems and issues pertaining to the statute. It is often used as a place to which controversial legislative proposals can be referred for further study and consideration.

## Indiana

The Office of the Indiana Public Access Counselor was created by the General Assembly in 1999.<sup>21</sup> Under the statute creating the office, the Public Access Counselor is required to establish and administer an educational program for public officials and the public concerning the rights of the public and the responsibilities of public officials under the Open Door Law,<sup>22</sup> and the Access to Public Records Act.<sup>23</sup> The Public Access Counselor is also empowered to respond to informal inquiries from the public and

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<sup>19</sup> §2.2.3702

<sup>20</sup> §30-178

<sup>21</sup> Indiana Code 5-14-4

<sup>22</sup> Indiana Code 5-14-1

<sup>23</sup> Indiana Code 5-14-3



public agencies concerning access law and to issue non-binding advisory opinions upon request from the public or a public agency. In addition, the Public Access Counselor is charged with recommending to the General Assembly ways in which to improve public access and submitting an annual report on her activities to the Legislative Services Agency.

A formal complaint may be filed against a public agency for denial of access to records or public meetings. A formal complaint must be filed within 30 days after the denial or after the complainant receives notice that a meeting was held by a public agency either in secret or without notice. A complaint is considered filed on the date it was received by the Public Access Counselor or the date of the postmark if received more than 30 days after a denial. After receipt, the Public Access Counselor sends the complaint to the public agency that is the subject of the complaint and requests a response from the agency. The Public Access Counselor has 30 days to issue an advisory opinion. Filing a formal complaint does not toll any statute of limitations applicable to suits filed under either the Open Door Law or the Access to Public Records Act. The public or public agencies may also contact the Public Access Counselor with an informal inquiry. Such inquiries may concern general questions about the access law or may pertain to a specific complaint. If necessary, the Public Access Counselor will contact the agency about which the complaint is made in an effort to resolve the problem without issuing a written opinion.

Although the Public Access Counselor's opinions are not binding, contact with the Public Access Counselor can be important if an individual proceeds to litigation. Under the Open Door Law and the Access to Public Records Act, a prevailing plaintiff must be awarded reasonable attorney's fees and costs. But if the plaintiff has not contacted the Public Access Counselor before filing suit, these fees and costs will not be awarded unless the court finds that the suit was necessary to prevent a violation of the Open Door Law or because the denial of access to a public record would prevent the person from presenting that record to another public agency preparing to act on a related matter.

Contacting the Public Access Counselor may also have consequences for a public agency in litigation. Under the Open Door Law, a court will consider whether an agency acted in accordance with an informal inquiry or an advisory opinion in determining whether to declare any action or policy void.<sup>24</sup> If a public agency denies records furnished by a third party, it is required to notify the third party concerning whether the denial is in compliance with an informal or formal response from the Public Access Counselor.<sup>25</sup>

The Public Access Counselor is appointed by the governor for a four-year term and can be removed from office by the governor for cause. If a vacancy occurs, the governor shall appoint an individual to serve the remainder of the term of the Public Access Counselor.

## **Illinois**

The Public Access and Opinions Division of the Office of the Attorney General was created in December 2004. The Division is headed by the Public Access Counselor, appointed by the Attorney General. The Public Access Counselor is charged with ensuring that public bodies understand their obligations under the Freedom of Information Act<sup>26</sup> and the Open Meetings Act.<sup>27</sup> Both the public and government agencies may contact the Public Access Counselor for informal advice, help in resolving disputes over access to records or attendance of meetings, and for interpretation of the access statutes themselves. The Public Access Counselor's advice is non-binding, but most parties contemplating litigation contact the office before filing suit. Further, in such cases the parties frequently attach their correspondence with the Public Access Counselor as an exhibit to their court filing. In 2006, the Public Access Counselor responded to 781 inquiries concerning FOIA and 207 inquiries concerning the Open

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<sup>24</sup> Indiana Code 5-14-6.6-7(D)(4)

<sup>25</sup> Indiana Code 5-14-3-9(D)(2)

<sup>26</sup> 5 ILCS 140

<sup>27</sup> 5 ILCS 120

Meetings Act. Of the inquiries concerning FOIA, 660 were from the public, 81 from the media, and 40 from government officials. Of the inquiries received concerning the OMA, 131 were from the public, 48 from government officials, and 28 from the media. Providing educational training is also an important role of the Public Access Counselor and in 2006 the Office of the Attorney General conducted 53 training sessions throughout the state.

