State access counselors:
In search of responsive government

By Kathleen Richardson
Graduate Assistant
Iowa Freedom of Information Council

Prepared for the 1999 Annual Meeting
of the Iowa FOI Council
October 2, 1999

Contents

Introduction

In 1997, seven Indiana newspapers sent staff members into local government offices to ask for such public documents as crime reports, police logs, coaches' salaries, school board minutes and death certificates. This statewide "access audit" documented that while "openness" might have been on the statute books in Indiana since the 1950s, it wasn't necessarily in the hearts and minds of local officials: Citizens who asked for public records were lied to, harassed and denied information. For example, 71 percent of the sheriffs refused to release crime reports.[1]

Public access projects in New Jersey, Virginia and Connecticut inspired by the Indiana project have yielded similar results. In New Jersey, seven Gannett newspapers sent employees to 213 municipalities, seeking public information; they got their requested records less than half of the time.[2] A recent FOI compliance audit of Connecticut municipalities has yielded "really, really bad" results, said Mitchell Pearlman, executive director of that state's FOI commission. "We think this is going to be a bombshell," he said; access auditors frequently used terms like "rude," "hostile" and "intimidating" to describe officials' responses to requests for records.[3]

Fifty years after the birth of the freedom of information movement, 25 years after every state adopted an FOI statute of some sort, advocates of openness still must struggle to ensure that citizens have access to the information they need to make educated decisions and to keep their government accountable. FOI issues become more complex as the landscape of government and communication evolves in the computer age. However, while video-conferencing and electronic record-keeping have changed the language of the debate, the bedrock issues remain: What government information and functions should be open to the public, who decides, and how can citizens be ensured of receiving a fair hearing when they've been denied access?

---

[1] "The state of secrecy: Indiana fails the test on access," page 2 of a reprint of a series published Feb. 22-26, 1997, by the Evansville Courier, the Fort Wayne Journal Gazette, the Indianapolis Star and News, the Muncie Star Press, the South Bend Tribune, the Times of Northwest Indiana and the Terre Haute Tribune Star. Available from the Hoosier State Press Association, One Virginia Avenue, Suite 701, Indianapolis, Indiana 46204.

[2] "Public access denied," project by Gannett New Jersey Newspaper Group, published in March-April 1999. Available on-line from the newspaper group at www.injersey.com/access

[3] Comments made during a panel discussion at the National Freedom of Information Coalition annual meeting, May 1999, in Atlanta, Georgia.

* * *

The international campaign promoting freedom of information that sprouted after World War II blossomed in the United States during the 1950s. Basil "Stuffy" Walters of the Chicago News — and a former Des Moines Register managing editor — "found disquieting conditions" at all levels of government in his 1950 FOI report to the American Society of Newspaper Editors, according to a 1998 study of the history of the nation's FOI movement by Jeanni Atkins and James A. Lumpp of the University of Mississippi.[4] Harold Cross, a Columbia University law professor, reported to the ASNE in 1953 that a Cold War "cult of secrecy" in government provided ample cause for concern that the American public's "right to know" was being trampled upon.[5]

Media organizations, journalism schools and other FOI pioneers launched political trench warfare during the 1950s to get access laws on the books in all states. Ironically, they often met opposition from fellow newsmen, who argued that open-meetings laws would create public hostility to the media. Besides, "we have too many damn statutes now," complained one journalist.[6]

It took years of dogged effort, but by the mid-1970s open-meetings laws had been enacted in every state. The FOI cause received a political and public relations boost in the post-Watergate era (state FOI commissions were created in New York and Connecticut in 1974 and '75 respectively), and the years since have seen openness advocates waging constant skirmishes to close existing loopholes, fend off new ones and toughen enforcement.

Today, FOI champions also wrestle with retooling state "sunshine" laws to catch up with the computer age. E-mail and electronic conferences stretch the definition of open meetings. As pressure grows to put more government information on-line, privacy concerns surface.

---

[4] "Pioneers in the state freedom of information movement," Atkins, J. & Lumpp, J.A. of the Department of Journalism, University of Mississippi. Paper submitted to the Association for Education in Journalism and Mass Communication convention, Baltimore, Maryland, August 5-8, 1998. Page 3.
[5] Ibid, page 4.
[6] Ibid, page 7.

Increased interest is evident among legislators and journalists in terms of how to address these issues and who should address them. The number of states that have formal procedures for dealing with citizen questions and complaints about possible open-meetings and open-records violations likely can be counted on two hands — with fingers left over. (Comparative information about state "sunshine" laws is largely anecdotal; there is no central clearinghouse for such information, and academic studies are quickly outdated. As a matter of fact, the Brechner Center for Freedom of Information at the University of Florida recently announced a project to create a comprehensive on-line overview of state access statutes — and estimated it would cost over $1 million and take four years to complete.)

As it stands, the little old lady in Yale, Iowa, who has the door slammed in her face at the city council meeting or at the city clerk's office has no one government official who will hear her complaint, who is devoted specifically to addressing it, who will give her immediate advice and who will ensure that the dispute is resolved. The only way for most citizens to have their grievances taken seriously is to go to court — a process that is expensive, time-consuming and often daunting.[7]

One could argue that the very least a democracy owes its citizens is a place where they will get a fair hearing of their concerns about their government — and not a runaround.

[7] Theoretically, city and county attorneys should be resources for citizens with FOI concerns, but in practice, they often don't provide much help.

