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# Evaluating Public Access Ombuds Programs: An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising under Open Government Laws

*Daxton R. Stewart\**

## I. INTRODUCTION

Government transparency is essential in a democracy to ensure that citizens and their proxy—the news media—can effectively scrutinize the conduct of public business. For this reason, the federal government, the District of Columbia, and all 50 states have passed open government laws, which are intended to ensure public access to government records and meetings.<sup>1</sup>

Yet, more than a century after the earliest of these “sunshine laws” went into effect, citizens and journalists still struggle to consistently receive access to meetings and records as the laws require. An inherent tension exists in the relationship between a citizenry that wants to remain informed and agents of government who seek to control information, and this tension may be even greater between the government and those given special protection under the First Amendment to monitor government—the news media.

Since Connecticut created the state’s Freedom of Information Commission in 1975, several jurisdictions have developed programs to manage disputes concerning public access to government records and meetings. While every state offers judicial remedies for parties who feel they have been wrongfully denied access to records or meetings under the law, alternative programs have been created in several jurisdictions. As of the end of 2009, 32 states have implemented some kind of alternative dispute resolution (ADR) program to handle public access issues, including administrative agencies, mediation programs, public access counselors, special duties for attorneys general, and groups to provide informal advisory opinions.<sup>2</sup> Five states have created ombuds programs to scrutinize public access is-

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1. Shannon E. Martin, FREEDOM OF INFORMATION: THE NEWS THE MEDIA USE 131-133 (2008).

2. See Daxton R. “Chip” Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, 1 J. OF MEDIA L. & ETHICS 49, 78 (2009).

sues, and others have incorporated already existing ombuds programs to investigate complaints regarding public access matters.<sup>3</sup> Additionally, the federal government established the Office of Government Information Services, which in 2009 began providing oversight of agencies' responses to the Freedom of Information Act.<sup>4</sup>

Though ombuds offices used to manage public access disputes have been in existence for nearly a decade, the process of creating and operating these programs has been the subject of little empirical research. As new public access ombuds programs are created, and as other new programs develop, the successes, failures, and challenges faced by other ombuds program can help to inform better design and outcomes. This study, informed by Dispute Systems Design theory, includes the conclusions drawn from case studies of public access ombuds offices in three jurisdictions: Virginia and Iowa, two programs which have been in existence for nearly a decade, and the recently created Arizona program.

The article begins with a review of literature regarding ombuds, public access laws, and dispute systems design. It follows with case studies of the development of public access ombuds offices in Virginia, Iowa, and Arizona. Finally, this article draws conclusions from those experiences, offering guidance to aid other jurisdictions in designing their own ombuds programs.

## II. LITERATURE REVIEW

### A. *Ombuds and Public Access*

The first ombuds on record date back to 1713, when King Charles XII of Sweden appointed a "Chancellor of Justice" to provide oversight of the king's administrators; the Swedish ombuds concept that developed over the next couple of centuries emerged as a popular model in Europe in the 1950s.<sup>5</sup> The "classical ombuds" concept—an independent government official that investigates and issues recommendations about government activities—did not gain a foothold in the United States until the 1960s, which Howard Gadlin attributed to the changing social and political climate and a "demand for mechanisms by which people could address maladministration by government, educational, and corporate bureaucracies."<sup>6</sup> This "classical ombudsman" concept,<sup>7</sup> which has been adopted by the United States Ombudsman Association and the American Bar Association as the

3. *Id.* at 69-71.

4. See 5 U.S.C. § 552(h) (2012).

5. Sarah Thacker, *Good Intentions Gone Astray: How the ABA Standards Affect Ombudsmen*, 2 J. INT'L OMBUDSMAN ASS'N 65, 66 (2009).

6. See Howard Gadlin, *Ombudsman: What's in a Name?*, 16 NEGOT. J. 37, 38 (2000); AMERICAN BAR ASSOCIATION, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf.

7. This classical ombuds provides government oversight, though other kinds of ombuds have developed in other contexts as well, such as the "organizational ombuds" that works within organizations such as businesses or schools, and the "advocate ombuds," which does not take an impartial approach but rather pushes for needed changes. See STANDARDS, *supra* note 6; Larry B. Hill, *The Ombudsman Revisited: Thirty Years of Hawaiian Experience*, 62 PUB. ADMIN. REV. 24, 36-38 (2002), available at <http://www.accessmylibrary.com/article-1G1-82772321/ombudsman-revisited-thirty-years.html>.

standard for government ombuds programs, includes four essential characteristics: independence, impartiality, providing a credible review process, and confidentiality.<sup>8</sup>

Classical ombuds programs typically have no formal enforcement authority, instead relying on voluntary compliance with recommendations to be effective.<sup>9</sup> However, this does not mean that ombuds are without power. Gadlin notes that ombuds' investigative and recommendation powers provide "enormous leverage," even when the ombuds is making informal inquiries and investigations, because ombuds are making decisions about proper and improper conduct.<sup>10</sup> Further, ombuds can report bad behavior and refusals to cooperate with recommendations to enforcement authorities, which may have more formal power to issue sanctions.<sup>11</sup>

Five states—Virginia,<sup>12</sup> Iowa,<sup>13</sup> Arizona,<sup>14</sup> Washington<sup>15</sup> and Tennessee<sup>16</sup>—have created ombuds programs specifically aimed at managing public access disputes arising under open government laws. Most of these public access ombuds programs resemble the "classical ombudsman," in that they were established by statute and were created to be independent and impartial reviewers of inquiries and complaints about public access matters. This study focuses on three of these programs: Virginia, Iowa, and Arizona.<sup>17</sup>

Virginia's Freedom of Information Advisory Council is the oldest of the five aforementioned programs, starting in the summer of 2000, and it is also the only one that stands on its own as a public-access-specific agency. The Iowa Public Records Open Meetings and Privacy (PROMP) program in the Office of Citizens' Aide/Ombudsman, created in 2001, and the Arizona Assistant Ombuds for Public Access position, established in 2007, were built into ombuds offices that were already in existence. Both were legislatively created to serve as agencies independent of other branches of government and follow more of the "classical ombuds" path.<sup>18</sup> These three offices provide ample ground for probing research that can help shed light on the function and effectiveness of public access ombuds programs.

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8. The "credible review process" is not specifically mentioned in the American Bar Association standards, though it is incorporated into the "independence" standard. STANDARDS, *supra* note 6; UNITED STATES OMBUDSMAN ASSOCIATION, GOVERNMENTAL OMBUDSMAN STANDARDS 1 (2003), [www.usombudsman.org/documents/PDF/References/USOA\\_STANDARDS.pdf](http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf).

9. Gadlin, *supra* note 6, at 42.

10. *Id.*

11. Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOT. J. 353, 357-58 (1991).

12. VA. CODE ANN. § 30-178(A) (2009).

13. IOWA CODE ANN. § 2C.9(1) (2009).

14. ARIZ. REV. STAT. ANN. § 41-1376.01 (2009).

15. Washington's ombuds was created by the attorney general in 2005. See *Open Government Ombudsman*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL, [www.atg.wa.gov/OpenGovernment/Ombudsman.aspx](http://www.atg.wa.gov/OpenGovernment/Ombudsman.aspx) (last visited Jan. 5, 2013).

16. TENN. CODE ANN. § 8-4-601 (2009).

17. Washington and Tennessee were excluded from the study for two important reasons. Washington's program does not resemble the "classical ombuds" in that it was created by the Office of the Attorney General in 2005 and is conducted through that office; Tennessee's program was formally authorized in 2009, just as this study was beginning, and thus was not ideal for an in-depth study yet.

18. Compare to Washington's ombuds program, which is housed in the Office of the Attorney General, and Tennessee's Office of Open Records Counsel, which is part of the state comptroller's office.

*B. Dispute Systems Design*

Dispute Systems Design theory (DSD) provides a framework both for designing new dispute resolution systems and for evaluating dispute resolution systems that are already in place. DSD is rooted in the work of Ury, Brett & Goldberg, who examined ideal procedures for effective dispute management and proposed a series of principles to reconcile parties' interests, to determine who is right, and to manage power issues.<sup>19</sup> The authors used these lessons to build a framework of six basic principles of DSD:

1. Putting the focus on interests by creating processes that identify the core concerns of relevant interest groups;
2. Providing "loop-backs" in the process to encourage a return to interest-based methods as a dispute progresses through the system;
3. Providing low-cost alternatives to reach satisfactory resolutions;
4. Encouraging discussion about the nature of disputes and the best ways to resolve them early in the process;
5. Arranging procedures from low-cost to high-cost; and
6. Ensuring that adequate resources are committed to motivate and educate parties so that they can make the system work.<sup>20</sup>

Costantino & Merchant embraced these principles and incorporated lessons from organizational design to build on this framework in the organizational context.<sup>21</sup> In the first instance, these authors suggest addressing whether ADR systems are appropriate for the type of conflict at hand. They also encourage instituting programs that are simple to use, easy to access, and narrowly tailored to address particular problems.<sup>22</sup> Further, they encourage emphasis on the design and review of dispute resolution systems, calling for stakeholder involvement in the design process,<sup>23</sup> training and education of stakeholders,<sup>24</sup> and constant evaluation of whether the program is meeting its intended goals.<sup>25</sup>

The goal of DSD goes beyond effective management of the many disputes that arise. Costantino & Merchant recognized that good systems should do more than "tinker at the edges of conflict," instead they should seek to change the cul-

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19. WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

20. *Id.* at 42-64.

21. See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996).

22. *Id.* at 121.

23. *Id.* at 49.

24. *Id.* at 134-35.

25. *Id.* at 168.

ture of conflict in an organization.<sup>26</sup> Slaikeu & Hasson provide the metaphor of “rewiring” people and organizations to change the way they think about conflict, training stakeholders to understand and approach conflict management in an effective manner.<sup>27</sup>

In her “distillation” of the DSD literature, Fader noted another important issue in DSD: “thorough self-assessment” at the front end of a systems design process.<sup>28</sup> Through this self-assessment, relevant stakeholders are brought together to discuss the characteristics of their disputes and their existing procedures, with a goal of determining the proper kind of system that can address these kinds of disputes most effectively.<sup>29</sup> It is only after this kind of self-assessment is completed and supported by leadership that the actual design of the new dispute system should begin.<sup>30</sup>

Conflict management systems design has received much attention from scholars, but little social science research has been done to help build theory in this area.<sup>31</sup> Empirical research that examines both the design process and the outcome can help build theory in DSD, particularly by addressing how system design affects the function of the system.<sup>32</sup> Case studies of the public access ombuds programs in Virginia, Arizona, and Iowa contribute to this body of research by providing illustrations of the design process as each was created and implemented, allowing for analysis from a Dispute Systems Design perspective.

### III. METHOD

This article examines the results of case studies conducted from December 2008 to March 2009 by the author of the public access ombuds programs in Virginia, Iowa, and Arizona. Case studies are ideal for studying complex social dynamics, allowing multiple methods of data gathering to study an individual case or cases in depth; in turn, these can be compared and contrasted and used to build theory.<sup>33</sup> However, what case studies provide in depth, they lack in breadth, with the obvious weakness of not being generalizable. Using three case studies and comparing and contrasting the experience in each mitigates this weakness, allowing the researcher to search for broad themes in common among the studies.

The case studies focused on the formal design of each program, how each was implemented and have since developed, and how each comports with the tenets of the classical ombuds model. The primary method of gathering data in

26. *Id.* at 218.

27. KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 199 (1998).

28. Hallie Fader, Note, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 HARV. NEGOT. L. REV. 481, 486 (2008).

29. *Id.* at 488 (quoting COSTANTINO & MERCHANT, *supra* note 21, at 96-97).

30. *Id.* at 486-87.

31. See John P. Conbere, *Theory Building for Conflict Management System Design*, 19 CONFLICT RESOL. Q. 215 (2001).

32. Lisa B. Bingham, *The Next Step: Research on How Dispute System Design Affects Function*, 18 NEGOT. J. 375, 376-77 (2002).

33. ROBERT SOMMER & BARBARA SOMMER, A PRACTICAL GUIDE TO BEHAVIORAL RESEARCH: TOOLS AND TECHNIQUES 203 (5th ed. 2001).

the case study was in-depth interviews, supplemented by legal research and a review of government documents and news reports.

For the case studies, 24 sources were interviewed, at least seven in each state. Interviews typically lasted between 30 minutes to one hour, with a total of about 15 hours' worth of interviews resulting in more than 50,000 words of transcribed interviews.<sup>34</sup> The primary ombuds officer in charge of open government issues was interviewed, as were sources representing news media and government groups (see list of interview subjects in Appendix A), to get an understanding of how users of the office evaluate its strengths and weaknesses. The source interviews provide a level of depth that would be unattainable from reliance on legal research or government documents alone, allowing commentary and examples to aid understanding of how these offices have had an impact on dispute resolution and conflict management involving open government matters.

The case studies were aimed at addressing three research questions:

- RQ1: What aspects of Dispute Systems Design are reflected in the creation of public access ombuds programs?
- RQ2: To what extent do public access ombuds program follow the tenets of "classical ombuds" programs?
- RQ3: What are the best practices in designing a public access ombuds program?

#### IV. CASE STUDIES

Below, the experience of each of the three programs is summarized briefly,<sup>35</sup> followed by analysis of the themes that emerged from the case studies.

##### A. Virginia

The Virginia Freedom of Information Act was passed in 1968, requiring that government records and meetings be open to the public.<sup>36</sup> The Act requires liberal construction of its terms to favor openness, narrow construction of exceptions, and a requirement that "the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested."<sup>37</sup>

34. Unless otherwise noted, direct quotes and paraphrases of quotes attributed to the sources are from these interviews.

35. Full-length case studies for each program were written by the author. The purpose of this study is to provide a brief overview of these case studies to lead to the analysis and conclusion addressing the research questions. Publication of the full-length case study of the Virginia Freedom of Information Advisory Council was published in 2010. See Daxton R. "Chip" Stewart, 9 APPALACHIAN J.L. 217 (2010). This section is excerpted from that article.

36. COMMONWEALTH OF VIRGINIA, REPORT OF THE JOINT SUBCOMMITTEE STUDYING VIRGINIA'S FREEDOM OF INFORMATION ACT, H. Doc. No. 106, at 4 (2000), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD1062000/\\$file/HD106\\_2000.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD1062000/$file/HD106_2000.pdf).