## **Iowa**

The Office of Citizens' Aide/Ombudsman is a statutory position<sup>28</sup> appointed by the governor. The ombudsman is charged with investigating citizen complaints pertaining to state and local government and its role is substantially broader than just matters of public access to records or meetings. However, it received 282 contacts in 2006 concerning public records, open meetings, and privacy.<sup>29</sup> About 60 to 80 percent of those complaints involve local government issues.<sup>30</sup> While the ombudsman recommends that citizens try to work out differences with agencies directly before complaining to the ombudsman's office, once a complaint is received by the ombudsman's office it may investigate the complaint impartially and independently. The ombudsman will work with the government agency to resolve the problem and make recommendations for administrative or policy changes were necessary. The ombudsman may also make recommendations to the General Assembly for legislation as appropriate.

## **Florida**

What was previously an informal mediation program within the Office of the Attorney General was codified by the legislature in 2007.<sup>31</sup> According to the statute, the Office of the Attorney General must employ one or more mediators to resolve disputes involving access to public records. Such a mediator must be a member in good standing of the Florida Bar. Mediation is defined as acting "to encourage and facilitate the resolution of a dispute between two or more parties. It is a formal, nonadversarial process that has the objective of helping the disputing parties reach a mutually acceptable, voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives."<sup>32</sup> The mediation staff will also recommend to the legislature needed legislation and assist the Department of State in preparing training seminars regarding access to public records.

The Governor has also created the Office of Open Government.<sup>33</sup> The office is required to provide the governor and executive agencies with "guidance and tools to serve Florida with integrity and transparency." The role of the office is to oversee compliance with open government and public records laws, provide training to executive agencies, and ensure that the governor's office complies with the statutes in a full and expeditious manner. Each agency is directed to designate an individual to serve as the public records/open government liaison with the Office of Open Government.

## **Maryland**

The Maryland Open Meetings Compliance Board was established as an independent body by the General Assembly in 1991. The three-member board considers complaints alleging violations of the open meetings statute by state and local government bodies. The board was created to offer the public an

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<sup>28</sup> Iowa Code Chapter 2C

<sup>29</sup> Ombudsman's Report 2006, p. 3, available at [www4.legis.state.ia.us/caodocs/Annual\\_Reports/2007/CAWPA000.PDF](http://www4.legis.state.ia.us/caodocs/Annual_Reports/2007/CAWPA000.PDF)

<sup>30</sup> Id.

<sup>31</sup> Fla. Stat § 16.60

<sup>32</sup> Fla. Stat §16.60(1)

<sup>33</sup> Fla. Exec. Order No. 07-01

alternative to litigation when violations of the open meetings statute are alleged. Its opinions are non-binding<sup>34</sup> and the value of its opinions lies more in promoting future compliance and educating public bodies and members of the public.

The three members of the board are appointed by the Governor with the consent of the Senate.<sup>35</sup> The board has no permanent office, but it receives support from the Office of the Attorney General.

A party that believes there has been a violation of the Open Meetings Act<sup>36</sup> by a public body may file a complaint with the compliance board. A complaint should include a detailed explanation of what took place, the dates on which the violations allegedly occurred, and the potential violation allegedly committed by the public body. The board will then send the complaint to the public body for a response. If the board concludes the complaint does not provide enough information, it may ask the complaining party for additional information. The public body is expected to respond to the allegations within 30 days.<sup>37</sup> The public body should address all the allegations in the complaint and any other issues raised by the board. If it denies a violation occurred, it should explain how the public body properly complied with the law. If the public body admits to having violated the statute, it should explain the steps it has or will take to comply in the future. The compliance board may also ask for documents from the public body.

The compliance board will normally issue an opinion within 30 days of receiving the public body's response. Because its opinions are advisory, the board will indicate only whether it thinks the Open Meetings Act has been violated and explain the basis for its opinion. The board's opinions are made available on the Internet shortly after issuance.

## Washington

The position of Open Government Ombudsman was created by the Attorney General in January 2005. The ombudsman is an Assistant Attorney General for Government Accountability and his role is to assist both citizens and public agencies to comply with the Public Disclosure Act<sup>38</sup> and the Open Public Meetings Act.<sup>39</sup> The ombudsman can provide informal opinions when appropriate. While these opinions are non-binding, they may be persuasive in convincing the agency to reconsider its position or when submitted to a court as part of a suit against the agency.

The Ombudsman coordinates the Attorney General's legislative and policy initiatives on open government, drafting legislation and working with the legislature to pass it. The Ombudsman is also charged with drafting and updating the Attorney General's rules for disclosure of public records. The Ombudsman conducts open government training for both citizens and public agencies and makes written resource materials available to both.