Methodology

This study looks at a handful of states that DO have formal mechanisms in place to handle citizens' grievances about access issues — or that are working to install them. Two — Connecticut and New York — have successful, long-time FOI agencies, though they approach their missions in markedly different fashions. Connecticut's Freedom of Information Commission is the largest and best-funded access agency in the nation; it uses mediation and a quasi-judicial series of hearings to resolve disputes. New York, on the other hand, has an unsalaried 11-member Committee on Open Government to monitor government agencies and issue advisory opinions, but the day-to-day work is done by one attorney and two secretaries.

Maryland's Open Meetings Law Compliance Board is about as barebones as a government operation can get: It has no budget. Three citizens volunteer as board members, with the Attorney General's Office lending the services of an assistant attorney general to do the grunt work of answering phone calls and mediating disputes.

Hawaii's Office of Information Practices is a lesson in what NOT to do: The agency was created over a decade ago with huge jurisdiction and little money. It has been engaged in political guerrilla warfare for its existence ever since, fighting for funds and fending off antagonistic and litigious public employees' unions.

In Indiana, the newspapers' access audit contributed to a legislative climate ripe for the appointment of an access counselor, who is busily creating her new office out of whole political and legal cloth. Meanwhile, the Virginia Coalition for Open Government, a non-profit alliance of access advocates, is working with a legislative study committee to lay the groundwork for that state's first FOI commission.

And, finally, closer to home, the director of the Iowa Mediation Service, who has been involved in mediating everything from farm foreclosures to school district mergers for 15 years, offers his thoughts on what sort of FOI mediation could work in Iowa.

Most of the information in this report was gathered through interviews, though many of the agencies examined have extensive websites that contain everything from the history of the organization and its mission statement, to details about staffing, procedures, agency reports and opinions. For the reader's convenience, the subjects and dates of the interviews and the web addresses are listed at the end of the paper.

This study is not an exhaustive look at state access agencies, but hopefully it will be illuminative, instructive and helpful to any discussion of how to address FOI issues in Iowa.

CONNECTICUT: The Granddaddy of FOI Agencies

Agency: Connecticut Freedom of Information Commission.

Organization: Independent agency with enforcement power. It's the largest FOI commission in the nation and the one with the most statutory power. Charged with ensuring that all public agencies comply with the state Freedom of Information Act (Connecticut Code, Section 1-205 to 1-241), covering both open meetings and open records.

Staffing: The commission's five members are appointed by the governor with approval by either house of the General Assembly; the governor also selects one member as chairman. No more than three members can belong to the same political party, and they serve staggered four-year terms. There is an executive secretary and 14 staff members.

Current annual budget: Approximately $3 million.

Background: The Connecticut commission was established in 1975, a product of the post-Watergate push for openness: Democrat Ella Grasso promised to start an FOI commission if she were elected governor, and she was. Almost 25 five years later, the commission still has to "fight for its budget," said Eric Turner, the agency's public education director, but it is an established part of Connecticut government.

Process: Connecticut is the only state with a quasi-judicial process for dealing with complaints about possible violations of the state's open-meetings and open-records law. The FOI Commission renders advisory opinions, and is empowered to investigate all grievances, "hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, . . . subpoena witnesses . . . and to require the production for examination of any books and papers which the commission deems relevant" (Connecticut Freedom of Information Act, Section 1-205). The commission's final decisions are legally binding, but can be appealed through the courts.

The citizen's complaint works its way through an ascending series of both informal mediation and formal hearings. The grievance first goes through an ombudsman program: Each case is assigned to a staff attorney who contacts parties in the dispute and attempts to broker a

settlement. If mediation fails, the case then goes to a quasi-judicial hearing, presided over by a hearing officer, an ombudsman from the staff. All parties must appear at the 90-minute hearing, either in person or represented by counsel, and may present evidence and call witnesses.

The hearing officer prepares a report for the full FOI Commission, which meets twice a month. A copy of the report, and notice of the commission's meeting, are sent to all parties, who may attend the meeting and make brief statements. The commission then votes to accept or amend the report.

The agency handles approximately 10,000 inquiries and 500 formal cases a year.

Other responsibilities: The FOI Commission conducts training for government officials and workshops for the public, provides speakers and publishes literature on access issues.

Penalties: The FOI Commission is empowered to order relief it deems necessary to rectify a violation — for example, it can order officials to attend an FOI workshop; nullify action taken at an illegal meeting; order production of a public document; and impose civil penalties of between $20 and $1,000 on officials who violate the FOI Act, but it can also levy fines for claims found to be frivolous. (Turner, the commission's public education director, said fines are seldom used, but they do provide the agency with leverage.)

Observations: Connecticut's process for dealing with citizen complaints is the envy of many access advocates throughout the nation: It is clear-cut, thorough and effective on a case-by-base basis. The independent nature of the commission assures both citizens and public officials of fairness. But it is also expensive (by comparison, the New York FOI budget is approximately $185,000 a year), and while it is more informal than a court proceeding, the series of hearings can take months.

And several of the people interviewed pointed out that while a process that requires complainants and respondents to attend several hearings may work in tiny Connecticut (where everyone lives within an hour of the capital, Hartford), the travel would be burdensome in a larger state and the workload untenable in a state with a bigger population. ("It would never work

in New York," said Robert Freeman, executive director of the the New York Committee on Open Government. "The cost would be staggering.")

Significantly, Turner pointed out the recent rejuvenation of the ombudsman program as a "great success." He said the program has been effective in settling disputes through informal mediation before they reach the hearing stage, and has cleared up a backlog in the commission's caseload.