37. *Id.*

Before 2001, when disputes arose, the primary mechanism to resolve disputes was through litigation and judicial enforcement.<sup>38</sup> The law offered no “implementation or enforcement authority,” and there was “no statutory provision mandating alternative dispute resolution” or other informal methods of resolving disputes outside of litigation.<sup>39</sup> Advocates for journalists and citizens expressed frustration with having litigation as the only avenue for resolving disputes under the Act. Frosty Landon, a longtime editor of *The Roanoke Times* and the former executive director of the Virginia Coalition for Open Government, summarized it thusly:

There was nothing there that provided for continuing day-to-day advocacy work for compliance with the state’s Freedom of Information Act . . . It was a constant source of frustration for media and citizen watchdogs. While the legislature gave all of the right lip service to open government, the practical application was that you had to go to court, and after a couple of years and \$50,000 in costs, the court may not give you a satisfactory result.<sup>40</sup>

Landon said he founded the Coalition for Open Government with an eye toward reforming the Virginia Freedom of Information Act.<sup>41</sup> The group called for a legislative study on the public access laws, and in 1998, the Virginia General Assembly approved a resolution to create “a joint subcommittee to study the Virginia Freedom of Information Act . . . to determine whether any revisions to the Act were necessary.”<sup>42</sup>

During the study group’s first meeting on June 12, 1998, the Virginia Coalition for Open Government suggested that the committee “explore several approaches used by other states in ensuring compliance with public access laws, including the creation of (i) a quasi-independent FOIA office, (ii) a FOIA enforcement agency, (iii) an expanded FOIA role for the Attorney General or (iv) some hybrid of these approaches.”<sup>43</sup> During its next meeting, the committee heard comparisons of the approaches of several states that used either “an assisting agency relative to enforcement or implementation of the laws” or “the use of alternative dispute resolution” to handle disputes arising under open government laws.<sup>44</sup> However, by the end of the year, the joint subcommittee did not reach a conclusion on how to create or operate such an office. Thus, the committee “agreed to continue its study for an additional year” to focus on the possibility of creating “a state ‘sunshine office’ to resolve FOIA complaints, conduct training and education seminars, issue opinions on final orders, and offer voluntary mediation of disputes[.]”<sup>45</sup> The push was aided by results from an audit of open records law compliance conducted by 14 Virginia newspapers in 1998 that showed that

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

39. VA. H. DOC. NO. 106, *supra* note 36, at 27-28.

40. Telephone Interview with Forrest M. Landon, Council Member, Virginia Freedom of Advisory Council, Former Executive Director, Virginia Coalition for Open Government (Feb. 2, 2009) [hereinafter Landon Interview].

41. *Id.*

42. VA. H. DOC. NO. 106, *supra* note 36, at 3.

43. *Id.* at 9-10.

44. *Id.* at 11.

45. *Id.* at 25.



only 58 percent of officials in the state's 135 cities and counties complied with requests.<sup>46</sup>

The membership of the joint subcommittee remained the same as it was the previous year. Three members came from the House of Delegates, including Chip Woodrum, who again served as the chairperson of the group.<sup>47</sup> Two state senators also served on the committee, as did newspaper editor John B. Edwards and attorney Roger C. Wiley, who represents counties and cities across the state.<sup>48</sup> As it had the previous year, the committee welcomed several perspectives to the table to discuss their interests and proposals for revising the Virginia Freedom of Information Act.<sup>49</sup>

After its first meeting, the committee reached consensus that a "sunshine office" should be "an independent agency that would not be subject to direct political pressure while it serves Virginia citizens and state and local public bodies."<sup>50</sup> Ultimately, the joint subcommittee decided to house the office in the division of Legislative Services to shield it from interference.<sup>51</sup> The subcommittee settled on a 12-member Freedom of Information Advisory Council made up of a mix of government officials, media representatives, and citizens that could issue non-binding advisory opinions on matters involving the Virginia Freedom of Information Act.<sup>52</sup> The council was also to be responsible for training government employees and creating educational materials about the law.<sup>53</sup>

The terms "ombudsman" and "mediator" were used frequently in these discussions to describe what function the agency would have in dispute resolution.<sup>54</sup> According to Landon, the Coalition for Open Government preferred to think of the role as an "ombudsman": "We called it that from day one. We were just using it as a descriptive term. There's no tradition for actual ombudsman in Virginia with a capital 'O.'"<sup>55</sup>

The bill authorizing creation of the Virginia Freedom of Information Council was signed into law by Governor Jim Gilmore on April 10, 2000.<sup>56</sup> Besides the mandate of fostering compliance, the council was to: (1) furnish "advisory opinions or guidelines . . . to any person . . . in an expeditious manner"; (2) "[c]onduct training seminars and educational programs" for public officials and employees; and (3) publish educational materials about the Freedom of Information Act.<sup>57</sup>

After a brief interview process, Maria Everett, who had helped to facilitate discussions during the joint subcommittee hearings as a staffer in the Division of

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46. Pamela Stallsmith & John Denniston, *Want Public Information? In Virginia, Good Luck*, RICHMOND TIMES-DISPATCH, Nov. 1, 1998, <http://nfoic.org/sites/default/files/vawantpubinfo.pdf>.

47. VA. H. DOC. NO. 106, *supra* note 36, at ii, 27.

48. *Id.*

49. *Id.*

50. *Id.* at 33.

51. Telephone Interview with Ginger Stanley, Counsel, Virginia Press Association (Feb. 6, 2009) [hereinafter Stanley Interview].

52. VA. H. DOC. NO. 106, *supra* note 36, at 37-38.

53. *Id.* at 39.

54. Landon Interview, *supra* note 40.

55. *Id.*

56. *Bill Creating Freedom of Information Panel Signed into Law*, ASSOCIATED PRESS, Apr. 10, 2000.

57. VA. CODE ANN. § 30-179 (2009).

Legislative Services, was hired to serve as the council's executive director.<sup>58</sup> As one of its first acts, the council gave Everett the authority to conduct the office's day-to-day functions as it began work in 2000.<sup>59</sup> Every source interviewed for this case study mentioned Everett's hiring as the most significant factor in the council's successful implementation and development. Dana Schrad, executive director of the Virginia Association of Chiefs of Police, said that "when the FOIA Council was created, [Everett] was such a good person to put into that position," noting that choosing another person may have delayed the council's effectiveness as a resource.<sup>60</sup> "She made the council a practical resource for government folks, journalists, and other interests groups on how FOIA applies in Virginia."<sup>61</sup>

Everett sensed skepticism from the government, particularly from local government attorneys, early in her tenure as the council's executive director.<sup>62</sup> After a hostile reception while speaking on a panel before a group of local government attorneys shortly after the office was created, Everett penned an article aimed at people in local government entitled "Friend or Foe? The Virginia Freedom of Information Advisory Council."<sup>63</sup> In her article, Everett noted the council's goal of providing an independent resource for handling open government matters for all, whether from government, media, or the public, but it particularly emphasized what the council offered to government employees and officials.<sup>64</sup> Leo Rodgers, county attorney for James City County, said these outreach efforts were critical in getting local government attorneys to buy into the program.<sup>65</sup> Further, Landon used grant money to help publicize the FOI Advisory Council by printing color posters and having them sent to local and state government bodies.<sup>66</sup>

Much of the council's outreach efforts involved conducting training and education on open government matters.<sup>67</sup> From July 2000 to November 2001, the first 15 months the office was open, Everett conducted about 40 presentations to numerous groups, such as the Virginia Municipal League, the Virginia Association of Counties, the Virginia Press Association, at both the University of Virginia

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58. Everett said she wasn't angling for the job. "They opened the hiring process. It was not like thou shalt be appointed, but they had the Press Association and local government representatives on the panel, and they wanted me to do it. I didn't want this." *Id.*

59. COMMONWEALTH OF VIRGINIA, REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL, H. DOC. NO. 30, at 2 (2001), available at <http://foiacouncil.dls.virginia.gov/YR1AnnualReport.pdf>.

60. Telephone Interview with Dana Schrad, Executive Director, Virginia Association of Chiefs of Police (Feb. 19, 2009) [hereinafter Schrad Interview].

61. *Id.*

62. Telephone Interview with Maria J.K. Everett, Executive Director, Virginia Freedom of Information Advisory Council (Jan. 7, 2009) [hereinafter Everett, Interview #2].

63. Maria J.K. Everett, *Friend or Foe? The Virginia Freedom of Information Advisory Council*, 6 J. LOC. GOV'T L. 2 (2001).

64. *Id.*

65. Telephone Interview with Leo W. Rodgers, County Attorney, James City County (Feb. 26, 2009) [hereinafter Rodgers Interview].

66. Landon Interview, *supra* note 40.

67. Everett, Interview #2, *supra* note 62.

and Virginia Tech, and the Virginia Coalition for Open Government.<sup>68</sup> The office now conducts about 70 training sessions each year.<sup>69</sup>

Increased legislation involving the Freedom of Information Act has been one of the unintended consequences of the creation of the FOIA Advisory Council. The council has become what Landon calls a “permanent study commission on FOI issues,” a place where legislators can send any matters pertaining to the Freedom of Information Act for further consideration before drafting new bills.<sup>70</sup> Wiley said that, while unintended, this development has turned out to be very important in the council’s mission.<sup>71</sup>

## B. Iowa

### 1. Historical Background

Iowa passed its open government laws in 1967, requiring that government records and meetings be accessible to the public.<sup>72</sup> The legislature’s stated intent of the open meetings portion of the law is “to assure . . . that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people.”<sup>73</sup> For more than 30 years, the only formal mechanism available to people who believed they had been wrongfully denied access to meetings or records under the laws was judicial enforcement. For meetings violations, any aggrieved party, including taxpayers, citizens, the attorney general, and county attorneys,<sup>74</sup> may seek damages of not less than \$100 nor more than \$500,<sup>75</sup> including “all costs and reasonable attorneys fees” incurred in enforcing the violation in court.<sup>76</sup> For records violations, parties could seek enforcement through injunction or a writ of mandamus,<sup>77</sup> and a knowing violation of the act could be prosecuted as a “simple misdemeanor.”<sup>78</sup> A complainant who successfully proved that a record custodian violated the provisions of the public records law is entitled the same amount of damages and reimbursement for costs and attorney fees as provided in the open meetings law.<sup>79</sup> However, sources agreed that litigation was

68. COMMONWEALTH OF VIRGINIA, REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL B1-B3 (2001), available at <http://foiacouncil.dls.virginia.gov/2001ar.pdf>.

69. COMMONWEALTH OF VIRGINIA, REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL, H. DOC. NO. 25, at 6 (2008), available at <http://foiacouncil.dls.virginia.gov/2008ar.pdf>. The council conducted 65 training sessions in 2008 and 77 training sessions in 2007. See *id.*; see COMMONWEALTH OF VIRGINIA, REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL, H. DOC. NO. 42, at 6 (2007), available at <http://foiacouncil.dls.virginia.gov/2007ar.pdf>.

70. Landon Interview, *supra* note 40.

71. Telephone Interview with Roger C. Wiley, Council Member, Virginia Freedom of Information Advisory Council, and, Attorney, Local Government Agencies (Feb. 9, 2009) [hereinafter Wiley Interview].

72. See Douglas L. Phillips, *Iowa – Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2006), [www.rcfp.org/ogg/item.php?t=short&state=IA&level=F1](http://www.rcfp.org/ogg/item.php?t=short&state=IA&level=F1).

73. IOWA CODE ANN. § 21.1 (2009).

74. *Id.* § 21.6(1).

75. *Id.* § 21.6(3)(a).

76. *Id.* § 21.6(3)(b).

77. *Id.* § 22.5.

78. *Id.* § 22.6 (repealed May 12, 2011).

79. *Id.* § 22.10(3).

not a viable way to consistently handle disputes arising over access to public records and meetings.<sup>80</sup>

Kathleen Richardson, who worked in the newsroom at the *Des Moines Register* for 20 years before becoming the executive secretary of the Iowa Freedom of Information Council in 2001, outlined what options were available to people who believed they were improperly denied access to a record or meeting:

Essentially, you call the Attorney General's office, and the Attorney General's office says that they don't have time to do anything. They basically ignore you, and you might call my predecessor Herb Strentz, the executive director of the Iowa Freedom of Information Council, and he might give you advice about what the law says and how to approach the problem. But, there really isn't any other formal mechanism other than trying to get your newspaper to get an attorney to sue and enforce the law.<sup>81</sup>

Iowa's Office of Citizens' Aide/Ombudsman, which was created by the legislature in 1972,<sup>82</sup> has always had jurisdiction to investigate citizen complaints about access to public records and meetings, according to Bill Angrick, who has served as Iowa's ombudsman since 1980.<sup>83</sup> "We're charged with investigating unfair and unreasonable practices, and we have looked at open records and open meetings issues for most of the time the office has been in existence," Angrick said.<sup>84</sup> While there weren't many cases before 2001, Angrick recalled they would pop up on occasion, and he specifically recalled a time that he issued a report about a county assessor who failed to make property record cards available in the early 1980s.<sup>85</sup> According to Angrick, "[t]here were other cases like [the county assessor situation] going back to that period of time."<sup>86</sup>

Writing in 1999, Richardson said that the Citizens' Aide /Ombudsman office's "[h]andling of access issues is currently a scatter-shot approach," with a process that "can take several months" when it chooses to investigate.<sup>87</sup> As Richardson noted, until the office added a position to focus on public records and open meetings issues, getting assistance from the ombudsman office in these sorts of cases was problematic, particularly for citizens, who would call the office or the Attorney General for assistance but would then be referred to her for help:

80. Telephone Interview with Kathleen Richardson, Director, Drake University School of Journalism and Mass Communication, and, Former Executive Secretary, Iowa Freedom of Information Council (Feb. 3, 2009) [hereinafter Richardson Interview]; Telephone Interview with William P. Angrick II, Citizens' Aide/Ombudsman (Jan. 9, 2009) [hereinafter Angrick Interview].

81. Richardson Interview, *supra* note 80.

82. The Ombudsman Act was passed by the Iowa legislature in 1972, but the role of ombudsman was first created in 1970 in the governor's office. Annual Report of the Iowa Citizens' Aide/Ombudsman, OMBUDSMAN'S REPORT 2003 4 (2004), <http://publications.iowa.gov/1431/1/2003%20DRAFT%202.pdf>.

83. Angrick Interview, *supra* note 80.

84. *Id.*

85. *Id.*

86. *Id.*

87. Kathleen Richardson, State Access Counselors: In Search of Responsive Government 21 (presented at annual meeting of the Iowa Freedom of Information Council, Oct. 2, 1999) (unpublished manuscript) (on file with author).

[A] citizen has less power, has no relationship with a records custodian, and doesn't have the resources of a journalism organization for suing. Somebody would call me and say, "I'm having trouble in my community, the city council is violating the law by holding closed meetings . . . ." So I'd ask, "Have you called the ombudsman?" And they'd say, "I have, and they said to call you."<sup>88</sup>

Richardson continued:

I'm certainly not a government official. I have no way to help people obtain their legal rights, and to citizens it was very frustrating for years. Even before I came on board here that was a longstanding problem in Iowa. There was nobody for the average citizen to go to help enforce the law.<sup>89</sup>

In the spring of 2000, a dozen newspapers across the state conducted an audit, sending reporters to each of Iowa's 99 counties to ask for public records.<sup>90</sup> Journalists requested public documents such as police incident reports, sheriffs' lists of persons with permits to carry concealed weapons, expense reports by city managers, personal property tax bills, and building permits.<sup>91</sup> Compliance was spotty at best, particularly in the area of law enforcement records; 58 percent of sheriff's departments denied requests about the concealed-carry permits, and 42 percent of police departments denied access to incident reports.<sup>92</sup>

Numerous sources cited this audit as the force that spurred the Iowa legislature to authorize the creation of a new position in the Office of Citizens' Aide/Ombudsman to handle public records and open meetings issues.<sup>93</sup> Angrick noted the audit came out toward the end of the legislative session, and it drew the attention of the Iowa General Assembly's legislative council, which appoints the ombudsman and approves hires and budgets for the office.<sup>94</sup>

That particular year, after that sunshine study was published in papers and on television in Iowa, I was appearing before the legislative council, and I got asked, "What are you doing in this area?" I said, "We are doing some things, but we could be doing more, especially if I had a staff assistant to focus on this, to do outreach and education and those kinds of things." They asked how much would it cost, and I said it would be for an entry-level person. So they approved it, and I advertised, and later

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88. Richardson Interview, *supra* note 80.