## Georgia

As the result of amendments in 1997, the Office of the Attorney General was given the ability to help citizens and government agencies mediate disputes dealing with access to records or meetings without resorting to litigation. The Open Government Mediation Program is designed to help citizens with questions concerning alleged violations of the Open Meetings Act<sup>40</sup> by local government bodies or questions concerning governmental agency responses to requests under the Open Records Act.<sup>41</sup> Attorneys in the Department of Law work to ensure that local governments provide appropriate access to meetings

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<sup>34</sup> § 10-502(i)(1)

<sup>35</sup> § 10-502.2

<sup>36</sup> § 10-500

<sup>37</sup> § 10-502.5(c)(2)(ii)

<sup>38</sup> Chap. 42.56 RCW

<sup>39</sup> Chap. 42.30 RCW

<sup>40</sup> O.C.G.A. § 50-14-1 – 50-14-6

<sup>41</sup> O.C.G.A. §50-18-70 – 50-18-76

and records. If a local government agency fails to abide by its statutory obligations, the Attorney General may initiate legal action to force compliance.

## Arizona

The Ombudsman – Citizen Aide is part of the legislature and was established to make government more responsive to citizens.<sup>42</sup> This includes receiving complaints under the Public Records Law<sup>43</sup> and the Open Meeting Law.<sup>44</sup> Arizona’s ombudsman operates much like Iowa’s ombudsman. It is an informal confidential procedure designed to help resolve matters through contact with the public agency and mediation of the parties, but it has no enforcement powers. As in Iowa, the Arizona ombudsman recommends that citizens try to resolve problems directly with the public body before contacting the ombudsman. The ombudsman’s jurisdiction is limited to state government except in the matter of public access, where it may receive complaints against local government as well. The Open Meeting Law provides that a suit alleging a violation of the statute may be brought by an individual, the attorney general, or a county attorney.<sup>45</sup> The attorney general has created an Open Meeting Enforcement Team which can hear complaints concerning violations of the Open Meeting Law.

## Formal/Informal Resolution

### Massachusetts

The Massachusetts Public Records Law<sup>46</sup> is a hybrid containing elements of both formal and informal resolution. Complaints concerning lack of access may be made to the Supervisor of Records, but the Supervisor may use his discretion in determining whether or not to open an appeal concerning a request for public records. Violations of the Open Meetings Law are handled by the appropriate district attorney, not the Supervisor of Records.

According to the Public Records Law, the Supervisor may reject an appeal when the records are subject to active litigation, administrative hearings or mediation; when the Supervisor concludes that the appeal is designed or intended to harass, intimidate or assist in the commission of a crime; or when the Supervisor concludes that the request is made solely for commercial purposes.<sup>47</sup> Further, such appeals must be in writing and include a copy of the requester’s letter and, if available, a copy of the custodian’s response. The Supervisor may only accept an appeal from an individual who has made his or her request in writing. An oral request, while valid as a request under the Public Records Law, may not be the basis for an appeal to the Supervisor.<sup>48</sup>

Once an appeal is accepted, within a reasonable time the Supervisor shall investigate the circumstances giving rise to the appeal and render a written decision to the parties stating the reason or reasons for the decision. The legal presumption shall be that the record sought is public.<sup>49</sup>

The Supervisor may conduct a hearing or require that the disputed records be provided for *in camera* review. The Supervisor may require a records custodian to produce other records and information necessary to reach a determination on the appeal.<sup>50</sup> The Supervisor may also require the records custodian to submit an index of the requested records when there is a large number of records or pages involved. The

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<sup>42</sup> A.R.S. § 41-1371 – 41-1383

<sup>43</sup> A.R.S. § 39-121

<sup>44</sup> A.R.S. § 38-431

<sup>45</sup> A.R.S. § 38-431.07(A)

<sup>46</sup> G.L. c. 4 §7 (26)

<sup>47</sup> 950 CMR 32.08(2)

<sup>48</sup> 950 CMR 32.08(2)

<sup>49</sup> 950 CMR 32.08(3) and (4)

<sup>50</sup> 950 CMR 32.08(5) and (6)

index must be contained in a single document, must describe each withheld record or deletion from a released record, and must state the exemption or exemptions claimed for each withheld record or deletion. The index must contain descriptions of the withheld material and the exemptions claimed that are sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether or not the records are exempt.<sup>51</sup> Whenever necessary, the Supervisor may order conferences for the purpose of clarifying and simplifying issues or otherwise facilitating or expediting the investigation or proceeding.<sup>52</sup>

The opinions of the Supervisor are not binding. Although in practice they are often followed by the agency, if the Supervisor feels the agency has not complied with his order he must notify the appropriate attorney general or district attorney to take action to enforce the opinion.<sup>53</sup> However, a requester denied access may also file a complaint in the superior court without consulting the Supervisor. A requester may also bring suit if the Supervisor upholds the agency's denial of access to records.<sup>54</sup>

## Utah

The State Records Committee, created by the Government Records Access and Management Act,<sup>55</sup> is located in the Department of Administration. The seven-member committee is required to meet once every three months to hear appeals from denials of access and to review and approve retention and disposal of records.<sup>56</sup>