NEW YORK: The Model

Agency: New York Committee on Open Government.

Organization: Located in the New York Department of State. Charged with overseeing the implementation of the state Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law. Issues advisory opinions only. (New York Code, Public Officers Law, Article 6, Section 89-1(a)(b) and 89-2(a)(b).

Staffing: The committee has 11 members, five from government and six from the public. The five government officials are the lieutenant governor, the secretary of state, the commissioner of general services, the director of the budget and one elected local government official appointed by the governor. Of the six members of the public, at least two must be representatives of the news media. Staff members are an executive director and two secretaries.

Current annual budget: Approximately $185,000.

Background: The Committee on Open Government was created in 1974 on the heels of Watergate. "It was the end of the [Nelson] Rockefeller era, when there was a commission for everything," explained Executive Director Robert Freeman, who has been with the committee since those early days ("Long enough that I've upset everyone at least once"). The New York news media were influential, and lobbied for a body to oversee the state's fledgling and experimental freedom of information legislation. Eli Abel, the dean of the Columbia Journalism School, was tapped as the first head of the committee, providing instant respectability.

Succeeding gubernatorial administrations have recognized that the FOI office provides an important function, said Freeman. "We get a lot of people off the hook," he said, by providing advice to agencies to head off court action.

Process: The office monitors government agencies, and Freeman, an attorney, provides both oral and written legal opinions on access issues "to anyone who asks," he said. (Whenever a citizen seeks an opinion, Freeman sends a copy to the agency involved.) While his opinions "carry no legal weight at all," he said that over the years his office has developed credibility, and its opinions are often cited by judges.

The office handled almost 900 written opinions and 8,000 telephone inquiries in 1998.

Other responsibilities: Freeman sees his job as largely "education and persuasion," and to that end he spends much of his time speaking to the public and to government groups. The Committee on Open Government also issues an annual report — with observations and recommendations — to the governor and legislature.

Penalties: Upon judicial challenge, a New York court can nullify action taken by a public body in violation of the open meetings law and award attorneys' fees to the successful party. There are criminal penalties for willful concealment or destruction of a public record.

Observations: Freeman said that he and Mitch Pearlman, the executive director of the Connecticut FOI Commission, for years have debated which state's structure works better. Freeman points out the cost-effectiveness of his operation: "If you have no power, there is no need to have an elaborate due-process system with a fleet of attorneys," he said. He can provide an instant opinion to a caller, as opposed to a months-long quasi-judicial proceeding.

In fact, it is this cost-effectiveness that makes Freeman's operation a model often cited by other states interested in setting up FOI commissions or counselors. The Connecticut commission has the built-in clout, but New York's plan is often more politically feasible.

However, a concern that has been voiced about New York's operation can be applied to other states where the FOI organization is a one-man show: When so much of the agency's clout rests on Bob Freeman's experience and reputation, what happens when he is no longer there?

MARYLAND: On a Shoestring

Agency: The Maryland State Open Meetings Law Compliance Board.

Organization: Housed in the governor's office, but essentially independent. Charged with receiving, reviewing and resolving complaints regarding the state's open-meetings law. (Is NOT involved with open-records grievances.) Issues advisory opinions. (Maryland Annotated Code, Open Meetings Act, Section 10-501.)

Staffing: The governor appoints three citizens as part-time board members, with the advice and consent of the state Senate. The members serve staggered three-year terms. However, "everyone understands that the Attorney General's Office does the work," said Assistant Attorney General Jack Schwartz, the board's counsel.

Current annual budget: None.

Background: The Compliance Board was created in 1991 as part of major reform of the state "sunshine" law. There had been "constant controversy" between the press and local government, said Schwartz; the media complained that the only remedy to open-meetings violations was court action, with the attendant delays and costs. Journalists advocated some sort of alternative dispute resolution process, but local governments resisted. The Compliance Board was suggested by the Attorney General's Office as a compromise: It is a non-judicial alternative . . . that is powerless, in a formal sense. The board issues opinions, but "has no authority to order anyone to do anything," said Schwartz. What power it has is the power of "publicity and moral suasion, instead of decree and order," he said.

In addition, the Maryland legislature has declined to appropriate any money for the board. Its members receive no salary or travel expenses, and staff support is "by the sufferance of the Attorney General's Office," said Schwartz. He and his secretary do the Compliance Board work in their "spare time."

Process: The Compliance Board (primarily in the person of counsel Schwartz) receives complaints and issues opinions. Schwartz said part of his work involves "prospective" violations: For example, a reporter may call up to complain that a city council is going to hold an

illegal closed session. Schwartz will contact the government officials involved to nail down the facts, then issue an opinion. Government agencies can ignore his opinion, but Schwartz said they usually don't — mainly, to avoid bad publicity.

However, most of Schwartz's board work involves after-the-closed-meeting complaints by disgruntled citizens. The complainant files a written grievance; Schwartz sends a copy to the government body involved. The officials respond; and the Compliance Board sends a letter to all parties with its decision about the closed meeting. The board has no investigative powers, though an informal conference may be held with both parties.

The board's objective is to provide "some mild deterrence" to violations of the state's open-meetings law, said Schwartz: When one local government is encouraged to change its practices, word of mouth prompts its neighbors to do the same.

Other responsibilities: Schwartz conducts educational programs for both members of the public and government groups.

