“OPENING THE STATE HOUSE DOORS”: EXAMINING TRENDS IN PUBLIC ACCESS TO LEGISLATIVE RECORDS

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• The methodological problem of defining “legislative records”
  • Individual legislators, delegations, offices, agencies, etc.

• Recent developments:
  • Missouri—Constitutional amendment and legislative reaction
  • South Carolina—Legislative “caucuses”
  • Michigan—“Legislative Open Records Act”
LEGISLATIVE RECORDS UNDER STATE FOI LAWS

States Excluding Access to Legislative Records

States Granting Some Level of Access to Legislative Records
OF THE STATES THAT PERMIT ACCESS TO VARIOUS LEGISLATIVE RECORDS...
STATES WITH EXPRESS ACCESS TO LEGISLATIVE RECORDS

- Definition of a kind of another kind of governmental entity
- Definition of “record” subject to disclosure
- Definition of “agency”

Constitutional Provision

11

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STATES WITH FOI STATUTES THAT IMPLIALLY COVER THE LEGISLATURE

Based on definition of “record” subject to disclosure

Based on definition of government entity subject to FOI law

+ Language of statutory exemption

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3
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STATES THAT EXCLUDE THE LEGISLATURE COMPLETELY

- Explicitly: 8
- By implication: 2
- Based on judicial interpretation: 2
The FOIA’s definition of an “agency” excludes “Congress” by cross-reference to the Administrative Procedure Act.

Court have interpreted the term “Congress” to include its components (i.e., congressional committees) and members (i.e., individual legislators).

But what about legislative branch agencies?
Legislative Records under the Federal FOIA

- Legislative branch agencies are tasked with aiding Congress in its legislative capacity, but without “executing law” or “exercising authority.”

- Generally, they are excluded from FOIA, but . . .

- Some components are, in fact, subject to the FOIA (e.g., Copyright Office).

- And courts have occasionally been willing to adopt a “functional” approach that examines what a legislative branch agency actually does, and whether it may qualify as a FOIA-subject “agency.”
Most requesters encounter difficult accessing legislative records because they are maintained by Executive Branch agencies.

- Records may have originated with Congress.
- Records also may have been created or compiled by an agency in response to a legislative oversight/records request.

In these cases, the fight turns to the proper application of the “modified control test,” which examines “whether Congress manifested a clear intent to control the document[s].”

The case law here is still developing.
CONCLUSIONS

- Most states have adopted FOI laws that permit some basic level of access to legislative records. This is usually expressly provided; legislative records are typically excluded on explicit grounds. In cases of ambiguity, the presence of exemptions is particularly useful in interpreting the law. The overall trend favors public access.

- Short of amending the federal FOIA, the requester community should consider legislative branch agencies and novel applications of the agency control test as areas where the needle can be pushed in favor of greater transparency.