A requester dissatisfied with an administrative appeal to a governmental entity concerning access to records, or an aggrieved party who do not participate in the administrative appeal, may appeal to the records committee by filing notice of appeal with its executive secretary no later than 30 days after a final determination of an appeal to a governmental entity, or 45 days after the original request if the governmental entity has failed to make a determination. The notice of appeal must contain the requester's name, mailing address, phone number, copy of any denial of the record request, and the relief sought. The petitioner may also file a brief statement of facts, reasons, and legal authority supporting the appeal.<sup>57</sup>

Within five business days of receipt of the notice of appeal, the executive secretary of the records committee must schedule a hearing for the records committee to discuss the appeal at its next scheduled meetings falling at least 14 days after notice of the appeal but no longer than 52 calendar days after the notice of appeal is filed. Notice of the hearing must be sent to the requester; the notice of appeal, supporting statements, and notice of hearing must be sent to the governmental entity involved, each member of the records committee, any person who made a business confidentiality claim pertaining to the records, and all persons who participated in any proceedings before the governmental entity's chief administrative officer.<sup>58</sup>

The executive secretary may decline to schedule a hearing if the records involved have been found in a previous hearing involving the same governmental entity to be appropriately classified, as private, controlled or protected. If a hearing is denied, the executive secretary must notify the petitioner indicating that the hearing has been denied and the reason for the denial.<sup>59</sup>

A written statement of facts, reasons, and legal authority in support of the governmental entity's position must be submitted to the executive secretary of the records committee not later than five business days before the hearing. The governmental entity must send a copy of its written statement to the petitioner and the executive secretary shall forward a copy of the governmental entity's written statement to each

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<sup>51</sup> 950 CMR 32.08(7)

<sup>52</sup> 950 CMR 32.08(8)

<sup>53</sup> 950 CMR 32.09

<sup>54</sup> G.L. c.66 §10(b)

<sup>55</sup> Utah Code Title 63, Chapter 2

<sup>56</sup> Utah Code 63-2-502

<sup>57</sup> Utah Code 63-2-403(1) - (3)

<sup>58</sup> Utah Code 63-2-403(4)

<sup>59</sup> Utah Code 63-2-403(4)(b)

member of the records committee. No later than 10 business days after notice of appeal is sent to the executive secretary, a party whose legal interests are substantially affected by the proceedings may file a request to intervene. Any written statement of facts, reasons, and legal authority in support of the intervenor's position must be filed at the time of the request to intervene.<sup>60</sup>

At the hearing, the records committee shall allow the parties to testify, present evidence, and comment on the issues. The records committee may allow other interested parties to comment on the issues. The records committee may review the disputed records in camera. There is no discovery, but the records committee may issue subpoenas for the production of necessary evidence. The committee's review shall be *de novo*.<sup>61</sup>

No later than five business days after the hearing, the records committee shall issue an order either granting the appeal in part or in whole or affirming the determination of the governmental entity in part or in whole. The records committee may determine that the public interest in disclosure outweighs the fact that the records are properly classified as private, controlled, or protected. The order of the records committee shall include a statement of reasons for the decision, a description of the record or portions of the record to which access was ordered or denied, a statement that any party to the proceedings may appeal the decision of the records committee to district court, and a brief summary of the process for appealing to district court.<sup>62</sup>

If the records committee fails to issue an order within 57 calendar days of the filing of notice of appeal by the petitioner, the failure to issue an order shall be considered a denial by the records committee. The petitioner must notify the records committee in writing that he or she considers the appeal denied. Unless a notice of appeal is filed, the parties to the proceedings shall comply with the order of the records committee. If the governmental entity does not file a notice of appeal, or if the committee rules against the governmental entity, the governmental entity is required to produce the requested records and file a notice of compliance with the records committee. If the governmental entity is ordered to produce the records and fails to file a notice of compliance or a notice of appeal, the records committee may impose a civil penalty of \$500 for each continuing day of non-compliance, or send a written notice of the governmental entity's non-compliance to the governor, the Legislative Management Committee, and the Judicial Council.<sup>63</sup>

The seven members of the records committee shall include an individual in the private sector with records management experience, the state auditor or designee, the director of the Division of State History or designee, the governor or designee, one citizen member, one elected official representing a political subdivision, and one individual representing the news media. Except for the three designated members, the committee's members shall be appointed by the Governor with the consent of the Senate.<sup>64</sup>

## Attorney General Mediation

Several states, particularly Texas and Kentucky, provide a statutory role for the attorney general in responding to appeals from denials of access to records or meetings. In both states, the orders issued by the attorney general are binding, although they can be challenged subsequently in court.