Penalties: A Maryland court can nullify any action taken in an illegally closed meeting, and levy a civil penalty of up to $100 on any member of a public body who willfully takes part in such a meeting. The court may order production of a record, and award actual and punitive damages against a governmental unit refusing to produce a record. Willfully violating the Public Information Act is a misdemeanor punishable with a fine up to $1,000. Attorneys' fees may be awarded.

Observations: "The (Maryland) media were skeptical at first, but good people were named to the commission and an access-oriented attorney general has provided counsel," said Forrest "Frosty" Landon, executive director of the Virginia Coalition for Open Government and president of the National Freedom of Information Coalition.

Schwartz said he thinks the Compliance Board has been effective, mainly because its limited mission is proportional to its modest resources. There have been proposals to extend the board's responsibilities to monitoring open-records complaints, but he has resisted because the

move would mean "manifold expansion of responsibility with no prospect of matching resources." However, Schwartz also recognizes that the effort to expand the board's mandate is a sign that it is politically successful; local governments, initially reluctant, now accept it.

The informality of the process and lack of infrastructure keep costs down, and the board has created a little body of "quasi-law" that the courts are beginning to cite, said Schwartz. Obviously, the process would be more effective if the legislature would provide enough money for at least one staffer, he said; as it is, lack of staffing leads to backlogs in cases.

Most complaints to the office deal with local governments, school boards and counties, which the attorney general does not represent, so there has been no outcry about conflict of interests, said Schwartz. When a case involving a state agency comes up, a "Chinese wall" is erected: Schwartz represents the Compliance Board, another assistant attorney general represents the state agency, and they avoid discussing the case.

HAWAII: Lessons Learned

Agency: Office of Information Practices.

Organization: Recently moved from the Attorney General's Office to the Lieutenant Governor's Office after surviving an attempt to kill it. Charged with reviewing, investigating and ruling on public-records grievances; providing advisory opinions to both government agencies and the public; monitoring and assisting state agencies, and adopting administrative rules for collecting, storing and distributing public records (Hawaii Revised Statutes, Uniform Information Practices Act, Chapter 92F, Part IV 92F-41 and 92F-42).

Staffing: Director appointed by the governor and eight staff members, down from 15.

Current annual budget: $347,000 (down 38 percent from 1998).

Background: In 1980, the Hawaiian legislature enacted the Fair Information Practices Act, which severely limited access to public records in the name of privacy. Widespread criticism of the law led to the appointment in 1987 of a governor's task force, which produced a four-volume report analyzing the state's access laws. As a result, the legislature adopted fair information practices, modeled after the worldwide Uniform Information Practices Code, and created the Office of Information Practices.

The office has broad statutory jurisdiction over areas of public records and privacy ("everything from access to storage"), according to Director Moya Davenport Gray, but unfortunately has been hamstrung since its inception by inadequate funding. (The Hawaiian economy slumped almost immediately after the office was created.) In addition, the agency was so overwhelmed in its early years by requests for opinions, that while it was charged with writing rules governing access, the rules were never enacted.

The office survived an attempt in the legislature to eliminate it in early 1999, but it was moved from the Attorney General's Office into the Lieutenant Governor's Office and its budget and staff were slashed. Gray said the move has given the OIP a little more accountability (the lieutenant governor is elected, while the attorney general is appointed) and the agency is now seen as more independent.

Process: The Office of Information Practices receives citizen appeals, can investigate and issue opinions — which agencies can then ignore, said Gray. (This lack of stature can be blamed somewhat on years of inadequate budgets, she said.) The international bent of Hawaii's economy means the office also must keep an active eye on worldwide electronic privacy issues and directives.

The OIP handled 800-900 inquiries in 1998.

Other responsibilities: Gray said she has been pushing for more training of government officials since she was appointed director in 1995, and while there is a great desire for education among lower-level government workers, "upper management doesn't see the need." "Good training instills in the line employee the spirit of the law," said Gray. The employee begins to think of the public as his client, not his enemy, reducing conflict at the outset, she said.

Penalties: On the one hand, public officials who intentionally disclose private information are subject to criminal penalties. On the other, the court may compel disclosure of a record and may assess damages caused by an agency's failure to properly maintain a personal record. The courts are required to award attorneys' fees to the winner in a public-records' case. (The awarding of attorneys' fees is discretionary in open-meetings cases.) There is a criminal penalty for intentional violation of the open-meetings law, and action taken in an illegally closed meeting can be voided.

Observations: When a state's economy suffers, Gray said, "things like education, health, safety" take precedence over freedom of information. She referred to "surviving (political) guerrilla warfare" in her efforts to protect her office and her staff from attack. "It's very wearing, very hard on morale," she said.

Gray stressed the importance of "establishing a niche" and ensuring neutrality. She sees her office as an independent watchdog, not an advocate for the media. "We have taken hits from the media," she said. "The media in Hawaii have not been supportive." What is important, she said, is "changing the culture of government" to promote openness.

INDIANA: Getting Off the Ground

Agency: Public Access Counselor.

Operation: Independent office in the executive branch. Charged with establishing and administering training programs for public officials and education programs for the public on Indiana's access laws; responding to informal inquiries over the phone or in writing; mediating disputes; issuing advisory opinions, and submitting a yearly report to the legislature (Indiana Code, Access to Public Records, Chapter 4).

Staffing: One access counselor, a practicing attorney, appointed by the governor for a four-year term, who can be removed only "for cause." Plus any additional staff that the budget can bear.

Current budget: Estimated $160,000 over two years.