89. *Id.*

90. *Survey: Iowa Residents Often Denied Access to Public Records*, ASSOCIATED PRESS, Sept. 25, 2000, available at [www.freedomforum.org/templates/document.asp?documentID=3631](http://www.freedomforum.org/templates/document.asp?documentID=3631).

91. *Id.*

92. *Id.*

93. Angrick Interview, *supra* note 80; Richardson Interview, *supra* note 80.

94. Angrick Interview, *supra* note 80.

that year I hired Robert Anderson who was working at the University of Missouri Freedom of Information Center at the time.<sup>95</sup>

The news media viewed the creation of the new position as a victory: “I think they were all really excited and happy,” Richardson said.<sup>96</sup> Richardson added:

We had done some lobbying editorially to promote the whole idea of an access counselor,<sup>97</sup> and then the public records audit came out and this position was added to the Ombudsman’s office. We thought it was a triumph. For the first time in years, freedom of information advocates got something. It kind of showed the power of the press, binding together doing these audits and seeing something happen. We were all very optimistic.<sup>98</sup>

However, Richardson noted it “didn’t turn out to be the panacea we all thought.”<sup>99</sup>

## *2. Design and Formal Structure*

The legislative council approved the hiring of one additional full-time employee in the ombudsman’s office, to be paid about \$36,500 per year, specifying that “the additional position would be assigned the special responsibilities of public records and open meetings issues in addition to regular casework.”<sup>100</sup> Anderson was appointed to this position in 2001, and the position became known as PROMP, an acronym for Public Records Open Meetings and Privacy.<sup>101</sup> Though the position was created specifically to handle open government matters, no legislation was amended to reflect this. Instead, the new assistant ombudsman position would be subject to the same duties as established by the Iowa Citizens’ Aide Act.<sup>102</sup>

The Act creates the position of Citizens’ Aide, a person to be appointed by the legislative council and confirmed by the house and senate by majority vote.<sup>103</sup> The Citizens’ Aide, commonly referred to as the “Ombudsman” or the “Citizens’ Aide/Ombudsman,” serves four-year terms.<sup>104</sup> Under the Act, the ombudsman is given the power to investigate “any administrative action of any agency” upon the complaint of a citizen or upon his or her own motion.<sup>105</sup> Appropriate subjects for

95. *Id.*

96. Richardson Interview, *supra* note 80.

97. Richardson specifically mentioned that she and others were seeking a Public Access Counselor’s office, similar to the one in Indiana. *Id.* See IND. CODE ANN. § 5-14-4 (2010).

98. Richardson Interview, *supra* note 80.

99. *Id.*

100. See Minutes from Legislative Services Committee (Dec. 12, 2000) (cited by Angela Dalton via e-mail on Feb. 11, 2009).

101. Robert Anderson, *Message from Iowa’s First Public Records Ombudsman*, Annual Report of the Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2001 2 (2002), [https://www.legis.iowa.gov/DOCS/CAO/Annual\\_Reports/2002/CAWPA001.PDF](https://www.legis.iowa.gov/DOCS/CAO/Annual_Reports/2002/CAWPA001.PDF).

102. IOWA CODE ANN. § 2c.23 (2009).

103. *Id.* § 2c.3.

104. *Id.* § 2c.5.

105. *Id.* § 2c.9(1).

investigation include actions “contrary to law or regulation”<sup>106</sup> or acts that are “unreasonable, unfair, oppressive or inconsistent with the general course of an agency’s functioning, even though in accordance with law.”<sup>107</sup> The goal of the office is to act in “the interests of resolving complaints and improving administrative processes and procedures.”<sup>108</sup>

The law requires that the Citizens’ Aide “shall conduct a suitable investigation” into actions complained about by citizens, though there are some exceptions.<sup>109</sup> For example, if complainants have “available another remedy or channel of which the complainant could reasonably be expected to use,” the ombudsman could decline to investigate.<sup>110</sup> Additionally, if the ombudsman determines “other complaints are worthy of attention,” some requests for assistance may be denied.<sup>111</sup> When budget cuts affected state offices in 2002 and 2003, Angrick referenced these provisions in explaining how the office was trying to manage its caseload.<sup>112</sup>

“A proper role for the ombudsman, especially in times of limited resources, is to inquire whether established processes and procedures do not work, when unreasonable, inconsistent or unfair patterns appear, or when immediate risks exist for safety, health, or basic human rights violation government action or inaction,” Angrick wrote, specifically noting a decline in handling complaints related to correctional institutions and an increased emphasis on public records, open meetings, and privacy matters.<sup>113</sup> “These are the kinds of complaints we are continuing to prioritize.”<sup>114</sup>

The office was created as a resource for citizens, and Angrick believes part of this involves helping to train citizens to engage in self-help to resolve many of their complaints about government:

When citizens come to rely upon others to do what they can reasonably be expected to do themselves, they may become dependent and individually ineffective. Additionally, they do not develop or hone their ability to articulate issues, persuade others, and achieve results. A citizenry with those skills is, in my opinion, an important ingredient of the civic culture of democracy.<sup>115</sup>

In furtherance of this policy, the Office of Citizens’ Aide/Ombudsman has created guidelines entitled “What to do before calling the Ombudsman.”<sup>116</sup> These

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106. *Id.* § 2c.11(1)(a).

107. *Id.* § 2c.11(1)(b).

108. IOWA ADMIN. CODE § 141-1.1(2c) (2009).

109. IOWA CODE ANN. § 2c.12(1).

110. *Id.* § 2c.12(1)(a).

111. *Id.* § 2c.12(e).

112. Bill Angrick, *A Checklist for Good Government*, Annual Report of the Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2003 1, 5 (2004), <http://publications.iowa.gov/1431/1/2003%20DRAFT%202.pdf>.

113. *Id.* at 1.

114. *Id.* at 1, 5.

115. *Id.* at 1.

116. See Bill Angrick, *What to do Before Calling the Ombudsman*, Annual Report of the Iowa Citizens’ Aide/Ombudsman OMBUDSMAN’S REPORT 1998 4 (1999), <http://publications.iowa.gov/7961/1/CAWPA005.pdf>.

guidelines have appeared in the office's annual reports nearly every year since 1998, and they are listed on the office's Web site.<sup>117</sup> These guidelines advise people to "simply take the time to talk and listen" if they have problems with state or local government agencies and to follow "some good common sense steps" when trying to resolve these issues.<sup>118</sup> Six points are identified in these guidelines:

1. "Be prepared," with questions ready and necessary information at hand before contacting the agency;
2. "Be pleasant" by "treating public employees as you like to be treated";
3. "Keep records" including notes on the names of people contacted and any correspondence;
4. "Ask questions" about why the agency responded as it did;
5. "Talk to the right people," such as a supervisor who has the power to handle complaints or policy matters; and
6. "Read what is sent to you (*including the fine print!*)" to be aware of deadlines for appeals and other procedural rules.<sup>119</sup>

Citizens are then advised to call the Ombudsman's office if they "still cannot resolve the problem" after taking these steps.<sup>120</sup>

The Office of Citizens' Aide/Ombudsman operates free-of-charge to citizens.<sup>121</sup> The office had a budget of about \$1 million in Fiscal Year 2002, when the office had a staff including Angrick, Senior Deputy Ombudsman Ruth Cooperrider, and nine assistant ombudsmen.<sup>122</sup> By Fiscal Year 2008, the budget had grown to approximately \$1.5 million; the staff had added a full-time legal counsel and two additional assistant ombudsmen by this time.<sup>123</sup>

The office has the power to "maintain secrecy" in all matters before it, and it may conduct private hearings as well.<sup>124</sup> Among its many investigative powers,

117. All of the annual reports dating back to 1998 are available via the Iowa Library Services website. See *Iowa Citizens' Aide/Ombudsman Online Publications*, IOWA LIBRARY SERVICES, <http://publications.iowa.gov/view/departments/Iowa=5FCitizens=5FAide=5FOmbudsman.html> (last visited Jan. 12, 2013).

118. *Id.*

119. *Id.*

120. *Id.*

121. IOWA CODE ANN. § 2c.10 (2009).

122. *Office of Citizens' Aide/Ombudsman FY02 & FY03 Financial Information*, Annual Report of the Iowa Citizens' Aide/Ombudsman, OMBUDSMAN'S REPORT 2002 2 (2003), [http://publications.iowa.gov/1430/1/AnnualReport\\_02.pdf](http://publications.iowa.gov/1430/1/AnnualReport_02.pdf).

123. *Office of Citizens' Aide/Ombudsman FY07 & FY08 Financial Information*, STATE OF IOWA CITIZENS' AIDE/OMBUDSMAN 2007 ANNUAL REPORT 18, 20 (2008), [https://www.legis.iowa.gov/DOCS/LSA/SC\\_MaterialsDist/2008/SDMAT093.PDF](https://www.legis.iowa.gov/DOCS/LSA/SC_MaterialsDist/2008/SDMAT093.PDF).

124. IOWA CODE ANN. § 2c.8.



the ombudsman has the power to subpoena witnesses.<sup>125</sup> The office is supposed to make recommendations to an agency if any action is needed based on its investigations,<sup>126</sup> and if disciplinary action is warranted, the ombudsman is required to “refer the matter to the appropriate authorities.”<sup>127</sup>

However, this leaves the ombudsman without any formal enforcement powers. Some sources saw this as a significant drawback for the office. Within the Office of Citizens’ Aide/Ombudsman, however, the lack of enforcement power is seen as part of the proper role of an ombudsman.<sup>128</sup> Angrick explained:

My model is a softer model. I’d rather prevent the problem than enforce it, because prosecuting cases is costly and doesn’t always work. My particular strategy is to build up a lot on the front end, meet with city clerks, county officials, state officials, and to get people thinking that this is not only the law but the right thing to do.<sup>129</sup>

Angrick said this “softer” approach allows the office to handle more cases and to resolve them in a timelier manner than either adjudicative or administrative enforcement typically allow.<sup>130</sup>

Additionally, Angrick does not believe the ombudsman’s office has diverted many disputes from litigation, even if litigation appears to have lessened in recent years.<sup>131</sup> He noted that his office handles about 250 to 300 inquiries each year.<sup>132</sup>

Sometimes if you make a public statement, the bully pulpit approach . . . can be more effective. The University of Iowa had a search for a president that went bad, they didn’t make a hire, and they had a very secret process. When they opened it up again, I wrote a letter to them and to the attorney general, saying, I think you should do everything you can to maximize this to make it open so that the public knows who they are earlier in the process. They had a much more open process second time around. I’m not sure prosecution or mediation would do that.<sup>133</sup>

The Office of Citizens’ Aide/Ombudsman is a nonpartisan legislative agency. Angrick stressed the importance of such independence: “It’s exceedingly important to have . . . an independent ombudsman. It’s one of the significant ingredients in building that office. You don’t want to have an in-house ombudsman within the mayor’s office because when the mayor doesn’t want to be public, you’re toothless.”<sup>134</sup>

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125. *Id.* § 2c.9(4)-(5).

126. *Id.* § 2c.16.

127. *Id.* § 2c.19.

128. Angrick Interview, *supra* note 80.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

### 3. Implementation and Developments

When Anderson was hired in 2001, Angrick directed him to begin outreach efforts via training and education of government employees throughout the state.<sup>135</sup> Anderson noted that he reached out to officials in law enforcement and local government to help them understand “that allowing access to public records is an important part of their public trust.”<sup>136</sup> After his first year on the job, Anderson noted that it was “difficult to say” whether the situation had improved in his first year on the job, noting the poor compliance rates in the audits conducted by newspapers the previous year.<sup>137</sup> He mentioned collaborating with the Attorney General’s office in giving presentations to educate officials about public records and open meetings matters.<sup>138</sup> “I believe this working partnership with the attorney general’s office in educating and publicity is the best way to improve compliance with the public records and open meetings laws,” Anderson wrote in his first annual report in 2001.<sup>139</sup> Angrick noted that Anderson also worked cooperatively with the Iowa Freedom of Information Council in addressing open government matters: “Robert immediately undertook his responsibilities with vigor and creativity. We approached the task as one through which education and training would be just as important as investigation and criticism.”<sup>140</sup>

As Anderson was doing this work, he was diagnosed with bone cancer.<sup>141</sup> It turned out that he was terminally ill, and he resigned from the office in June 2002 when the cancer made it impossible for him to work.<sup>142</sup> He died in November of that year. The PROMP work was then divided among other ombudsman staff “as part of [the staff’s] shared and general responsibilities.”<sup>143</sup> In February 2003, Angrick hired Angela Dalton as an assistant ombudsman to fill one of the vacancies on the staff.<sup>144</sup> Angrick asked Dalton, who had a background in law enforcement but no particular history dealing with public records and open meetings issues beyond that capacity, if she would be interested in taking over the Public Records, Open Meetings, and Privacy duties, and Dalton accepted.<sup>145</sup> Sources mentioned Dalton’s background, attitude, and professionalism as keys to her performance in the PROMP role.<sup>146</sup>

Outreach and training remain as essential duties for the PROMP position. Dalton said some of the training she does includes an hour-long law enforcement

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135. *Id.*

136. Anderson, *supra* note 101, at 2.

137. *Id.*

138. *Id.*

139. *Id.*

140. Bill Angrick, *Message from the Ombudsman*, Annual Report of the Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2002 1 (2003), [http://publications.iowa.gov/1430/1/AnnualReport\\_02.pdf](http://publications.iowa.gov/1430/1/AnnualReport_02.pdf).

141. Angrick Interview, *supra* note 80.

142. Angrick Interview, *supra* note 80, at 2.

143. *Id.*

144. Telephone Interview with Angela Dalton, Assistant Ombudsman for Public Records, Open Meetings, and Privacy (Jan. 14, 2009) [hereinafter Dalton Interview #1].

145. *Id.*; Angrick Interview, *supra* note 80.