### Texas

Under the Texas Public Information Act,<sup>65</sup> previously known as the Open Records Act, the Office of the Attorney General has a statutory interpretive role that requires requesters and governmental bodies to

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<sup>60</sup> Utah Code 63-2-403(5)(a) – (6)(b)

<sup>61</sup> Utah Code 63-2-403(8) – (10)

<sup>62</sup> Utah Code 63-2-403(11) – (12)

<sup>63</sup> Utah Code 63-2-403(13) – (14)

<sup>64</sup> Utah Code 63-2-501(1) – (2)

<sup>65</sup> Govt Code Chapter 552

consult the Attorney General before proceeding to litigation. Unlike any other state, a governmental body is required to seek an opinion from the Attorney General before withholding records except under certain narrow circumstances.<sup>66</sup> If a governmental body is contemplating withholding information from a requester, it must seek an opinion from the Attorney General if there has been no previous determination made by the Attorney General concerning the information. Only the governmental body receiving the request may ask for an Attorney General's ruling. The opinions are prepared by the Open Records Division of the Office of the Attorney General.

The governmental body must ask the Attorney General for a decision and identify the applicable exemptions within a reasonable time, but no later than 10 business days after the request has been received. In interpreting what constitutes a previous determination concerning the requested information, the Office of the Attorney General restricts the term to situations in which the records are substantially similar to records previously submitted for AG review or where the records fall within the same category of records on which the AG has previously ruled.<sup>67</sup> At the same time, the governmental body must notify the requester that it is seeking a ruling from the Attorney General within 10 business days.

A governmental body seeking a ruling from the Attorney General must submit within 15 business days of receipt of the original request its written comments providing reasons for withholding the information, a copy of the request, evidence of the date of receipt of the request, and a copy of the requested information or a sample of the information if it is too voluminous. Further, the governmental body must label the records to indicate which exemptions apply to which parts of the records. A governmental body may not unilaterally withhold records based on its interpretation of prior Attorney General opinions. The statute specifically prohibits a governmental body from asking the AG to rule that records that have previously been found to be public either through a prior AG opinion or a court proceeding may now be withheld.<sup>68</sup>

If a governmental body fails to contact the Attorney General within 10 business days, notify the requester of its intent to seek a ruling within the same 10 business days, and provide the AG with comments and redacted records within 15 business days, the records are presumed to be public and must be disclosed under there is a compelling need to withhold them.<sup>69</sup> If the Attorney General finds that he or she needs more information from the governmental body in order to make a determination, the governmental body must provide the requested information within seven calendar days or the withheld information is presumed to be public. In general, most governmental bodies will not be able to overcome the presumption that the records have become public. However, such an analysis will often turn on whether the claimed exemption is mandatory or discretionary.

In cases in which third-party personal or proprietary information is involved, the third party whose information is being requested may submit to the Attorney General reasons why the information should not be disclosed. The governmental body requesting the Attorney General ruling may also submit reasons for withholding the information, but is not required to do so. If the information is proprietary, the governmental body must make a good faith effort to contact the third party of the request for an Attorney General ruling.

Under the statute, the Attorney General is required to render a decision within 45 working days after the date of receipt of the request for a ruling. The Attorney General may extend its deadline by ten working days by notifying the governmental body and the requester. The Attorney General must provide a copy of the decision to the requester.

The statute provides for a suit for writ of mandamus by a requester to compel a governmental body to release requested information or to ask for an attorney general decision. Either the requester or the attorney general may seek a writ of mandamus to compel a governmental body to release information if the

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<sup>66</sup> 552.301

<sup>67</sup> Open Records Decision No.673 (2001), Office of the Attorney General, State of Texas

<sup>68</sup> 552.301(f)

<sup>69</sup> 552.302

governmental body did not seek an attorney general decision, if the governmental body refused to release public information, or if the attorney general determined that the information must be disclosed but the governmental body refused to release the information. A court must award reasonable attorney's fees and costs to a prevailing party unless the governmental body acted in reliance on a court ruling or attorney general decision.<sup>70</sup>

In 2006, the Office of the Attorney General received 16,179 requests for rulings and issued 15,160 rulings. While governmental bodies may sue the Attorney General if they disagree with a ruling, those governmental bodies suing the Attorney General represent less than one percent of the rulings made.

The attorney general has no role under the Texas Open Meetings Act,<sup>71</sup> violations of which are enforced by local district attorneys.