Background: The governor appointed a temporary access counselor in 1998 after the "access audit" by seven Indiana newspapers showed that many public officials were ignoring the open-records and -meetings laws. A task force was formed to look into the issue and hearings were held throughout the state. The counselor's office was made permanent by laws that took effect July 1, 1999. Anne Mullin O'Connor, a deputy attorney general who often fielded calls about FOI issues, was named the first access counselor and is responsible for setting up the office.

O'Connor said the newspaper series pointed out gaps in compliance with the public access laws and there was widespread interest in creating a non-judicial alternative for dealing with complaints — a fast, cost-effective "everyday resource for the average citizen."

The political climate was ripe: O'Connor said the issue struck a chord with the governor, Frank O'Bannon, an advocate of openness, and there was no real opposition in the legislature. Both parties recognized that an access counselor was a simple way to address the state's well-publicized problems. "It's not a huge investment to do something that makes a difference," she said.

In addition, since all questions and complaints about the open-meetings and open-records laws are funneled to one place, it is easier to see where problems lie. (For example, O'Connor said, a hot topic at the moment is local economic development groups that claim they are not subject to the "sunshine" laws.)

Process: The access counselor deals with the full range of issues concerning the Indiana Open Door Law and Access to Public Records Act. She gives advice over the phone, intervenes with agencies in attempts to resolve disputes, and issues both written and oral opinions (which do not have the weight of law).

Other responsibilities: O'Connor does a lot of public speaking, especially to public officials' groups, and she plans to create brochures and videos on access issues.

Penalties: Legislation that created the access counselor's office encourages mediation — courts are required to award attorneys' fees to the winning party in an access grievance, but complainants won't receive reimbursement unless they work with the access counselor to try to resolve the dispute before going to court. Government agencies are required to cooperate with the access counselor and courts are ordered to expedite proceedings involving access complaints. (Proposals for mandatory fines or criminal penalties for violators proved contentious and were dropped during legislative negotiations.)

Observations: O'Connor said that the Indiana legislature looked at both New York and Connecticut as models for the new access counselor's office; the state's media pushed a Connecticut-like quasi-judicial commission, but politicians blanched at the cost. The more streamlined (and cheaper) New York model won. (Actually, the Indiana access counselor's office is even more spare: It is basically just the working staff, without the politically appointed commission.)

O'Connor said that during a time when there is a hesitancy to create new government, legislators were "actually very supportive, cooperative; they saw the need." In the first nine

months of the access office's existence, O'Connor documented its effectiveness: She handled more than 600 calls or complaints and was able to resolve almost every dispute.

"Most officials want to do the right thing; they just don't know how or have forgotten how," O'Connor said. Most have been receptive to what she is doing and have begun to call her first. "The office is a good resource for government at all levels," she said. O'Connor aims to make it a resource with an educational focus: Her goal is to re-educate public officials who may be so burdened with budget and staffing problems that they have forgotten that they are employees of the public and that they should seek answers instead of brushing questions off.

VIRGINIA: Laying the Groundwork

Group: Virginia Coalition for Open Government, a non-profit alliance founded in 1996 by more than 80 organizations and individuals, including the news media, journalism schools, lawyers, public-interest groups and library associations.

Goal: To encourage the Virginia legislature to create an Advisory Freedom of Information Commission to "hear FOI complaints, resolve disputes informally, issue advisory opinions if mediation fails, recommend improvements in state law as needed, (and) coordinate training and informational programs." The commission would create a permanent mechanism for objectively investigating and resolving complaints about access issues; provide a resource for both citizens and government officials; be low-cost, non-bureaucratic and non-judicial, and provide immediate answers and quick administrative review of complaints.

Background: Forrest "Frosty" Landon, executive director of the Virginia Coalition, said the group (spearheaded by the Virginia Press Association) began focusing on the need for an FOI commission in 1998, and has been working with a legislative study committee to lay the foundation for such an agency. Landon said he is optimistic; the legislators on the study committee seem favorably inclined to the idea. (Recommendations contained in an FOI study conducted 10 years ago were never adopted, but provided the framework for the current discussion, and Landon said the coalition was able to use the access audits as ammunition to underscore the overall need for training of government officials and mediation of citizen complaints.)

Landon said the legislative study committee invited officials from the Connecticut and New York FOI commissions to speak, and the legislative staff also examined several other states (Maryland, Florida, Kentucky, Georgia, Washington, Hawaii and North Carolina).

The conclusion: No two states have taken exactly the same approach, and Virginia would be well-served to borrow from several sources to create its FOI commission.

The biggest point of discussion within the legislative study group has been where to put the new access agency, to allay fears that an appointed ombudsman would come armed with a

political agenda. Suggestions on oversight have ranged from the Supreme Court to the Library of Virginia.

Recommendations:

* Organization — Landon and the coalition have recommended an advisory commission with support staff. The commission would include from three to seven members: citizens, media representatives, state and local government officials. A compliance adviser/access counselor would head the staff, assisted by the office of the attorney general, the department of consumer affairs or established within the legislative branch.

* Process — The access counselor would answer routine questions immediately, investigate and mediate formal inquiries, provide educational programs and materials for the public and government, and maintain the state access guidelines on the Internet and hard copy.

* Another idea — Hire outside law firms to represent state agencies in access disputes, so that the Attorney General's Office could handle administrative review of the cases without conflict of interests.