146. Richardson Interview, *supra* note 80; Angrick Interview, *supra* note 80; Telephone Interview with Mary Gannon, Counsel for Iowa Association of School Boards (Feb., 17, 2009) [hereinafter Gannon Interview].

academy, with 30 to 40 people in each class, as well as jail school trainings, which involve discussions about public records and other jail issues.<sup>147</sup> Another important role of the ombuds office, mentioned by every source, is influencing legislation about public records, open meetings, and privacy laws.<sup>148</sup> Angrick noted “proposing legislative change” is one of the major ways that the ombudsman can respond to “patterns of complaints or systemic causes of problems.”<sup>149</sup> One source, who was generally critical of the ombudsman’s office performance regarding public records and open meetings, praised the office’s efforts in affecting legislation: “The one area where they have had some impact is in getting the law changed,” said the source, an attorney dealing with local government matters.<sup>150</sup> “Regarding some issues such as how records request can be made, and what local governments can charge for records, they have been effective.”<sup>151</sup>

Dalton said that part of her daily responsibilities while the legislature is in session is to review the new daily bills to see if there are any that implicate open government or privacy matters:

We’re probably the most opinionated folks out there because we’re dealing with it day to day. The kind of complaints we’re seeing, if we can see a trend or a tendency for people using new loophole, we can put the word out, and we can suggest language to close the loophole if multiple agencies are doing it.<sup>152</sup>

For example, Angrick raised the issue of “walking quorums,” which involves government bodies rotating members in and out of a deliberation room to ensure there is not a majority present at any one time.<sup>153</sup> Angrick saw this happening in the Polk County Board of Supervisors and said that, while this practice is not technically prohibited by the Open Meetings law, it certainly violates the spirit of the law; he pushed for legislation to clarify the law in 2008.<sup>154</sup>

They were looking at some sort of joint project but they didn’t want to be scrutinized about it, so they would meet in various groups of two by two. They did that for a while in secret. People knew they were doing it and

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147. Dalton Interview #1, *supra* note 144.

148. Angrick Interview, *supra* note 80; Dalton Interview #1, *supra* note 144; Telephone Interview with Confidential Source #1, Attorney Working with Local Government Entities (Feb. 3, 2009) [hereinafter Confidential Source #1, Interview #1].

149. Bill Angrick, *Anatomy of a Number*, Annual Report of the Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2004 5 (2005), <http://publications.iowa.gov/4628/1/CAWPA000.PDF>.

150. Confidential Source #1, Interview #1, *supra* note 148. The source, who deals with the ombudsman’s office regularly, asked to remain confidential to preserve this ongoing relationship. The researcher granted this request to allow the source to speak candidly in addressing the performance of the office.

151. *Id.*

152. Dalton Interview # 1, *supra* note 144.

153. *If It Walks Like a Duck...*, Annual Report of the Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2006 3 (2007), [http://publications.iowa.gov/5239/1/2006\\_Annual\\_Report.pdf](http://publications.iowa.gov/5239/1/2006_Annual_Report.pdf).

154. Angrick Interview, *supra* note 80.

couldn't do anything about it. They were doing it to avoid deliberations in public, and I commented on that as being inappropriate.<sup>155</sup>

In 2005, after a citizen who lived in the western part of the state was told he would have to appear in person to pick up documents from a school district in central Iowa, the office addressed the issue of whether someone seeking copies must be present in person to pick up copies of the documents.<sup>156</sup> Mary Gannon, counsel for the Iowa Association of School Boards, said she had proposed a bill that would require prepayment before copies were made as well, after some of her constituents had mentioned unpaid bills were becoming a problem.<sup>157</sup> Angrick recalled:

They said, "We're not going to send it to you." The law says he has to get records at the office of the custodian, so he has to drive there. Now, that follows the law, but it's unreasonable. We engaged in a discussion with the school district. I'm allowed to formally recommend to the legislature changes in the law, so I recommended I think in 2006 for the first time changes in that very antiquated provision that required people to come to the office of the custodian. I think you should be able to make a request by telephone, e-mail, fax, any way. The legislature agreed and passed that legislation.<sup>158</sup>

However, the most significant legislative project the ombudsman's office has taken up was participating in a legislative study committee that was looking to make several changes in the state's freedom of information laws.<sup>159</sup> The ombudsman's office was actively involved in this legislation, which would have changed several provisions and, most importantly, would have created "an administrative enforcement agency with some "real teeth," according to Dalton.<sup>160</sup>

Angrick said the bill reflected the tension between the "softer option" of an "ombudsman who can make recommendations and investigate" and an enforcement agency besides what was already in place in the attorney general's office.<sup>161</sup> Toward the end of 2008, Angrick sought support for the creation of a permanent legislative advisory committee on public records, open meetings, and privacy

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155. *Id.*

156. *Id.*

157. Gannon Interview, *supra* note 146.

158. Angrick Interview, *supra* note 80; see IOWA CODE ANN. § 22.3(1), which now says "the custodian shall not require the physical presence of a person requesting or receiving a copy of a public record." See also *Count on Officials to do "the Right Thing" ...or Require It?*, Annual Report of the Iowa Citizens' Aide/Ombudsman, OMBUDSMAN'S REPORT 2005 2 (2006), <http://publications.iowa.gov/4628/1/CAWPA000.PDF>.

159. Angrick Interview, *supra* note 80.

160. Dalton Interview #1, *supra* note 144. The bill, Senate File 2411, passed the Senate but did not get to a vote in the House. Angela Dalton, *What's Happening on Public Records, Open Meetings, and Privacy*, Annual Report of the Iowa Citizens' Aide/Ombudsman, OMBUDSMAN'S REPORT 2007 3 (2008), <http://publications.iowa.gov/7960/1/CAWPA004.pdf>.

161. Angrick Interview, *supra* note 80.

matters.<sup>162</sup> This committee would include the ombudsman or “the Ombudsman’s designee,” as one of 17 members to advise the Iowa General Assembly on legislation regarding freedom of information and privacy.<sup>163</sup>

#### 4. Issue: Caseload

One of the major challenges the Office of Citizens’ Aide/Ombudsman has faced since creation of the PROMP position is managing a growing caseload.<sup>164</sup> Angrick noted that, while Dalton performs the public records, open meetings, and privacy role, she also has other responsibilities in the office:

Right now, my office handles about 4,500 cases a year. With 11 investigators, we don’t have time for just one person to handle open records and open meetings. Everybody does some of them, and Angie does the most. For PROMP issues, I estimate we’ll have 275 this year, which is fair but still a small percentage of what we get each year.<sup>165</sup>

Dalton emphasized the importance of having all assistant ombudsmen ready to handle open government matters, saying that cases needing expedited handling could be prioritized and given to somebody else.<sup>166</sup> She also suggested that having a diverse caseload, which went beyond PROMP matters, was beneficial to her by allowing her to avoid burnout and to bring in a variety of experiences from other cases:

If it were one person, they may be able to do just 300 complaints plus all of the [training out outreach work]. That may allow for quicker turnover on cases than they are currently. But, usually, people are putting these on priority . . . . I just don’t know if that outweighs benefits of having [a] diverse caseload.<sup>167</sup>

In 2003, the electronic case management system at the office was updated to allow entry of contacts involving public records, open meetings, and privacy issues.<sup>168</sup> These contacts, which involve both complaints about government action or inaction and requests for information about open government issues, have grown steadily since they were first recorded.<sup>169</sup> Keeping up with this growing number of cases may be slowing down the efforts of the ombudsman’s office to handle public records and open meetings issues in a prompt manner. Richardson commented that “citizens were frustrated with the speed, especially in the early

162. William P. Angrick II, *Summary of Ombudsman Recommendations, IDENTITY THEFT PREVENTION STUDY COMMITTEE 4-7* (2008), <https://www.legis.iowa.gov/DOCS/LSA/IntComHand/2009/IHEGC007.PDF>.

163. Angrick, *supra* note 162, at 7.

164. Angrick Interview, *supra* note 80.

165. *Id.*

166. Telephone Interview with Angela Dalton, Assistant Ombudsman for Public Records, Open Meetings, and Privacy (Feb. 12, 2009) [hereinafter Dalton Interview #2].

167. *Id.*

168. Angrick, *supra* note 116, at 5.

169. See Appendix B: Inquiries and Requests from the FOI Ombuds Offices, Table 1.

years.”<sup>170</sup> She added: “It was a resource issue as well. A citizen might be told, ‘I already have three dozen cases on my desk, so it might be awhile before I can get you in.’ It wasn’t a quick turnaround.”<sup>171</sup>

Dalton aims to resolve citizen complaints informally by a phone call or two, usually focusing on talking to an attorney who deals with the government agency in question.<sup>172</sup> When she is able to do this, she said, “we’re pretty effective at getting cases resolved relatively quickly.”<sup>173</sup> Sometimes, she will conduct a preliminary review by examining relevant documents in the agency’s possession to see if that will aid in resolving the dispute.<sup>174</sup>

However, when the informal approach fails to resolve the dispute, cases can begin to take longer: “If it rises to a different level, we generally put a notice in writing to the agency. We inform them that we’re opening an investigation pursuant to the section that governs us, and that puts them on notice...An investigation usually ends up taking more time.”<sup>175</sup> She said formal investigations “can last a month, three months, sometimes they’ll last a year.”<sup>176</sup> In the case of a “contentious issue,” an investigation might span longer than one year “if the agency is not as cooperative, chipping away at every single piece of it.”<sup>177</sup> These kinds of delays are particularly challenging for journalists who hope the ombudsman’s office can help them gain access to information.<sup>178</sup> “Over the years, I’ve been aware of relatively few cases where journalists went through the ombudsman’s office,” Richardson said.<sup>179</sup> “They need information, they’re on deadline, they don’t have three to six months to get a piece of paper.”<sup>180</sup>

Perception on use of the office by journalists is different within the office itself. Angrick told the Iowa General Assembly that “complaints [were] more frequently generated by the media than private citizens” in 2004.<sup>181</sup> Likewise, Dalton recalls several specific instances of dealing with journalists over the years, though these are typically informational requests rather than complaints.<sup>182</sup> “Oftentimes reporters don’t feel they can file a complaint or be a complainant without their boss or their editors telling them they can file a complaint,” Dalton said, describing that journalists sometimes expressed concerns that they had to be careful how

170. Richardson Interview, *supra* note 80.

171. *Id.* Richardson, who has examined dispute resolution systems in other jurisdictions, specifically contrasted her experience in Iowa with the Indiana Public Access Counselor. “Legally, when somebody calls and registers a complaint, they have to do a written opinion like two or three weeks. It’s a very quick turnaround. It’s tough, but they manage to do it,” she said. *Id.*

172. Dalton Interview #1, *supra* note 144.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Richardson Interview, *supra* note 80.

179. *Id.*

180. *Id.*

181. Government Oversight Committee, 2004 Interim Committee Briefing (July 21-22, 2004), [www.legis.state.ia.us/GA/80GA/Interim/2004/brf/ove.htm](http://www.legis.state.ia.us/GA/80GA/Interim/2004/brf/ove.htm).

182. Dalton Interview #1, *supra* note 144. However, Dalton noted that by 2007, “Most of our cases stemmed from citizen complaints. A few complaints came from journalists.” Dalton, *supra* note 160 at 3.

they handled relationships with their sources.<sup>183</sup> “An editor or supervisor will write a letter or file a formal complaint.”<sup>184</sup>

When a journalist contacts Dalton, sometimes what the office is best equipped to do is to help the journalist narrow requests to a manageable amount or to negotiate fees for copying:

We brainstorm to figure out how to get what they’re really looking for. For [broad requests for] e-mails [of government officials], you can do keyword searches. Look for anything to or from the mayor with these four terms. That definitely narrows down the search. It’s obvious at that point what’s being asked for. You get an IT worker doing the search, then they have it reviewed for confidentiality, and they’re reducing the cost.<sup>185</sup>

Dalton said she understands not everybody will be satisfied with the approach the ombudsman’s office takes in handling requests for help involving a public records or open meetings dispute.<sup>186</sup> However, she sees the office as serving an important role in maintaining transparent governance:

We’re not filing lawsuits, but we’re holding people accountable, but in a softer way than a lawsuit. We have over 5,000 cases a year as an agency, so if we can resolve them informally, we do. We can look at documents, go back to case files, and determine how we did things so we can be consistent, so we can help people.<sup>187</sup>

However, compliance with the open government laws remains problematic. An open government audit conducted in 2005 by 15 Iowa newspapers found improvements in compliance by most agencies but also reported continued issues with groups such as school superintendents and sheriff’s departments.<sup>188</sup> Of the 99 counties in Iowa, 29 sheriff’s departments did not comply with a request for a list of concealed-weapons permit holders.<sup>189</sup> Several of these were “repeat offenders” who also didn’t comply in the 2000 audit.<sup>190</sup> Angrick noted similar compliance issues before a legislative study committee on freedom of information issues in 2007, in which he “stated that reports of noncompliance with both public records and open meetings laws have increased with ‘frequency and audacity’ despite

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183. Dalton Interview #1, *supra* note 144.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Open Records Check by Iowa Newspapers Finds Some Improvement, Some Backsliding*, ASSOCIATED PRESS, Mar. 19, 2005.

189. Colleen Krantz & Janet Rorholm, *How Open is Iowa?*, SIOUX CITY JOURNAL, Mar. 20, 2005, available at [http://siouxcityjournal.com/news/how-open-is-iowa/article\\_ed64e70-c1db-5b16-a427-123c052b5989.html](http://siouxcityjournal.com/news/how-open-is-iowa/article_ed64e70-c1db-5b16-a427-123c052b5989.html).

190. Janet Rorholm & Colleen Krantz, *Requests to Police Met with Resistance*, DES MOINES REGISTER, March 21, 2005, available at <http://nfoic.org/iowa-audit-march-2005>.

increased training efforts” by both local government groups and the ombudsman’s office.<sup>191</sup>

### 5. Issue: Perception of Impartiality

Another challenge the office faces is a perception among sources interviewed for this study who said the agency seemed to advocate too strongly on behalf of citizens at the expense of government concerns.<sup>192</sup> While the title “Citizens’ Aide” appears to suggest that the ombudsman is supposed to be acting as an advocate for Iowa citizens, the law creating the position does not expressly demand that the Citizens’ Aide act on behalf of citizens. Instead, the power is discretionary; the Citizens’ Aide “may” do several things, such as investigate citizens’ complaints and make recommendations to an agency, but it may also decline to investigate at its own discretion.<sup>193</sup>

Both Angrick and Dalton described the ombudsman’s office role as an independent one. Angrick has referred to the ombudsman’s role as “an objective, impartial, timely investigator of complaints,”<sup>194</sup> stressing the importance of being “smart and sensitive to both sides of the pendulum” to “make sure the cadre of policymakers and stakeholders come together.”<sup>195</sup> Similarly, Dalton has seen her role go beyond citizen concerns, such role includes acting as an impartial agent for addressing government inquiries as well:<sup>196</sup>

When I’m making a phone call, I tell them I’m not an advocate for that person, and I don’t always believe 100 percent what that person has told me until I see otherwise. I try to be conscientious about what I say and how that comes across so the government doesn’t see me as biased. If they see me as one-sided, it’s downhill from there.<sup>197</sup>

However, the perception of impartiality within the office is not reflected by the opinions of sources on the media and government sides, each of whom said the agency seemed to advocate too strongly on behalf of citizens at the expense of government concerns. Mary Gannon, who has been representing the school board association since before the creation of the PROMP position in the ombudsman’s office, criticized the office thusly:

One criticism I have, and I’ve told this to [Angrick] himself, is that the title of the office is Citizens’ Aide, and they take that title quite seriously it appears because they tend to side with citizens long before they talk to

191. *Final Report*, FREEDOM OF INFORMATION, OPEN MEETINGS, AND PUBLIC RECORDS INTERIM STUDY COMMITTEE 3 (2008), <https://www.legis.iowa.gov/DOCS/LSA/IntReport/2009/IPRBH000.PDF>.