## **Kentucky**

If a requester has been denied access to either records, under the Open Records Act,<sup>72</sup> or meetings, under the Open Meetings Act,<sup>73</sup> of a public agency, he or she may file an appeal with the Attorney General. Such an appeal would include a copy of the request letter and a copy of the written response denying access. If the public agency refuses to provide a written response, the complaining party shall provide a copy of the written request. In the case of alleged violations of the Open Meetings Act, an appeal would include a copy of the written complaint to the agency describing the alleged violation and proposing a remedy and a copy of the agency's written response. If the agency refuses to provide a written response, the complaining party shall provide a copy of the written complaint. The Attorney General will then review the complaint and issue a decision as to whether the public agency violated either the records or meetings statute. The Attorney General may also review complaints dealing with issues other than denial of records, such as excessive fees or misdirection of the request. The Attorney General's decisions are binding and may be enforced in court. However, they are subject to court challenge and can be reversed by a court.

During its review of a complaint, the Attorney General may request additional documentation from the agency and may request copies of the requested records, but those records shall not be disclosed by the Attorney General. The Attorney General's decision in an open records appeal must be issued within 20 business days, although the AG may extend its time 30 days by sending written notice to the parties explaining the reasons for the delay and including the expected date on which the opinion will be issued. The Attorney General's decision in an open meetings appeal must be issued within 10 business days, and there is no statutory mechanism for extending this deadline.

The burden of proof lies with the agency that made the denial. The Attorney General shall not reconsider a decision already rendered under the Open Records Act. If the requested documents are disclosed to the complainant after a complaint is made, the Attorney General will not issue a decision.

If either the agency or the requester is not satisfied with the AG's decision, they have 30 days in which to appeal to the circuit court. If neither party files an appeal within 30 day, the AG's decision has the force of law and may be enforced in the circuit court of the county where the agency is located or where the records are maintained. While a requester may file a complaint with the Attorney General, the requester may also proceed directly to court without consulting the Attorney General.

In 2006, the Attorney General's Office issued about 370 open records decisions and about 13 open meetings decisions.

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<sup>70</sup> 552.323(a)

<sup>71</sup> Govt Code Chapter 551

<sup>72</sup> KRS 61.870 – 61.884

<sup>73</sup> KRS 61.805 – 61.850



## Rhode Island

The Attorney General is required to investigate citizen complaints filed under both the Access to Public Records Act<sup>74</sup> and the Open Meetings Act.<sup>75</sup> Under the Access to Public Records Act, if a requester is denied access to records after filing an administrative appeal with the agency that has the records, the requester may then file a complaint with the Attorney General. The Attorney General is required to investigate the complaint and if the complaint is found to be meritorious the Attorney General may file suit against the public body in the superior court of the county in which the records are maintained.<sup>76</sup>

In the case of alleged violations of the Open Meetings Act, an aggrieved party may file a complaint with the Attorney General. If after investigation the complaint is found to be meritorious, the Attorney General may file suit against the public body in superior court. No complaint may be filed with the Attorney General more than 180 days from the approval of the minutes of the meeting at which the alleged violation occurred, or, in the case of an unannounced or improperly closed meeting, more than 180 days from the public action of a public body revealing the alleged violation, whichever time is greater. If the Attorney General declines to take legal action, the individual 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. While the court must award reasonable attorney's fees to the prevailing party, the Attorney General is not entitled to a fee award for representing the prevailing party.<sup>77</sup>

The Attorney General is required to submit an annual report to the legislature under both statutes summarizing the number of complaints received, the number of complaints found meritorious, and the action taken by the attorney general in response to each complaint.<sup>78</sup>

## North Dakota

Under both the Open Records<sup>79</sup> and Open Meetings<sup>80</sup> laws, anyone can ask the Attorney General for an advisory opinion regarding an alleged violation of either statute. The request must be made within 90 days of an alleged violation of the open meetings law and within 30 days of an alleged violation of the open records law. There is no charge for the opinion, which is issued to the public body with a copy to the requester. If the Attorney General finds a violation, the public body has seven days to take corrective action, such as releasing records or providing minutes of a closed meeting. However, the Attorney General does not have the power to overturn a decision of or action by the public entity.

## Nebraska

Under the Nebraska Public Records statutes,<sup>81</sup> a person denied their rights under the law may file a suit in district court, or may ask the Attorney General to review the matter to determine if the record is public or whether the public body has violated some other provision of the statute. The Attorney General shall make a determination within 15 calendar days after receiving the complaint. If the Attorney General determines the record is public or that the public body is not in compliance with the law, the public body shall be ordered to disclose the record immediately or otherwise comply. If the public body continues to withhold the record or remain in non-compliance with the statute, the individual may file suit in district court or may demand the Attorney General bring suit in the name of the state in district court. If the

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<sup>74</sup> R.I. Gen. Laws § 38-2

<sup>75</sup> R.I. Gen. Laws § 42-46

<sup>76</sup> R.I. Gen. Laws § 38-2-8(b)

<sup>77</sup> R.I. Gen. Laws § 42-46-8(b)-(d)

<sup>78</sup> R.I. Gen. Laws § 38-2-15 and R.I. Gen. Laws § 42-46-11

<sup>79</sup> N.D.C.C. § 44-04-18

<sup>80</sup> N.D.C.C. § 44-04-19

<sup>81</sup> Neb. Rev. Stat. §§ 84-712 – 84-712.09

individual requests that the Attorney General bring suit, the Attorney General must do so within 15 calendar days of receiving the request.