IOWA: Alternative Dispute Resolution

Handling of access issues is currently a scatter-shot approach in Iowa. Chapter 21.6 of the Iowa Code specifically charges the Attorney General's Office with enforcing the open-meetings law, but complaints are currently being investigated by the office of Citizens' Aide/Ombudsman. The process can take several months.

The Ombudsman's 1998 annual report pointed out that while the office does not often hear access complaints targeted at state agencies, "complaints about municipal and county governments are the greatest source of our public records and open meetings issues. . . . Local governments vary in their understanding and conformity with Iowa laws calling for open government." With approximately 1,400 municipal, county and other non-state agencies in Iowa, the challenge of keeping local government on the straight and narrow is daunting.

While the Iowa Mediation Service is not currently involved in mediating open-meetings and open-records disputes on a large scale, the observations of its executive director can provide insights into how the mediation process could work in Iowa.

Agency: Iowa Mediation Service.

Organization: Independent, non-profit organization that works closely with the Iowa Attorney General's Office. Provides conflict-resolution services throughout the Midwest.

Staffing: Director and six staff members, with 30 to 50 contract mediators. Seven-member board; members are elected by a majority of the board for two-year terms, representing a variety of interest groups — church, farm, government, business.

Budget: Charges fees (though cheaper than attorneys). Also receives state and federal funds and private grants.

Background: The organization began as the Iowa Farmer-Creditor Mediation Service during the farm crisis in the mid-1980s. A group of concerned citizens, including farmers, church leaders and businesspeople, sought to head off the farm foreclosures that were threatening to clog the courts; they decided to go the non-profit route because there was no government interest in mediation, said Executive Director Mike Thompson, who has been with the service since the

beginning. The Iowa legislature subsequently passed a law requiring that farmer-creditor disputes go through mediation before foreclosure.

After the farm crisis waned, the mediation service branched into other areas; it now handles everything from environmental issues (such as neighbors fighting large-scale hog lots) to public policy debates (for example, school district mergers), personal injury disputes and divorces.

Thompson said the service mediates 100 to 200 public policy cases annually and 700-800 agriculture and nuisance cases.

Process: Participants sign agreements going in, but what really makes it binding is the service's devotion to educating the parties involved and their commitment to the process, said Thompson. While lawyers often refer cases to mediation, the service insists that participants at least consult legal counsel.

Other responsibilities: The Iowa Mediation Service provides training for government groups and agencies.

Observations: One advantage of bringing a dispute to an independent mediator is that a non-government facillitator has more flexibility than a government agency; it isn't hog-tied by burdensome rules and procedures, said Thompson.

On the other hand, it is difficult to get government to come to the table (officials are reluctant to admit they are wrong by submitting to mediation) and, absent regulation or legislation, an independent mediator is powerless to compel it, said Thompson.

One complication that Thompson foresees in mediating FOI disputes: Most mediation sessions are traditionally confidential, and conducting open negotiation creates some dilemmas. The complainant usually wants "to bring the light of day into the process," said Thompson, but government officials traditionally seek confidentiality so that they will have deniability. It's a political issue, he said: They want to be able to blame the arbitrator for a result that might prove unpopular with voters.

Conclusion

Ensuring citizens access to government involves a delicate balancing of democratic ideals, legal issues, financial constraints and — at its heart — political will. Talk to any state FOI mediator, and the discussion eventually boils down to this: What was the political climate that led legislators to see the need for an access ombudsman in the first place and, perhaps more important, why has the state been willing to continue devoting its resources to freedom of information?

While each state is unique, in terms of FOI needs and political exigencies, several common themes emerge that are germane to any discussion of FOI mediation in Iowa. The advice centers primarily on the structure of the office and the politics that create it.

Structure

* **Placement is crucial.** To be successful, any access office must be seen as ***neutral and independent.*** If the office is a government agency, citizens must be confident they can receive a fair deal, and other government agencies must respect the ombudsman, listen to her and be certain she doesn't have a political agenda.

"That's what government is all about — it is non-partisan. The people have a right to know information about their government," said Anne Mullin O'Connor, Indiana's new access counselor. Independence lends credibility to the position, she said: "When I call a state agency, they know it doesn't matter what the governor thinks." If the ombudsman can be removed only for cause, even if she is appointed by the governor, she is insulated from shifting political winds. "The current governor may be supportive, but you never know about the next one," said O'Connor.

The most frequent locations suggested for the office were an ***independent agency*** in the governor's office or the legislative branch — though Virginia is even considering an FOI commission in the judiciary.

And, while several states (including Maryland, Florida, Kentucky and North Carolina) have FOI commissions that operate out of, or in close connection with, the ***Attorney General's***

Office, the people interviewed generally frowned on the practice: Since the attorney general in most states represents at least state government, if not local entities, there is an immediate built-in ***conflict of interest*** in any dispute between public official and citizen.

The states that DO place responsibility for FOI issues in the Attorney General's Office often set up special procedures to ensure neutrality. In Florida, for example, a state agency that is involved in an access dispute must hire an outside attorney to represent it.

Mike Thompson, of the Iowa Mediation Service, also had conflict-of-interest concerns about placing an access counselor in the Attorney General's Office, but offered the following compromise: Have the attorney general be in charge of compliance, but mandate that any FOI dispute must go through mediation. An ***independent mediator*** would be hired on contract, and while the Attorney General's Office could sit in on the discussions, the mediator would provide a buffer between state government and the disputing parties.