192. Gannon Interview, *supra* note 146; Confidential Source #1, Interview #1, *supra* note 148.

193. See IOWA CODE ANN. § 2c.9; § 2c.12 (2009).

194. Angrick, *supra* note 149, at 1.

195. *Id.*

196. Dalton Interview # 2, *supra* note 166.

197. *Id.*



the public body with whom they have a beef. The office comes across as significantly biased.<sup>198</sup>

Another government source, Terry Timmins, general counsel for the Iowa League of Cities, agreed that the office had an orientation favoring citizens:

They're very much . . . an advocate for rights of citizens, particularly when it comes to open meetings and open records. They don't often take the side of cities, and we find ourselves at odds with them. That's their job. Their job is to take on state and local agencies when they feel there's been a violation of the law.<sup>199</sup>

Another anonymous source representing government bodies was even more dubious about the office's stated impartiality:

My biggest problem with the Ombudsman's office is that they see their job as acting as a zealous advocate for aggrieved citizens. What I mean is, they see violations where there aren't any, and attribute bad motives to people, and assume the worst about government officials in any situation where the facts are ambiguous.<sup>200</sup>

The tension between the ombudsman's approach and local government is evident to Richardson, who has dealt with these matters on behalf of the news media and said the ombudsman and the government sometimes appear to act as adversaries:

[People in the ombudsman's office] see themselves as advocates for citizens of Iowa to make the government as open as possible, maybe to the point that some of the government associations are kind of rubbed the wrong way by that. They think they're always going to take the side of citizens against government officials.<sup>201</sup>

Timmins added that, because he had come to understand this as the role of the ombudsman's office, he had come to expect it and didn't see it as a negative thing: "They try to be impartial, but their role is to represent citizens, and we don't begrudge them that because that's their role. I've had dealings with them, and they were good discussions. They're very open to our comments, to our point of view."<sup>202</sup> However, because of this, Timmins' clients were more likely to come to him and the League of Cities for help on public records and open meetings issues rather than the ombudsman.<sup>203</sup>

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198. Gannon Interview, *supra* note 146.

199. Telephone Interview with Terry Timmins, General Counsel for Iowa League of Cities (Mar. 5, 2009) [hereinafter Timmins Interview].

200. Confidential Source #1, Interview #1, *supra* note 148.

201. Richardson Interview, *supra* note 80.

202. Timmins Interview, *supra* note 199.

203. *Id.*

Another government source agreed that the perceptions of partiality makes government officials more “reluctant to work with them or listen to any suggestions they have for improvement” and suggested that a more neutral approach might improve compliance with the ombudsman’s recommendations.<sup>204</sup> The source opined that the office’s hiring of a former investigative journalist for the *Des Moines Register* as an assistant also sent the wrong message to local government officials, who may have felt that a journalist couldn’t help but be biased toward news media interests in open government matters.<sup>205</sup> The source added that “[t]he Ombudsman’s office assumes that every local government official is either stupid or corrupt. That rankles people.”<sup>206</sup>

Dalton disagreed with this assessment, saying she understood the danger of being perceived as biased toward citizens.<sup>207</sup> When the office gives off this sense, she said, it may be because her duty is to be an advocate of the public records and open meetings laws, which favor citizen access:

We may feel passionate about the intent of open government law, that it is good and fair. But until you’ve seen the documents and seen both sides, you really can’t go to one side or the other. It’s usually not until the very end, if you have a substantiated complaint, do you take on advocate role. I usually don’t feel like an advocate, but (when violations are apparent) you can say, “This is what the law is and this is how you do it. You don’t get to choose.”<sup>208</sup>

Multiple sources who wanted to remain confidential said as a result of this perceived lack of impartiality, their clients simply don’t use the ombudsman’s office as a resource.<sup>209</sup> One source described his experience:

My members, they’d never go there. I don’t know of anyone who’s ever gone there. If they’ve got problems, come to me first, and then they may go to the legislature . . . . When they do complain, it’s to me or even to members of the legislature, and they’re complaining about the ombudsman being a little too overzealous.<sup>210</sup>

Another source representing government interests said that despite the fact that the ombudsman’s office holds itself out as a resource for government interests, it no longer has the trust of government officials or employees, hampering the effectiveness of the office.<sup>211</sup> The source, after stating that the office’s credibility was “shot,” suggested that it may take a structural overhaul to create a more independ-

204. Confidential Source #1, Interview #1, *supra* note 148.

205. *Id.*

206. *Id.*

207. Dalton Interview #2, *supra* note 166.

208. *Id.*

209. Confidential Source #1, Interview #1, *supra* note 148; Telephone Interview with Confidential Source #2, Source Working with Local Government Entities (Feb. 5, 2009) [hereinafter Confidential Source #2 Interview]; Telephone Interview with Confidential Source #3, Attorney Working with Local Government Entities (Feb. 13, 2009) [hereinafter Confidential Source #3 Interview].

210. Confidential Source #3 Interview, *supra* note 209.

211. *Id.*; Gannon Interview, *supra* note 146.

ent office that would be a consistent resource for government interests—even if it meant changing the agency’s focus and mission.<sup>212</sup>

The sources interviewed for this study all cited enforcement as one of the most troublesome areas of Iowa’s public records and open meetings laws. “There are days when I wish I just could write a uniform citation for meetings violations,” said Dalton, recalling her days in law enforcement.<sup>213</sup> “[H]ere’s your date, show up in court, I’ll meet you there. But it doesn’t work that way.”<sup>214</sup> Instead, the office works toward voluntary compliance with its recommendations, with the top recommendation being future compliance with the open meetings law.<sup>215</sup> Dalton elaborated: “Nobody ever says, ‘No we’re not going to accept your recommendation,’ so that’s the softer versus the hard enforcement.”<sup>216</sup>

This strategy does not encourage compliance, according to an attorney working with local government agencies: “Suppose your board screws up and illegally closes a meeting, what is the Ombudsman’s office going to do? Write a nasty report about you that no one reads?”<sup>217</sup> The source went on to say that from a practical perspective, having the office structured the way it is can be beneficial to clients because “nothing much will happen” if a citizen complains and the government agency does not agree with the ombudsman’s recommendation.<sup>218</sup>

Dalton noted that when the ombudsman’s office has documentation of continuous violations, it can pass that off to the attorney general or county attorneys, who can then file for civil or criminal penalties.<sup>219</sup> However, when those agencies decline to prosecute, as mentioned above, the only remaining recourse is litigation.<sup>220</sup> Richardson offered the example of what happened in Riverdale, Iowa, as an illustration.<sup>221</sup> Citizens have brought at least three lawsuits against Riverdale city officials since 2004 involving records and meetings violations, and one citizen says it has cost him more than \$250,000 in legal costs to bring these cases.<sup>222</sup> Richardson called the Riverdale citizens “the perfect poster children for the problems in enforcement, since they called everyone, from the governor’s office on down, and nobody would help them.”<sup>223</sup> She said that after citizens of Riverdale, a town of about 600 people, were denied access to public records about the city’s volunteer fire department, they asked the city attorney for help but were denied.<sup>224</sup> They then contacted the ombudsman’s office, which called the mayor but was

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212. Confidential Source #3 Interview, *supra* note 209; Gannon Interview, *supra* note 146.

213. Dalton Interview #1, *supra* note 144.

214. *Id.*

215. *Id.*

216. *Id.*

217. Confidential Source #1, Interview #1, *supra* note 148.

218. *Id.*

219. Dalton Interview #1, *supra* note 144.

220. Richardson Interview, *supra* note 80.

221. Kathleen Richardson, Presentation to the Iowa Senate and House State Government Committees (Feb. 5 & 6, 2007) (transcript on file with author) [hereinafter Richardson presentation].

222. Tom Saul, *Iowa Sunshine Laws Might get Teeth*, QUAD CITY TIMES, Mar. 18, 2008, available at [http://qctimes.com/news/local/iowa-sunshine-laws-might-get-teeth/article\\_aac70e79-21ef-5cec-a295-af6118359bb5.html](http://qctimes.com/news/local/iowa-sunshine-laws-might-get-teeth/article_aac70e79-21ef-5cec-a295-af6118359bb5.html).

223. Richardson Interview, *supra* note 80.

224. Richardson presentation, *supra* note 221.

unable to resolve the dispute.<sup>225</sup> The local sheriff declined to investigate, and the county attorney refused to prosecute.<sup>226</sup> The citizens made calls to the attorney general, to Governor Tom Vilsack, even to U.S. Senator Charles Grassley.<sup>227</sup> Nothing worked for them until they filed a lawsuit, which they won in 2006 and were awarded their attorney's fees as part of the judgment.<sup>228</sup>

In response to perceived issues with enforcement, state Senator Mike Connelly sponsored legislation in the 2008 session that would have created an independent board intended to enforce the public records and open meetings laws.<sup>229</sup> The recommendation came after a legislative study group had advised the creation of an "Iowa Public Information Board" that could "receive, investigate, and prosecute complaints" in contested cases, as well as offering mediation.<sup>230</sup> The bill passed the Senate in April 2008,<sup>231</sup> but agreements between media groups and local government groups on the Senate Bill fell apart before a final version could be approved by the House.<sup>232</sup> Angrick has been in conversations to revive the enforcement agency with interested groups, though several sources mentioned that finding money to create a new office during difficult economic times will be hard.<sup>233</sup> "We've been revisiting the enforcement model, dialoguing with legislators, and the FOI folks and media definitely wanted an enforcement agency," Angrick said in 2009, "but state budgets have gone belly up, they're not going to find half a million or a million dollars to fund it."<sup>234</sup>

It took a few more years, but Iowa eventually created an independent outside office to handle public access disputes. In 2012, the Iowa legislature authorized the nine-member board, which has an executive director as its only employee, "to implement, enforce and interpret" the state's public records and open meetings laws.<sup>235</sup>

### *C. Arizona*

#### *1. Historical Background*

Arizona's Public Records Law and Open Meetings Law have developed in very different ways. The state's records laws are more than a century old but were without alternatives to litigation as a dispute resolution tool until recent years.

225. Richardson Interview, *supra* note 80. Dalton said the Riverdale citizens forgot about using the ombudsman as an option as the case progressed. "I think we could have avoided a lawsuit in that one. Yeah, I think we could have resolved that one," Dalton said. Dalton Interview #2, *supra* note 166. However, she said that there "probably" would have been another lawsuit regardless. *Id.*

226. Richardson presentation, *supra* note 221; Saul, *supra* note 222.

227. Richardson presentation, *supra* note 221.

228. Richardson interview, *supra* note 80; *see also* Saul, *supra* note 222.

229. Saul, *supra* note 222.

230. *Final Report*, *supra* note 191, at 5.

231. *Id.* at 9.

232. Angrick Interview, *supra* note 80.

233. *Id.*

234. *Id.*

235. William Petroski, *New Iowa Public Information Board Wont' be a "Gotcha" Agency, Chairman Pledges*, DESMOINESREGISTER.COM, Aug. 21, 2012, available at <http://blogs.desmoinesregister.com/dmr/index.php/2012/08/21/new-iowa-public-information-board-wont-be-a-gotcha-agency-chairman-pledges/>.

Meanwhile, the open meetings laws were created more recently and have been policed by the Office of the Attorney General.

Arizona's Public Records Law<sup>236</sup> was adopted in 1901 and creates a presumption of openness of any record in the office of any government officer.<sup>237</sup> The Arizona Supreme Court has long affirmed the strong public purpose of the law, making the point in 1952 that allowing the state to determine which documents should be open to the public is "inconsistent with all principles of Democratic Government."<sup>238</sup> Thus, the court held judicial review was required of any state effort to deny access to its records.<sup>239</sup> The court later noted that "access and disclosure is the strong policy of the law."<sup>240</sup>

The courts, however, provided the only recourse for a person who believed he or she had been denied access to records. Complainants were allowed to file a cause of action to challenge an "alleged refusal to provide public documents," but there was no administrative agency in place to handle such actions.<sup>241</sup> John Fearing, the deputy executive director of the Arizona Newspapers Association, said this made enforcing violations of the open records law extremely difficult: "The problem in Arizona is that if you didn't have a law firm at your fingertips and some government person said, 'No, you can't have that record,' then you're done. You either have to sue in Arizona or you have to run away with your tail between your legs."<sup>242</sup>

The state's Open Meetings Law is a much more recent creation, enacted in 1962.<sup>243</sup> The first version of the law was enacted in 1962, after several failed attempts by the legislature to pass a law ensuring public access to meetings of government agencies.<sup>244</sup> The legislature clearly stated the purpose of the law:

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.<sup>245</sup>

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236. ARIZ. REV. STAT. ANN. § 39-101-161 (2008).

237. *Ariz. Bd. of Regents v. Phoenix Newspapers*, 806 P.2d 348, 351 (Ariz. 1991); see also Daniel C. Barr & Jerica L. Peters, *Arizona – Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2006), [www.rcfp.org/ogg/index.php?op=browse&state=AZ](http://www.rcfp.org/ogg/index.php?op=browse&state=AZ).

238. *Mathews v. Pyle*, 251 P.2d 893, 896 (Ariz.1952).

239. *Id.*

240. *Carlson v. Pima Cnty.*, 687 P.2d 1242, 1246 (Ariz. 1984).

241. *Moulton v. Napolitano*, 73 P.3d 637, 646 (Ariz. Ct. App. 2003); see also ARIZ. REV. STAT. ANN. § 39-121.02.

242. Telephone Interview with John Fearing, Deputy Executive Director, Arizona Newspapers Association (Feb. 11, 2009) [hereinafter Fearing Interview].

243. ARIZ. REV. STAT. ANN. § 38-431-.09 (2008); see also *Cooner v. Bd. of Educ.*, 663 P.2d 1002, 1006 (Ariz. Ct. App. 1982) (noting that "the open meeting law was enacted in 1974 . . . although it was preceded in 1962 declaring that it was the public policy of the state that proceedings of government bodies be conducted openly.").