## **Arkansas**

The Attorney General is authorized to issue legal opinions to some public officials, such as members of the General Assembly, state boards and commission, heads of executive departments, and prosecuting attorneys.<sup>82</sup> While these opinions are not binding on the public officials or in later litigation, they may be used for their persuasive value. The Attorney General also has a statutory role under FOIA to issue opinions concerning disclosure of personnel and job evaluation records.<sup>83</sup> Once a records custodian receives a request for personnel or job evaluation records, either the custodian, the requester, or the subject of the records may ask the Attorney General for an opinion as to whether the records can be disclosed. The Attorney General must issue an opinion within three working days of receipt of the request. The custodian shall not disclose the records until the Attorney General has issued an opinion. However, if the Attorney General rules against the requester or the subject of the records, either can challenge the decision in court. The Attorney General has also issued informal opinions to individuals not authorized by law to request them. These opinions are not considered official opinions and are not numbered. However, they may also have some persuasive value.

## Miscellaneous Government-sponsored Entities

### **South Dakota**

The Open Meetings Commission was created by the legislature in 2004.<sup>84</sup> It consists of five state's attorneys appointed by the Attorney General, whose office provides an attorney to assist the Commission with procedural matters.

## States Exploring Adoption of Mediation

### **Tennessee**

The legislature has appropriated \$100,000 in the current fiscal year to create an ombudsman's position. The governor proposed that the ombudsman be located in the state comptroller's office after advocacy groups criticized the governor's initial proposal to place it in the Office of the Attorney General, which the advocacy groups saw as a potential conflict of interests since the AG also defends state agencies on open records and meetings matters. Currently, the ombudsman will respond to citizen requests for information and advice on open government issues and may mediate some disputes. A study committee has been appointed to flesh out the functions of the ombudsman. The original proposal made by the Tennessee Coalition for Open Government was a composite of Virginia's FOI Advisory Council and New York's Committee on Open Government.

### **Pennsylvania**

Although the Pennsylvania Right to Know Law was substantially overhauled recently, it still is among the worst access laws in the country. Gov. Ed Rendell has indicated that he will support further

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<sup>82</sup> Ark. Code Ann. § 26-16-706

<sup>83</sup> Ark. Code Ann. § 25-19-05(c)(3)(B)

<sup>84</sup> SDCL 1-25-8

amendments to the law, including some kind of ombudsman function. At this time, however, the details of such an office are not clear.

## Mediation: Does it work and why?

As far as access statutes are concerned the idea that there might be a workable remedy short of suing the offending public body is very much a state mechanism. Although the federal Freedom of Information Act pre-dates almost all the state statutes and frequently serves as the template for state laws, when the law was passed in 1966 Congress was largely concerned with providing a statutory right of access that could be enforced in court; it was not concerned with mediation models that might take the pressure off the courts and provide a more practical alternative for dispute resolution.

But several first-generation states – Connecticut, New York, Massachusetts and Minnesota – built in a mediation system that allowed requesters to get relief short of going to court. All four states developed somewhat different mediation models. New York provided quick and respected interpretations of the law, which, while not binding in court, have become widely-accepted for their persuasive value. On the other end of the procedural scale, Connecticut's Freedom of Information Commission is more of an administrative law judge model where complaints are heard in quasi-judicial proceedings and whose decisions are binding unless successfully challenged in court. Massachusetts borrowed from Connecticut, providing an appeal mechanism to the Records Supervisor, whose office could hold formal hearings and adjudicate matters in a manner similar to the Connecticut FOI Commission. But at the same time, the Records Supervisor is not required to hear an appeal at all. The Department of Administration in Minnesota provides interpretations of the access laws, but its approach relies more on written opinions than does the less formal New York model.

For quite some time these four states were the leading mediation models. When Hawaii adopted a uniform code model for its access law, the Uniform Information Practices Act, written by a committee of attorneys, one of its features was a mediation office that would not only interpret the law but also oversee the process of records management and related privacy issues. But there has been quite a gap between the time when Hawaii entered the mediation club and the more recent movement towards mediation models in other states. Much of the focus on such mediation came as the result of access audits conducted throughout the states by press associations and access advocates. As the result of its embarrassing performance, Indiana created its own Public Access Counselor, modeled largely after New York's system. Illinois followed suit several years ago.