Another option would be to add a designated access counselor to the state ***citizen's aide/ombudsman's office***, but the legislature would have to appropriate more money to accommodate the increased work load. In addition, regulations would have to provide the access counselor with the freedom to give immediate advice over the phone, and to mediate disputes and dispense advisory opinions without unduly burdensome bureaucracy.

*** Narrow the access counselor's mandate and give him enough resources — both time and money — to do the job well.** The FOI ombudsman must not only be insulated from political pressures, but work pressures as well.

"If you are putting it in an existing agency, you have to be very careful," said O'Connor. There is a tendency to treat the access ombudsman like a staff attorney, to lard onto his job non-FOI duties that pull him from his main mission: educating both public officials and private citizens, and addressing and resolving access disputes.

Jack Schwartz, the assistant attorney general who shoulders the FOI work in Maryland, said the key reason that state's Open Meetings Law Compliance Board has been successful,

despite its lack of funding, is because its mission is narrowly defined. "You have to make (an agency's) responsibility proportional to its resources," said Schwartz.

A prime example of the dangers of violating this commonsensical rule is Hawaii's Office of Information Practices, at least some of whose problems can be laid to the fact that the agency was handed a broad mandate but inadequate funding.

While they obviously have a vested interest in the issue, several of the access counselors interviewed pointed out the cost-effectiveness of their operations. Robert Freeman said New York government agencies at all levels can call his office for quick, free legal advice on FOI issues. Indiana's O'Connor said that legislators saw an access counselor as a relatively low-ticket way to deal with the state's FOI problems.

* **Focus on education.** An access counselor should be a resource for both public officials and private citizens. All of the FOI mediators contacted said they spent the bulk of their time speaking to citizens' groups and ***conducting openness workshops*** for state attorneys and front-line public employees. Their work involves not only putting out access-complaint fires, but providing training to prevent the conflagrations in the first place.

In disputes involving local governments, the culprit is as often ***ignorance*** as intransigence, the mediators said. Officials lack a clear understanding of what they can and cannot do. "Education is a big issue," said Iowa Mediation's Thompson. "Local entities rarely talk to legal counsel when making decisions. . . . Their application of the law is dubious at best."

* **Concentrate on mediation.** The access counselors said that the majority of FOI complaints can be resolved through informal mediation. Even Connecticut, with its highly structured hearing process, has rejuvenated its first-phase ombudsman program in an effort to resolve disputes quickly and informally. The idea is to get away from a judicial atmosphere and to keep costs down.

Thompson differentiated between mediation (a dialogue attempting to resolve a dispute) and arbitration (binding or advisory decision-making). He suggested a multi-pronged approach

that would involve informal ***negotiation***, which would filter out most cases, ***mediation*** and then ***arbitration***.

Any mediator must have both the training and skills to effectively facillitate discussion and the ***statutory or regulatory clout*** to get other government agencies to the table, said Thompson. The biggest problem encountered in negotiating with government entities, he said, is their defensiveness and reluctance to back down. In addition, the government-agency representative at the table must have the authority to negotiate and to make the decisions necessary to resolve the dispute.

* **Enforcement**: The access counselor must be seen as independent; he must have the legal and political clout to get both parties to cooperate, and the skills to negotiate a resolution. But what about enforcing that decision?

Connecticut is the only state FOI commission with statutory enforcement powers. In the other states examined, the access officers issue advisory opinions that have no force of law; they must rely on the trust and respect their offices have earned from government agencies and the courts over the years. (On the other hand, in many states opinions by the Attorney General's Office are advisory as well. Having an FOI ombudsman with more clout than the attorney general might throw the political machinery out of whack.)

An FOI mechanism with the force of law is the most effective, of course. But, practically speaking, as Robert Freeman of New York pointed out, such a process requires a fleet of attorneys and due-process guarantees that might sabotage the very selling points of an ombudsman's office: informality, speed and low cost.

* **Logistical considerations**: As mentioned previously, a system that requires the parties in FOI disputes to attend several hearings might be practical in a state as tiny as Connecticut, but it would prove an impediment to participation in a larger state, especially during winter months, unless video-conferencing was an option.

Politics

*** The political will must exist** before the legislature will agree to devote scarce resources to an access counselor. In both Connecticut and Indiana, the ***governor*** was an advocate of open government. ***News media*** influence led to the creation of the New York Committee on Open Government, and, 25 years later, newspapers (through the access audit in Indiana and the press association in Virginia) still do the heavy lifting at initial stages of the campaign.

Moya Gray Davenport, whose Office of Information Practices in Hawaii has been the target of political grenades, offered the most pointed advice: Establish a ***broad constituency***. "Newspapers can do a lot," Gray said. But, especially in an era of absentee owners, "they won't be there when you need them." Build a broad constituency — beyond media and tiny public-interest groups — that will support you "no matter what."

She counseled thinking to the future and establishing a niche: "***Privacy protection*** affects everyone on a gut level every day," she said. "FOI affects them only when they want something."

Gray also warned that anyone attempting to establish a public access counselor should look down the road at ***potential opposition***. Hawaii's FOI office has been tied up in litigation with public employees and police unions over access to discipline records.

"The sixth to eighth years are crucial," said Gray — not only because the access ombudsman will have established a track record to garner respect, but also a body of law "to make yourself disliked."

*** Appoint a well-respected person** as FOI chief to give the office immediate credibility. In New York, a respected journalism school dean was the first head of the Committee on Open Government. In Maryland, a revered 92-year-old public figure was named the first chairman of the Open Meetings Law Compliance Board.