244. See Barr & Peters, *supra* note 237.

245. ARIZ. REV. STAT. ANN. § 38-431.09.

Similar to the Public Records Law, the Open Meetings Law had no formal mechanism in the statute for resolving disputes under the act besides judicial remedies.<sup>246</sup> Unlike the records law, however, the Open Meetings Law called for enforcement by the attorney general or county attorney,<sup>247</sup> leading the Arizona attorney general's office to establish the Open Meeting Law Enforcement Team (OMLET) in 1982 to handle complaints from citizens about violations.<sup>248</sup>

Even though the open meeting laws had been on the books for several years, they were largely ignored until the late 1970s, when local government bodies "started cranking up the volume" of executive sessions.<sup>249</sup> This was when the attorney general stepped in, according to David Merkel, who worked as the Tempe City Attorney for more than 30 years before becoming general counsel for the Municipal League of Arizona Cities and Towns in 1998: "When the volume started cranking up, the attorney general's office said, 'Hey, we have to add a little structure to this, we have to have some intake mechanism and enforcement mechanism.' [T]hey've become very knowledgeable in this particular area . . . [w]hich is good, [because] now there's some consistency there."<sup>250</sup>

The attorney general created a Public Records Task Force in the late 1990s, according to Paula Bickett, an assistant attorney general who was the task force's first chair.<sup>251</sup> However, that group's mission was to advise state agencies on public records law policy, not to serve as a resource for citizens or other groups when disputes arose over access.<sup>252</sup> Fearing explained that "[i]n Arizona, the attorney general is in charge of enforcing open meetings laws, but they just wouldn't go for that with open records laws."<sup>253</sup> The lack of enforcement in public records issues became more publicized with the results of an audit conducted in 2001 by several media organizations in Arizona.<sup>254</sup> Just over half of the law enforcement agencies audited complied with a request under the Public Records Law.<sup>255</sup> The audit noted that "(a)uditors who visited school district offices often had to cite the law to get documents."<sup>256</sup> An officer for the St. John's Police Department filed a "suspicious person" report about a reporter from the Associated Press who had asked to see the crime log and refused to say why he wanted it.<sup>257</sup>

The audit prompted several newspapers to publish editorials calling for stronger enforcement of the Public Records Law, including calls for the legislature

246. *Id.* § 38-431.07(A).

247. *Id.*

248. Telephone Interview with Chris Munns, Assistant Attorney General, and, Member, Open Meetings Law Enforcement Team (Feb. 24, 2009) [hereinafter Munns Interview].

249. Telephone Interview with David Merkel, General Counsel, Arizona League of Cities and Towns (Feb. 11, 2009) [hereinafter Merkel Interview].

250. *Id.*

251. Telephone Interview with Paula Bickett, Assistant Attorney General, and, Member, Public Records Task Force (Feb. 24, 2009) [hereinafter Bickett Interview].

252. *Id.*

253. Fearing Interview, *supra* note 242.

254. Jacques Billeaud & Enric Volante, *Open & Shut: A Statewide Public Records Audit – Police less Likely to Open Records*, ARIZONA DAILY STAR, Jan. 22, 2002; *see also* Jon Kamman & C.T. Revere, *Open & Shut: A Statewide Public Records Audit – Open-Government Concept Under Strain*, ARIZONA DAILY STAR, Jan. 23, 2002.

255. Billeaud & Volante, *supra* note 254.

256. Kamman & Revere, *supra* note 254.

257. *St. John's Officer Files Report on "Suspicious" AP Reporter*, THE ARIZONA DAILY STAR, Jan. 22, 2002.

to do something about it.<sup>258</sup> The audit made it clear that people needed other options to aid them in open government matters.<sup>259</sup> “I thought that there has to be some alternative dispute resolution for common person in Arizona, including if you’re a journalist, because journalists have no special status in our society over regular people,” Fearing said.<sup>260</sup> Fearing went to the attorney general and gubernatorial candidate, Janet Napolitano, who he said expressed some support:

Me and my attorneys and newspaper folks had lunch with her. We said, “Janet, this is one thing we have to get done.” She said it’s a great idea, and if I get elected, I will appoint somebody in my office to do this. She got elected, but after that, she never took my calls. But she liked the idea.<sup>261</sup>

He also went to the board of the newspapers association to talk about lobbying for a bill; he received lukewarm support at first, with some newspapers telling him they thought it would slow down the records access process:

It was just me and my attorney. The TV and radio folks weren’t there, and the First Amendment Coalition attorney thought it was the worst idea since fill-in-the-blank. I was about the only person who pushed it from day one. The board [of the Arizona Newspapers Association] backed it, but they had to overcome one of the metro papers in town.<sup>262</sup>

Fearing and his attorney drafted a bill and persuaded state Senator Dean Martin to sponsor it.<sup>263</sup> In 2005, the Arizona Senate passed a bill that would have appropriated \$185,000 to create a “public access adviser’s office.”<sup>264</sup> The office would have been placed in the Arizona State Library, Archives and Public Records, but some legislators objected to this, according to Patrick Shannahan, who has served as the Arizona Ombudsman since the office’s creation in 1996.<sup>265</sup>

So then [the legislators] had to say, “What do we do with it?” In the very last days of the session, they said to give it to the state ombudsman and to give me \$50,000 to do this additional mission; but it was too late in session to resolve that, so it died.<sup>266</sup>

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258. *Editorial Reaction: A “Disturbing Trend” Among Public Officials*, ARIZONA DAILY STAR, Jan. 24, 2002.

259. Fearing Interview, *supra* note 242.

260. *Id.* Daniel C. Barr, a media law attorney who represents newspapers and who had some objections to the creation of a public access counselor, said Fearing had other motives besides standing up for regular people. “That’s what he says now. John was sort of naïve about it. He thought it would be a great tool for smaller newspapers.” Telephone Interview with Daniel C. Barr, Partner, Perkins Coie LLP (Feb. 24, 2009) [hereinafter Barr Interview].

261. Fearing Interview, *supra* note 242.

262. *Id.*

263. *Id.*

264. *House Defeats Bill on Public Access*, ASSOCIATED PRESS, May 11, 2005.

265. Telephone Interview with Patrick Shannahan, Arizona Ombudsman-Citizens’ Aide (Feb. 23, 2009) [hereinafter Shannahan Interview].

266. *Id.*

The new duties of the Ombudsman's office would have been focused on training and educational purposes, which Martin said were already being conducted by other groups.<sup>267</sup>

Fearing persevered, coming back for the 2006 legislative session with a new sponsor and another bill, one that would create new duties in the office of Ombudsman-Citizens' Aide to investigate public access complaints and to conduct training and education.<sup>268</sup>

In the second year, things changed, and we found [Senator Robert Burns, chairman] of the Senate Appropriations Committee[,] to sponsor the bill. It was his bill that created the ombudsman's office to start with. We went to this guy and floated this bill with him, and we said that the ombudsman's office would be great place for this kind of person. He agreed and carried the bill.<sup>269</sup>

Burns contacted Patrick Shannahan, the ombudsman who continues in the role today, to talk about the office's expanded role under the proposal.<sup>270</sup> Shannahan described the exchange:

My advice to them was that I work for you, I work for the legislature, so if you want to give me this additional mission, we can do that, just give me additional resources to allow me to make this successful. They asked, "What do you need?" I told them two people and \$185,000, I can do it for that, and they said, "OK."<sup>271</sup>

There was little opposition to the bill; Shannahan noted that it "sailed through the legislature."<sup>272</sup> Chris Thomas, director of legal services and general counsel for the Arizona School Boards Association, recalled that he was the only one at many of the legislative sessions who raised any objections about the bill:

In Arizona, we already have the attorney general as the primary enforcer of the open meetings law, and I was concerned about adding another layer to that. I stated those objections on the record, and I was assured that that was not the intent of the bill. The bill was intended to give citizens a resource to navigate these relatively complex laws that the attorney general doesn't have the resources to deal with. We were kind of told it would be a more collaborative thing.<sup>273</sup>

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267. House Defeats Bill on Public Access, ASSOCIATED PRESS, May 11, 2005.

268. Fearing Interview, *supra* note 242.

269. Fearing Interview, *supra* note 242.

270. Shannahan Interview, *supra* note 265.

271. *Id.*

272. *Id.*

273. Telephone Interview with Chris Thomas, General Counsel, Arizona School Boards Association (Feb. 18, 2009) [hereinafter Thomas Interview].



Fearing agreed that while some people branded it as a “newspaper bill,”<sup>274</sup> he saw it as a bill that would help regular citizens far more than newspapers.<sup>275</sup> He added: “People complain about special interest groups, but almost every piece of legislation is brought by some special interest group. It just happens to be that our special interest is information from government.”<sup>276</sup>

The bill appropriated \$185,000 to the Ombudsman’s office to hire two assistants, one of whom was to be an attorney that would handle public access matters.<sup>277</sup> The bill passed the Senate by a vote of 27-2, and Napolitano signed the bill into law on June 21, 2006.<sup>278</sup>

## 2. Design and Formal Structure

The Arizona Ombudsman-Citizens’ Aide office had been operating since 1996, and Shannahan, a retired Army colonel, had served as the ombudsman since the founding of the office.<sup>279</sup> The office has several specific duties outlined by statute, including:

- Investigating administrative acts of agencies that may be “contrary to law”<sup>280</sup> or are otherwise “unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion or unnecessarily discriminatory”;<sup>281</sup>
- Seeking an “appropriate remedy” upon filing of a complaint;<sup>282</sup>
- Notifying complainants within 30 days of receipt whether their complaints will be investigated;<sup>283</sup>
- Providing written annual reports to the governor, the legislature, and the people;<sup>284</sup> and
- Appointing a deputy ombudsman and hiring other employees.<sup>285</sup>

The ombudsman’s office operates as a free service to citizens filing complaints.<sup>286</sup> After investigations are concluded, the ombudsman may present its opinions to the

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274. Senator Jack Harper, who voted against the final version of the bill, said, “We now have a government program for everybody, including privately owned newspapers.” Christian Palmer, *State Ombudsman Role Expands to Mediate AZ’s Public Records Requests*, ARIZONA CAPITOL TIMES, June 23, 2006. See also Fearing Interview, *supra* note 242.

275. Fearing Interview, *supra* note 242.

276. *Id.*

277. Palmer, *supra* note 274.

278. *Id.*

279. Shannahan Interview, *supra* note 265.

280. ARIZ. REV. STAT. ANN. § 41-1377(A)(1) (2008).

281. *Id.* § 41-1377(A)(2).

282. *Id.* § 41-1377(B).

283. *Id.* § 41-1378(B).

284. *Id.* § 41-1376(A)(2).

285. *Id.* § 41-1376(A)(4).

286. *Id.* § 41-1378(C).

governor, legislature, and/or prosecuting attorneys.<sup>287</sup> According to Shannahan, the office is intended to be a “neutral, impartial and independent” resource for citizens and government officials.<sup>288</sup> The office is in the legislative branch of government, but it has the power to investigate complaints involving all areas of government except for the judiciary and state universities.<sup>289</sup> The office’s physical location is intended to represent its independence—it cannot be located in the state office complex or next to any state agency.<sup>290</sup> Shannahan elaborated on his perception of the role of the office:

We’re the ones who are supposed to take what people say with a grain of salt. I look at the complaint and what they are saying with a critical eye and I look at what the agency says with a critical eye. The point of having us in the legislative branch, instead of the executive branch, is to give us the independence to do that. In other words I can say something that one of these big agency directors doesn’t want to hear and my parking space is not going to change. They don’t affect my resources and they can’t fire me.<sup>291</sup>

After the first bill failed to create an independent office in the State Library, Archives and Public Records division, another possibility was giving the duties to the attorney general’s office, which had been investigating open meetings issues for years.<sup>292</sup> However, Fearing described concerns about the office’s independence: “If it was in the attorney general’s office, they were afraid the attorney general couldn’t be fair because it also serves as a representative for state agencies.”<sup>293</sup> When the ombudsman was brought up, there were fears by some citizen and media advocates that government employees would ask questions about every public access request to the ombudsman, thus slowing down the access process.<sup>294</sup> However, those fears turned out to be unfounded and Fearing believes the ombudsman’s office is “the right place for it.”<sup>295</sup> Besides being an independent location, the ombudsman’s office provided a resource and a shield for public employees who were uncertain about the law.<sup>296</sup> Fearing provided an example:

Suppose I want to go down to city hall for a copy of an accident report my son was involved in. The person down at City Hall doesn’t know what the records are, doesn’t want to get in trouble, doesn’t want to get her boss in trouble, so she says, “No, you can’t have that.” My argument was that a public access ombudsman gives them somebody to go to shift blame to if something goes wrong. If at future point in time, some per-

287. *Id.* § 41-1376(B).

288. Christian Palmer, *Up Close with Patrick Shannahan, Arizona’s Ombudsman-Citizens’ Aide*, ARIZONA CAPITOL TIMES, Aug. 4, 2006.

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

290. *Id.* § 41-1382.

291. Palmer, *supra* note 288.

292. Fearing Interview, *supra* note 242.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

son goes to the clerk to harass her about giving out records, she can tell them, “The public access ombudsman said it was OK.” It gives the government somebody else to shift blame to, and blame I don’t mean in negative terms. I’m a clerk, I process these reports, I don’t know anything about public records, but if somebody else says it’s a public record, take it.<sup>297</sup>

According to Shannahan, it was a new charge for the ombudsman’s office when the legislature added public access duties to its list of responsibilities, the office having rarely handled complaints about public access issues in the past.<sup>298</sup> The most egregious abuse Shannahan saw before 2007 was when the office once investigated the Arizona Department of Transportation after it spent more than two years refusing to respond to a company’s request for documents regarding contracts for seeding and planting next to state roads.<sup>299</sup> Besides that, however, complaints to the office on public access issues were uncommon.<sup>300</sup>

Shannahan approached the new public access duties the same way he did the other duties of the office, with two major exceptions.<sup>301</sup> First, the statute creating the public access duties calls for one of the two new assistant ombudsmen to be an attorney.<sup>302</sup> Though none of the other assistants in the office were attorneys, Shannahan saw the necessity of having an attorney in this role.<sup>303</sup>

It is absolutely essential to have an attorney do this as opposed to a lay person like me. The other stuff we do, we don’t have attorneys doing it, we have lay people doing it, and it works. But when it comes to public access, there’s so much law involved, and people calling the shots are often attorneys. There’s a tremendous amount of attorney to attorney discussion going on, so it’s absolutely essential that our person is an attorney. If I didn’t have an attorney in that position, I think we’d be lost. We need an attorney to be credible, someone who can cite case law and have conversations with attorneys.<sup>304</sup>

Second, the statute calls for the public access ombudsman to “train public officials and educate the public” about public access laws through “interpretive and educational materials and programs.”<sup>305</sup> Shannahan emphasized the importance of these duties in public access:

[We] don’t approach it just as a case complaint office. I think the education piece of it is critically important. What we find is that government

297. *Id.*

298. Kamman & Revere, *supra* note 254. “Anyone denied access to records is welcome to seek help from his office,” Shannahan said, “but the ombudsman has no authority to force any official to comply.” *Id.*

299. Palmer, *supra* note 288.

300. *Id.*

301. Shannahan Interview, *supra* note 265.

302. ARIZ. REV. STAT. ANN. § 41-1376.01(A) (2008).

303. Shannahan Interview, *supra* note 265.

304. *Id.*

305. ARIZ. REV. STAT. ANN. § 41-1376.01(A).

people out there are eager to be taught, school boards and city councils and fire districts are always asking us, can you come out and spend a day with us? They are eager and thirsty to be told how they should do this because it's very complicated.<sup>306</sup>

When the ombudsman's office is approached by citizens or government with inquiries about any manner, including public access, the office has three distinct approaches to resolving disputes: coaching, assistance, and investigation.<sup>307</sup> The first level, coaching, is used when the office believes people are capable of resolving problems on their own:

We talk them through what their options are. It could be a city clerk calling us asking about a request for these personnel records, but there's personal information in them, what should we redact? Or a citizen wants to get copies, this is what I'm looking for, how do I go about doing that? We're coaching them about things. We want them to be focused and targeted and not too general in their requests, and we're coaching them about how they can do their part.<sup>308</sup>

The second level, assistance, is when the office makes contact, usually by telephone, with an agency to help a citizen through a dispute:

Typically with records, it would be, "I submitted a request a month ago and I haven't gotten a response yet." We can contact the government agency and say, "this person called us, he hasn't gotten a response, what's going on?" We can kind of facilitate that, we can get the person the record, and we can do it very informally, with no pointing fingers or assigning blame.<sup>309</sup>

If coaching and assistance fail to resolve disputes, the office may then consider an investigation; for example, when a person has requested a record and feels that the request was denied unlawfully. At this point, a more formal process begins under the statute, under which the ombudsman's office can examine offices and confidential records and can even hold hearings.<sup>310</sup>

After the legislature passed the changes creating the new public access duties in the ombudsman's office, Shannahan had a little longer than six months to get the office ready to begin work on January 1, 2007.<sup>311</sup> He began by deciding that the office would have general responsibility for public access matters, with the new attorney position serving as the primary contact person.<sup>312</sup> The second full-

306. Shannahan Interview, *supra* note 265.

307. *Id.*; see Arizona Ombudsman-Citizens' Aide, 2007 OMBUDSMAN ANNUAL REPORT 5 (2008), <http://www.azleg.gov/ombudsman/2007AnnualReport.pdf>.