The opportunity arose in Virginia in 2000 to make significant amendments to the Freedom of Information Act, including a mediation office. Both Connecticut and New York were studied closely and the informal New York model won out for several reasons. It seemed unlikely that the legislature could be convinced to create a new agency with its attendant bureaucracy and the New York model could be funded more cheaply by assigning the mediator's role to the executive director of the FOI Advisory Council, a group housed within the legislature. Beyond that, state access advocates hoped that the informal opinions prepared by the executive director would create a body of administrative law much more amenable to the intent of the access statute than existing court interpretations and the occasional attorney general's opinion.

When New Jersey completely rewrote its access laws several years ago, it included a citizen-led Government Records Council modeled after Connecticut. While such a council places greater emphasis on disclosure than the previous model in which going to court was the only remedy, the council so far lacks the expertise and the political will that has developed in Connecticut. Under New Jersey's law the governor dominates the appointment process to the council, which is completely dependent on legal support from the attorney general's office and administrative support from another state agency. The council has yet to promulgate regulations and its insistence so far on requiring requesters to use a standardized request form does not bode well for imbuing the system with the spirit of disclosure.

When given a choice, state access advocates have shied away from placing a mediation function within the office of the attorney general, reasoning that the attorney general is typically the office that defends public agencies and, as such, is unlikely to be able to play an unbiased role. Such concerns make perfect sense in the abstract, but the leading states that rely on the attorney general as mediator have shown that such an office can perform well. In Texas, the attorney general plays a gatekeeping role in deciding whether or not a public body can withhold records. Without being vetted by the attorney general under most circumstances, public bodies cannot claim an exemption and may actually lose the ability to claim the exemption if they do not follow the procedural requirement to contact the attorney general. Further, the attorney general can become involved in subsequent litigation to either enforce or defend its disclosure decision against a suit by the public body. Kentucky's attorney general process is a bit less formal, but still relies on an attorney's review of the facts and law and a written decision concerning whether or not the public body violated some aspect of the records or open meetings law. Its decisions are binding and either the public body or the requester can challenge its decisions in court, although by that time the attorney general is not a party to the litigation. Other states provide less well-defined roles for the attorney general and several states – Florida, Washington, and Georgia – have recently created offices within the attorney general's office to help resolve access disputes. Florida's position has actually been codified by the legislature, while the positions in Washington and Georgia are solely appointments of the attorney general.

Any and all of these state mechanisms can provide effective relief, although the commitment to open government varies from state to state. States like Connecticut, New York, Minnesota, Hawaii, Virginia, and Texas have moved to the forefront of mediation although Massachusetts' system has become largely dormant from lack of political commitment. Florida's public records laws have frequently been cited as among the most robust in the country and the codification of its previous informal mediation process will likely enhance its reputation further. Kentucky has a well-deserved reputation for pro-access decisions that are consistently mindful of the intent of its access laws. By contrast, however, New Jersey's system remains in its infancy and the records council has not yet developed procedures and institutional attitudes that guarantee its independence and commitment to implement its role as an arbiter. Some states that have created positions within the attorney general's office do not yet have an adequate track record to show if they are effective on the one hand, or merely political window dressing on the other hand.

In the end, the effectiveness of any given system depends largely on the political support provided by government as well as state access advocates. At least three states have experienced serious political fallout because of decisions made by its mediation offices. After finding that there was no deliberative process privilege recognized by state law, the lead access attorney at the Office of the Records Supervisor in Massachusetts lost his job and the office largely lost needed political support. In Hawaii, the head of the Office of Information Practices lost her job after ruling against the politically-connected police union; OIP's sails were trimmed and it was moved from the Office of the Attorney General to the less visible Office of the Lieutenant Governor. Even in Connecticut the executive director of the FOI Commission was targeted after the Commission ruled against a candidate for governor in a case involving a police investigation of a domestic disturbance at his home. That candidate subsequently was elected and threatened action against the staff of the FOI Commission.

Beyond political support, however, these offices are most effective when their employees believe deeply in the right of access. Generally speaking, the cause of access has been well-served by the individuals and staff members who have worked in most of these offices, but when individuals look at the job as little more than a job or, even worse, as a political appointment, the likelihood that they will operate in an even-handed manner, where the presumption of disclosure is the starting point for interpretation, is diminished. A career spent in telling agencies that they must disclose information or provide public access to meetings is not likely to lead to widespread admiration within state and local government, although it may lead to strong support from other quarters, such as the press and the advocacy community.

At this writing, it appears that Congress will amend the federal Freedom of Information Act to provide for some kind of ombudsman function. While an ombudsman may be less well suited for the

political and bureaucratic temperament of the federal government, the fact that Congress is considering such a move speaks favorably of the work done by ombudsmen at the state level.