Anne Mullin O'Connor was well-known for her access work in the Attorney General's Office when she was appointed Indiana access counselor, and counsel Jack Schwartz's reputation for fair-mindedness has headed off conflict-of-interest qualms in Maryland.

Jim Keat, the Society of Professional Journalists sunshine chair in Maryland, confirmed that Schwartz's "great integrity" and the chairman's "immense prestige" have helped establish the open-meetings board, but the operation's no-budget, voluntary nature causes him to keep his "fingers crossed about the system when they are no longer on the scene."

Setting up a ***barebones*** attorney-and-secretary operation, as Indiana did, streamlines the process, but establishing an FOI ***committee*** of citizens and public officials appointed by the governor and approved by the general assembly (New York, Maryland) gives the legislature a stake in the office, and promotes political accountability and respectability (as well as providing a buffer between the attorney who does the day-to-day work and political pressures).

* * *

What sort of access process would work best in Iowa? While valuable lessons can be learned by looking to the experiences of other states, more study must be done of the unique political situation here.

* Should the focus be on an ***extra-governmentalmediation process***? Having FOI disputes handled by a non-profit outside mediator, modeled after the Iowa Mediation Service, would allow flexibility and reduce bureaucracy, but the process would lack clout—regulation or statute would be required to push both parties to the table. Funding would have to be cobbled from a variety of private and governmental sources.

* If an access counselor is placed ***inside government***, where should the office go? Establishing it as an independent agency in the executive or legislative branches would contribute toward crucial neutrality. Placing it in the state ombudsman's office makes sense, but the legislature would have to appropriate the necessary funds, and unless the counselor were relatively free of burdensome red tape, the advantage of immediacy would be lost.

* What is the ***natural constituency*** for the campaign for an access counselor, and who would lead the charge? While Iowa's FOI movement has been blessed with the backing of strong newspaper and broadcasting organizations, growing out-of-state corporate media ownership and the potential effect on support for any future lobbying effort is certainly a factor to considered.

* * *

Access audits in Indiana, New Jersey, Virginia and Connecticut have shown that openness must not only be in the statute books; it must be in the hearts of the public and the minds of public officials. The thousands of calls that flood the offices of the nation's few access counselors attest to the need for a place where a state's public officials can take their questions and citizens can take their grievances in the confidence that they will be addressed quickly and fairly.

A streamlined process for dealing with access issues is a resource for both government and the public; by funneling all inquiries to one office, problem areas and issues can be identified more easily. As government grows bigger and more complicated, its information issues also become more complex and require special attention and expertise.

In addition, as Frosty Landon, of the Virginia Coalition on Open Government, pointed out, "The idea of voluntary mediation resonates" in an era of groaning court dockets. There is growing recognition of the need for alternative dispute resolution outside the courtroom:

"It's good reform."

Bibliography

State Access Laws

Connecticut: Freedom of Information Act, Maryland Code, Sections 1-200 to 1-241.

Hawaii: Uniform Information Practices Act, Hawaii Revised Statutes, Chapter 92F, Sections 92F-1 to 92F-4; 92F-11 to 92F-19; 92F-21 to 92F-28; 924-41 and 92F-42.

Indiana: Access to Public Records, Indiana Code 5-14-3, Chapter 3. Open Door Law, Indiana Code 14-14-1.5, Chapter 1.5.

Maryland: Maryland Code Annotated, State Government Article—Public Information Act, Title 10, Subtitle 6, Part III. Open Meetings Act, Section 10-501, Title 10, Subtitle 5.

New York: New York Code, Public Officers Law—Freedom of Information Law, Article 6, Sections 84-90. Open Meetings Law, Article 7, Sections 100-111. Personal Privacy, Article 6A.

Interviews

Robert Freeman, executive director, New York Committee on Open Government. April 12, 1999.

Moya Davenport Gray, director, Hawaii Office of Information Practices. April 28, 1999.

E-mail from Jim Keat, Maryland sunshine chair, Society of Professional Journalists, May 9, 1999.

Forrest "Frosty" Landon, executive director, Virginia Coalition for Open Government. April 21, 1999.

Anne Mullin O'Connor, Indiana access counselor, April 15, 1999.

Jack Schwartz, assistant attorney general and counsel, Maryland State Open Meetings Law Compliance Board. April 30, 1999.

Mike Thompson, executive director, Iowa Mediation Service. April 22 and April 29, 1999.

Eric Turner, public education director, Connecticut Freedom of Information Commission. April 26, 1999.

Websites

Connecticut Freedom of Information Commission:

www.state.ct.us/foi/

Hawaii Office of Information Practices:

www.state.hi.us/oip/

Indiana Public Access Counselor:

www.state.in.us/pac/index.html

Maryland State Open Meetings Law Compliance Board:

www.mdarchives.state.md.us/msa/mdmanual/26excom/html/27open.html

New York Committee on Open Government:

www.dos.state.ny.us/coog/coogwww.html

Virginia Coalition for Open Government:

www5.infi.net/opengov

The Reporters Committee on Freedom of the Press:

Tapping Officials' Secrets handbook on-line

www.rcfp.org/tapping/

Gannett New Jersey Newspaper Group access project:

www.injersey.com/access

Additional material

Annual report of the Iowa Citizens' Aide/Ombudsman, 1998.

1998 Report to the Governor and the Legislature, New York Committee on Open Government.

Draft proposal on creating an Advisory Freedom of Information Commission by the Virginia Coalition on Open Government.