308. Shannahan Interview, *supra* note 265.

309. *Id.*

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

311. Shannahan Interview, *supra* note 265.

312. *Id.*

time position would help with the additional workload brought on by the public access duties, as well as assist in other matters around the office:

The second person is not working full-time on public access. We added it to the mix, and now everybody in my office does public access work. There's not a separate telephone number to call for public access. When they have a problem, they call our number, and whoever answers the phone, they help them.<sup>313</sup>

If a complainant requested an investigation or a legal opinion, those calls were passed on to the attorney.<sup>314</sup> However, if the call required more coaching or assistance, anyone in the office could handle the complaint.<sup>315</sup>

Because Shannahan intended for the attorney position to serve as the primary contact on public access matters, he created an informal search committee to sort through the hundreds of applications for the position and make recommendations to him about finalists.<sup>316</sup> Shannahan had a vision for what he wanted in the person who would take on this new position:

I was looking for someone who would be capable of working independently, because this is a job that requires a lot of travel throughout the state. I wanted . . . someone who was an attorney who had some experience, but not somebody straight out of law school, and not an old attorney because we couldn't afford an old attorney. If they had experience with open records or open meetings that was a plus. I wanted someone who was very articulate, who would be able to talk to other lawyers and to legislators and officials and also be able to talk with public people off the street. I was looking for someone with a positive personality, who would say, "Let's make this thing better, let's work to improve the situation," not someone with a negative regulator sort of attitude. And I wanted somebody who was capable of taking the program from scratch and building it up.<sup>317</sup>

Shannahan hired Elizabeth Hill, an attorney who had worked in the attorney general's office for three years and who had spent time on the Open Meetings Law Enforcement Team (OMLET), to serve as the primary ombuds in charge of public access cases. While Shannahan said that her experience on the enforcement team was not the primary consideration in her hiring,<sup>318</sup> several other sources noted it as an advantage Hill brought to the new position. Thomas was "pleasantly surprised" with the hiring process and noted Hill's "good backing in open meetings law" as a beneficial piece of her background.<sup>319</sup> Hill said her background at

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313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* The committee included representatives from the Office of the Attorney General, the State Library, Archives and Public Records, and the Arizona Newspapers Association. *Id.*

317. Shannahan Interview, *supra* note 265.

318. *Id.*

319. Thomas Interview, *supra* note 273.

the attorney general's office helped, but that she had to make a transition from that culture to the approach of the ombudsman's office:

I don't know about anything about being an ombudsman formally. I have an attorney background; I was a litigator for a while, so it was a transition from being an advocate to more of a mediator approach. But as far as training goes, it was mostly sitting down with Patrick Shannahan and discussing our role and what I should be doing, reading various materials. He's been doing this for 13 years.<sup>320</sup>

### 3. *Implementation and Developments*

Hill joined the office in February 2007, and she and Shannahan began to build the public access part of the ombudsman's office from scratch:

When [Hill] and I started work together, the first thing we did was develop a business plan, kind of analyze the mission. Who do we need to talk to, what do we need to say, what are our objectives? Then, we had to figure out how to get the word out to two sides. First, the public needed to know that the office existed, and second, how to get the word out to clerks and lawyers to know the office was in place.<sup>321</sup>

The office issued a press release and expanded the office's web site to include public access resources for the public.<sup>322</sup> Hill said this involved making "point of contacts" for public bodies across the state and other key players in open government matters:

For the first month or so, I spent time drafting an introductory letter that I sent out to close to a thousand public entities, key public people such as city attorneys and county attorneys, with the idea that they would then trickle information down to their clients . . . and hitting some of the associations that provide assistance to these local government entities, such as the League of Cities and Towns, the Counties Association, building rapport and contact within them to help spread the word about what it is that I do.<sup>323</sup>

Hill said it was sometimes difficult in the first couple of months because the people she called would not know her or what the ombudsman's office was doing in public access matters.<sup>324</sup> She continued to send out letters and educational materials, and even offered to meet face-to-face with several people to build the office's personal contacts.<sup>325</sup> Hill described the result: "Now, very rarely do I get the reac-

320. Telephone Interview with Elizabeth Hill, Assistant Ombudsman for Public Access, Arizona Ombudsman-Citizens' Aide (Feb. 4, 2009) [hereinafter Hill Interview].

321. Shannahan Interview, *supra* note 265.

322. 2007 OMBUDSMAN ANNUAL REPORT, *supra* note 307, at 5.

323. Hill Interview, *supra* note 320.

324. *Id.*

325. *Id.*

tion, 'I've never heard of you, what do you do?' Sometimes I do in rural communities."<sup>326</sup>

Shannahan's plan to have the Hill serve as the primary contact on public access matters has enabled Hill to focus on open meetings and public records matters exclusively.<sup>327</sup>

Other people in the office can get any issue. Anyone who feels they've been treated unfairly by a state agency can call and complain. Mine are very different. I'm very isolated from the rest of the group from the nature of the laws involved. It's just because in public records, there's a lot of interpretation involved and a lot of legal analysis involved. That's why the legislature requires an attorney to do this.<sup>328</sup>

Much of Hill's early outreach work involved creating educational materials. By April, she had created "open meeting law and public records law handbooks" that include statutes and recent attorney general opinions on open government matters.<sup>329</sup> The office distributed more than 4,000 of the handbooks—more than 2,000 each for public records and open meetings issues—to agencies across the state in 2007.<sup>330</sup> Hill also began conducting training sessions, conducting 11 sessions—six on open meetings and five on public records—in the office's first year.<sup>331</sup> Hill now receives daily training requests and spends a significant part of her time providing training around the state: "It's the most fantastic opportunity to make face-to-face contact with these folks, to show them I'm not a scary person and that I'm here to work with them."<sup>332</sup> According to Hill, requests for training sessions have more than doubled each year.<sup>333</sup> She conducted 38 sessions in 2008, and that she had already scheduled 30 in the first two months of 2009.<sup>334</sup> Hill elaborated on her role:

My role involves a lot of education. I offer trainings that are three hours each, three hours of open meetings, three hours on public records, so it takes up a full day. I'll sometimes come in to see the city staff, the manager, [and] the mayor. And I do a lot of training for attorneys through the state bar association. I'll even do training for the attorney general's office. So it really is a huge role, with lots of outreach and traveling. With budget cuts, I don't know how much traveling I'll do this year, but I may

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326. *Id.*

327. *Id.*

328. *Id.*

329. 2007 OMBUDSMAN ANNUAL REPORT, *supra* note 307, at 14. The most recent handbook is available online. ARIZONA PUBLIC RECORDS LAW, available at [azleg.gov/ombudsman/Public\\_Records\\_Book.pdf](http://azleg.gov/ombudsman/Public_Records_Book.pdf).

330. 2007 OMBUDSMAN ANNUAL REPORT, *supra* note 307, at 15.

331. *Id.*

332. Hill Interview, *supra* note 320.

333. *Id.*

334. *Id.*

do more webcasts. Every month, I have a training session downtown, and anyone who wants to come can come.<sup>335</sup>

Government sources praised Hill's role in education and training. Bickett sometimes advises state agencies to seek training on public records matters through the ombudsman.<sup>336</sup> Merkel said Hill has done "a wonderful job" in training,<sup>337</sup> and Thomas said she has added a valuable resource to public officials: "[Hill] has been real[ly] proactive in terms of doing training and working proactively with public agencies. We do a lot of that ourselves just with school boards, but we welcome another voice that is doing that."<sup>338</sup>

Hill's training sessions provide several benefits to trainees. Thomas emphasized the importance of conducting the seminars without cost for participants:

Our presentations we do on the open meetings law tend to be part of a larger conference or a seminar, and there's a registration fee for it. We mostly do them [at] cost. The ombudsman does them for free, and for those who are cost-conscious, which is even more so today, that's really attractive.<sup>339</sup>

The training sessions have had an unexpected impact as well, leading to an increase in calls to the office:

People who've never heard of me before now have heard of me and listened to me for six hours. Hopefully, it decreases the complaint calls I get because the government employees are educated and in-tune. On the other hand, I think it increases my call volume because now I've become their personal legal advisor. They call every day, any time they have a question about open records or public meetings law. They should talk to their attorney, of course, but I don't mind talking to them about these issues. I'm kind of their go-to person.<sup>340</sup>

In July 2008, Hill began writing a series of Public Access Newsletters to serve as educational resources as well, providing updates on recent legislation, case law, and attorney general opinions.<sup>341</sup> She had produced four newsletters through January 2009.<sup>342</sup>

Hill's role as public access "teacher" is just one of her primary duties; the other role is as a "problem solver":

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335. *Id.*

336. Bickett Interview, *supra* note 251.

337. Merkel Interview, *supra* note 249.

338. Thomas Interview, *supra* note 273.

339. *Id.*

340. Hill Interview, *supra* note 320.

341. *Id.*

342. The most recent report is available on the web site of the Arizona Ombudsman-Citizens' Aide, [www.azleg.gov/ombudsman/reports.asp](http://www.azleg.gov/ombudsman/reports.asp).



People contact her with questions and complaints and concerns, and she looks into it. That's the ombudsman role. She helps to resolve those problems. If they're legitimate, she tries to change what the agency is doing. If it's not legitimate, she works to resolve the problem with the complainant.<sup>343</sup>

Shannahan has required that each of the assistants in the ombudsman's office go through a 40-hour mediation training program, which Hill completed in 2008.<sup>344</sup> The office itself rarely uses the term "mediation" to describe how it can intervene in cases requiring assistance, but mediation skills are crucial for an ombudsman to resolve disputes effectively.<sup>345</sup> Rather than use the word "mediation," though, the office prefers "informal assistance" to describe how it approaches disputes:

It's one thing I learned early on. If I call a government agency and say who I am and say, "This person has a complaint and I'm calling to see how to work it out," and we kind of do what a mediator would do but don't use the word "mediation," people are willing to work with us, and that seems to work. If I call and say, "Let's have a mediation," flags go up, they say, "I can't, I have to have an attorney present." That raises warning flags for them. They want to get attorneys involved, and it becomes more difficult to do. It's easier for us to mediate doing all the things a mediator would do. It's easier for us to mediate a dispute but not really use the term "mediation." There's an expectation about mediation, where people go into this room, and there's a table, and there are rules, and you sign things. We kind of want to do it using that process, but in a less formal way.<sup>346</sup>

Hill's approach is to help parties identify the problems and to come up with their own resolution:

A lot of times in public records stuff, there is either some legal basis for why they're not giving out the record, so then I'm educating the person who called and made the complaint. I do a lot of coaching and assistance. Some of it is investigation if it warrants it, if based on facts there is a question on whether something was done properly, and then saying, "This is a violation, it was not done correctly, and this is what I recommend that you do." Only if they don't accept my recommendations do we go through the formal reporting process. If they're willing to accept the recommendations, my involvement pretty much ends there.<sup>347</sup>

But, she said resolving problems informally—ideally before they even become problems—is her goal:

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343. Shannahan Interview, *supra* note 265.

344. *Id.*

345. *Id.*

346. *Id.*

347. Hill Interview, *supra* note 320.

When people call, sometimes they just need some assistance. We can make some calls, send some e-mails, and try to get the ball rolling. We can be proactive, too. Last week, I got a call about an agenda item the caller thought was improper before a meeting ever took place. I could call the school district and express concerns about an agenda item that wasn't done properly. We were able to fix a problem before it ever happened.<sup>348</sup>

Sources representing both government and citizens said Hill has so far succeeded in providing this kind of “informal assistance.” Bickett, an assistant attorney general on the Public Records Task Force, explained Hill's role: “Sometimes she'll tell me if one of client issues taking position that's problematic. I'll contact the attorney for that agency and we can do some informal things that hopefully will avoid Liz having to take any formal action against one of our agencies.”<sup>349</sup>

However, sources representing news media said the mediation-style approach often means seeking middle ground when journalists feel they are unable to compromise on public access matters, particularly when avoiding delay in providing records is essential. Daniel C. Barr, a media law attorney in Phoenix who works with the First Amendment Coalition of Arizona, opined:

Their tendency is to split the baby, and that's fine if you want to split the baby, but my clients don't believe that they should have to. For easy cases, it's very useful, but in the cases I deal with, where the positions are pretty well known, splitting the baby is not satisfying.<sup>350</sup>

David Cuillier, a professor at the University of Arizona and the chairman of the Freedom of Information Committee for the Society of Professional Journalists, said the mediation approach can work, but difficulties can arise if agencies choose not to cooperate:

When you have these situations, hopefully [Hill] might be able to mediate everything out here, but some agencies can dig in their heels and it's going to take a lawsuit or litigation to get this fixed. It hasn't solved those big problems. My guess it has helped in a lot of places where ignorance was the issue, where an agency clerk or a citizen just didn't know the law. But there's still some percentage of these requests where an ombudsman's not going to help.<sup>351</sup>

These points underscored a major theme raised by all sources—that the public access ombudsman has primarily turned out to be a resource for citizens and government agencies and not for the news media who originally lobbied for the creation of the position. More than half of all inquiries have been made by members of

348. *Id.*

349. Bickett Interview, *supra* note 251.

350. Barr Interview, *supra* note 260.

351. Telephone Interview with David Cuillier, Assistant Professor, University of Arizona School of Journalism, and, Chairman, Freedom of Information Committee of the Society of Professional Journalists (Jan. 30, 2009) [hereinafter Cuillier Interview].

the public, while just under nine percent have been made by people in news media.<sup>352</sup> Fearing said this was what he expected all along, particularly considering the experience in other states that had ombudsman and public access counselors such as Indiana and Iowa.<sup>353</sup> Others, like Shannahan, have been more surprised by this:

I expected there would be more cases brought to us by the media. That was one of the concerns over at the legislature because the main sponsor outside of the legislature was the newspaper association, where the media said they were trying to open up the government. Going in, I anticipated that a large number of calls would be from the media, but that really hasn't been the case.

Shannahan also noted this meant the agency had been a better resource for government agencies than he had imagined:

That kind of shows that going into this thing, one of the things I said in my testimony [before the legislature] is that I don't think a lot of people out there are trying to hide stuff from the public. When that happens, we can take care of it. But in most cases, they want to do the right thing, but they don't know what the right thing is. If we can coach them, be an information resource for them, they'll do the right thing first, and there won't be complaining about it, and they'll do the right thing again and again and again. That's why the education part of this is so important.<sup>354</sup>

Thomas said that, from the school boards' perspective, the ombudsman has been a good resource for people in government:

It's come a long way. I feel like it's been a positive addition, and oftentimes it has worked opposite of what I thought. A citizen might be irate about what they see as a violation of the open records or open meetings law, and they've already been told "no" by a school district, and then they're told "no" by the ombudsman. If they're advocating for something that's not supported by the law, it actually helps to have a third party who is further removed from the situation.<sup>355</sup>

On the other hand, Cuillier—representing news media—suggested that one reason for the lack of impact on journalists may be that journalists have other resources available: "We already have a media hotline that Dan Barr runs. It's

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352. See Appendix B: Inquiries and Requests from the FOI Ombuds Offices, Table 3.

353. Fearing said he requested that the statute include a requirement that the ombudsman track users of the program and compile annual statistics, which is part of the law creating the public access duties. Fearing Interview, *supra* note 242; see also ARIZ. REV. STAT. ANN. § 41-1376.01(B)(1). "One of things I wanted in the bill was statistics at end of year," Fearing said. Fearing Interview, *supra* note 242. "I wanted to throw those numbers in their face. Nobody believed government or citizens would be a big user. Everybody believed it was newspaper bill." *Id.*

354. Shannahan Interview, *supra* note 265.

355. Thomas Interview, *supra* note 273.

funded by the Arizona First Amendment Coalition, so when the media have issues, they call this hotline, or Dan can write a letter. You can get an attorney to hit them over the head.”<sup>356</sup> Barr agreed the ombudsman is a better resource for citizens: “The ombudsman does a lot of good, especially for non-media requests. But when people like me get involved, with clients in the media, in situations like those, the ombudsman doesn’t do much good.”<sup>357</sup> Still, Cuillier noted, the office’s new duties have overall been “a good thing for the state,” and he said his student journalists have had some success when seeking Hill’s assistance:

I’ve had students who have gone to her because agencies have illegally denied them info for class projects, stories, reporting, data, that sort of thing. They’ve had kind of mixed results. She’s been very responsive about responding immediately and contacting the agency, and when it’s blatant, she’s good at talking sense to them.<sup>358</sup>

When the ombudsman’s office is contacted on public access matters, most of the inquiries have been about public records rather than open meetings, with public records inquiries topping 70 percent in the first year.<sup>359</sup> Shannahan attributed this, at least in part, to the existence of other resources to handle open meetings disputes such as the attorney general’s OMLET.<sup>360</sup> The ombudsman’s office has coordinated with the attorney general to prevent duplication of efforts and to ensure the public is receiving a consistent message about the application of the state’s open government laws:

We met with them before we even got going into this thing. My philosophy is that I don’t feel compelled to agree with the attorney general. He can do what he wants to, and I don’t have to agree with that because I don’t work for the attorney general. However, it certainly is nice, good, [and] desirable for us and the attorney general to be saying the same things.<sup>361</sup>

Complaints on meetings issues may be filed either with the attorney general or the ombudsman, but the ombuds office expressed intent to defer to OMLET if

356. Cuillier Interview, *supra* note 351.

357. Barr Interview, *supra* note 260.

358. Cuillier Interview, *supra* note 351. Cuillier specifically mentioned Hill’s response to the Tucson Police Department, which he said would “just come up with ludicrous reasons for blowing off students and saying no.” *Id.* Hill mentioned an incident involving a student reporter and Tucson police in 2007, saying that when the student asked for a database of auto thefts, “she got the run around for more than two weeks” before receiving a document without the make and model of the cars stolen. Hill Interview, *supra* note 320. The reporter was later denied access to the database by a supervisor who cited the federal Freedom of Information Act—which does not apply to state agencies—as a reason. *Id.* Hill said she called and she also “received the run around for several days” before contacting an attorney for the department, who provided an electronic copy of the record. *Id.*; see also 2007 OMBUDSMAN ANNUAL REPORT, *supra* note 307, at 16.

359. 2007 OMBUDSMAN ANNUAL REPORT, *supra* note 307, at 15. The 2008 numbers were provided by Shannahan during a telephone interview. Shanahan Interview, *supra* note 265.

360. Shannahan Interview, *supra* note 265.

361. *Id.*

that agency is contacted first.<sup>362</sup> Shannahan provided the office's perspective: "Typically, we don't very often have a situation where someone calls [the] OMLET with a complaint and then they call us. Usually, if they call [the] OMLET, they take care of it, and if they call us, we take care of it."<sup>363</sup> According to Bickett, on public records matters, there have been no instances of "stepping on each other's toes."<sup>364</sup> Likewise, Chris Munns, an assistant attorney general and member of the OMLET, said the offices have worked together well, particularly on training and education matters:

It seems like they were created with a lot of duties for education, so we've actually shifted some of our educational focus over to them. A lot of times when we find violations with public bodies, we refer them to Liz for training. They do also have the authority to investigate complaints and to take evidence and hold hearings, but they don't have the enforcement ability to go to superior court. I think she really does want to focus on the educational side and facilitating disputes.<sup>365</sup>

Hill has on occasion referred cases to the attorney general for investigation when she thought the situation called for enforcement:

One time, it was a repeat offender. I was familiar with them and their previous violations from when I worked in the Attorney General's office. I tried to work with them to get them on the right path, but the same violations were reoccurring, so I referred them to OMLET, and I said they need more serious enforcement and penalties or they're never going to learn.<sup>366</sup>

Shannahan agreed, noting that agencies have been reluctant to cooperate with the ombudsman's office in an inquiry or investigation:

Sometimes, if the problem is so severe it should get the attorney general's office involved for enforcement, I've said, "You know, you guys should take a look at this." We work independently, we're on separate tracks, we don't do joint investigations, but we try to make sure we're consistent. And there are times when we've referred cases over to OMLET when enforcement was necessary, when we needed that hammer to make sure a government body does what it's supposed to do.<sup>367</sup>

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362. "If a complaint has been filed with the Open Meeting Law Enforcement Team, we will defer to them to handle the complaint and any investigation." Munns Interview, *supra* note 248; *see also* *Arizona Ombudsman-Citizens' Aide, Frequently Asked Questions*, [www.azleg.state.az.us/ombudsman/faq.html#open](http://www.azleg.state.az.us/ombudsman/faq.html#open) (last visited Jan. 10, 2013).

363. Shannahan Interview, *supra* note 265.

364. Bickett Interview, *supra* note 251.

365. Munns Interview, *supra* note 248.

366. Hill Interview, *supra* note 320.

367. Shannahan Interview, *supra* note 265.

A more recent development in the ombudsman's office has been the increased role of the office in legislation on public access matters. While these duties are not specifically mentioned in the statute, Hill said the duties have put her in a position to see issues the legislature should address, such as clarifying access to electronic records and fee charging for electronic records.<sup>368</sup>

Our office has proposed legislation this year. This is the first year I've done it, but we'll do it on an annual basis, outlining trends we see in public records open meetings law . . . We work for the legislature. The legislature is Patrick Shannahan's boss, and the purpose of our office is for us to be the eyes and ears of the legislature. They look for us to identify problems in government and with statutes.<sup>369</sup>

#### 4. Issue: Independence and Impartiality

Each of the sources raised the importance of the ombudsman's office being both independent—that is, free from external influences, particularly in government—and serving as an impartial resource for parties who seek assistance or investigation. For example, Shannahan said independence and impartiality are “essential elements of any ombudsman's office,”<sup>370</sup> and most sources agreed the office has been independent and has remained impartial since being charged with its new public access duties in 2006. Even though the ombudsman's office is in the legislative branch, Shannahan feels no pressure from the legislature and does not cater to it or any other political subdivisions.<sup>371</sup> He said some of this security comes from the structure of the office, which, by law, makes it difficult for him to be influenced:<sup>372</sup>

The way we get that is that the legislature appoints me to five-year terms, and I then have complete control over other decisions. Who I hire, who I fire, how we operate, I have control of that. During that five-year term, it takes a two-thirds majority of the legislature to fire me, and in Arizona, getting two-thirds to agree on anything is next to impossible. It helps to assure the independence of the office.<sup>373</sup>

Opinions differ about the level of independence in the office. Shannahan noted the importance of public perception that the office is, in fact, independent.<sup>374</sup> However, Barr said he still feared the office could not be truly independent of the legislature, thus making it a questionable resource for his media clients who have

368. Arizona Ombudsman-Citizens' Aide, *Winter Highlights*, 2 PUB. REC. 1, 3 (2009).

369. Hill Interview, *supra* note 320.

370. Shannahan Interview, *supra* note 265.

371. *Id.*

372. See ARIZ. REV. STAT. ANN. § 41-1375 (2008) (outlining the five-year term of office for the ombudsman-citizens' aide and how he or she may be removed from office).

373. Shannahan Interview, *supra* note 265.

374. *Id.*

a dispute with a government agency.<sup>375</sup> Speaking specifically about the free press guarantee in the First Amendment, Barr opined:

The news media have heightened protection in our system [from government interference]. And then to turn to a government agency for help in enforcing the law against the government? It's one thing to go to the courts, that's in the judicial system. But the ombudsman gets a paycheck and is funded by the legislature.<sup>376</sup>

Fearing disagreed, saying any concerns people had about the ombudsman having difficulties with independence or impartiality had not been realized.<sup>377</sup> Shannahan noted the office has been free to criticize any government group publicly, and, in his experience, that has not been an issue for the ombudsman's office.<sup>378</sup> In a similar way, Shannahan described how the office's independence had cultivated a track record for being impartial as well:

I haven't seen concerns by people in government or people outside of government about our ability to be impartial. I think they feel they're going to get a fair shake from us. It's our attitude that we're not just trying to make someone think we're impartial, we really are impartial. When you have that attitude, that's the way you talk to a government person or a citizen, that's going to come across. You can't fake it.<sup>379</sup>

To build a reputation for impartiality, Hill made an effort early on in her outreach, particularly to government groups, to explain what she planned to do as the point person on public access matters in the ombudsman's office:

I did a number of presentations at luncheons, telling them, here's what you can expect from me, here's what my plan is, here's my role. I didn't want to call them and have them be automatically on the defensive, so I had to show them that I'm impartial and independent, and I'm not calling as an advocate or as an attorney for anyone.<sup>380</sup>

Hill added that the only time she would take on more of an advocacy role was when a person in government was relying on invalid or unlawful reasons for not complying with a request:

If a public official says, "We're not going to give it to them because of this reason," I can tell them, "That doesn't seem like a valid reason," and I try to provide them information to do the right thing. If they don't do it,

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375. Barr Interview, *supra* note 260.

376. *Id.*

377. Fearing Interview, *supra* note 242.

378. Shannahan Interview, *supra* note 265.

379. *Id.*

380. Hill Interview, *supra* note 320.

then I can tell them I am pursuing it and follow through on behalf of the person calling. If they don't, then I do file a report of misconduct.<sup>381</sup>

Hill has only had to file a report of misconduct once so far, where a citizen had requested copies of e-mails of board members and other records from the Peoria Unified School District Governing Board in September 2007.<sup>382</sup> The board did not respond for a month, leading the citizen to contact the ombudsman's office.<sup>383</sup> After a formal investigation, Hill determined in March 2008 that the board should release some of the e-mails immediately and recommended the board undergo public records law training.<sup>384</sup> When this failed to happen, Hill filed a formal report of misconduct with the head of the agency and with the legislature.<sup>385</sup>

Thomas said the ombudsman's office has been able to take an advocacy approach both when talking to citizens who are "wrong on the law" and with his school board clients.<sup>386</sup> He described such an instance:

I'll do a training for a board, the board will hear what they want to hear, then they'll go to [Hill] and say I said this, but of course I'll tell her I said the opposite. We've been on the same page about things for the most part. I think she's got a great reputation out there, and specializing particularly in this area has helped.<sup>387</sup>

### 5. *Issue: Alternative to Litigation*

Most sources said it was too early to tell if the ombudsman's office was affecting the number of disputes that end up in court. However, several doubted that placing public access responsibilities in the ombudsman's office would serve as a substitute for litigation as an option for parties in dispute over access, including Thomas:

I'm not aware of any [impact on litigation]. I think people are better trained, but I don't really see a decrease in litigation as a result of this. Districts that usually find themselves in trouble have decided willfully not to do things one way, but it's not because the ombudsman hasn't interceded.<sup>388</sup>

Some of this, another attorney representing government said, could be that so few cases are litigated in the first place:

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381. *Id.*

382. *Id.*

383. ARIZONA OMBUDSMAN-CITIZENS' AIDE, FINAL REPORT OF INVESTIGATION, CASE # 702863 (2008).

384. *Id.*

385. *Id.*

386. Thomas Interview, *supra* note 273.

387. *Id.*

388. *Id.*



If you look through the annotations for reported cases, which means they made it to the appellate level, and there are probably some that didn't advance that far, but you look at how long the laws have been on the books and how many cases reported there, it's fairly infrequent. I think it's a very, very small fraction of 1 percent. Maybe one to two cases a year, I'd say one a year would actually be more accurate.<sup>389</sup>

More common are threats of lawsuits that come through the negotiation process.<sup>390</sup> Merkel also cited a strong deterrent factor for government groups in pursuing litigation: the negative publicity it can bring to an agency if a news media plaintiff wins a case: "If they win one, they splash it all over the front pages. You don't want to lose one. They love attorney's fees. They love to write how they won attorney's fees."<sup>391</sup>

Cuillier and Barr both mentioned the lack of enforcement power by the ombudsman's office makes it almost impossible that the office can effectively serve as an alternative to litigation.<sup>392</sup> According to Cuillier, part of the reason the Arizona Newspapers Association had pushed for the legislation creating the new ombudsman duties was to provide "an outlet for weeklies that can't afford to go to court," and that it had not worked out that way so far. Cuillier cited the ombudsman's lack of "teeth or authority" as a "major flaw": "[The lack of authority] [i]s a real weakness. Agencies can just blow [the ombudsman] off. Up in Phoenix, they're just a bunch of yahoos. It's out of control what these agencies do, particularly sheriffs and police."<sup>393</sup> Cuillier also mentioned a situation in which Phoenix police refused to include any personal identifiers, such as date of birth or address, of arrested suspects in response to anti-identity theft legislation<sup>394</sup> that specifically mentioned it was not intended to alter or otherwise impact the Public Records Law.<sup>395</sup> Hill received a legal opinion from the legislative council stating the new law "did not modify what is considered a public record."<sup>396</sup> Cuillier recalled: "Well Liz is like, 'What the?' She wrote a letter opinion to everybody, to law enforcement agencies and said, 'See, read the law here, it says see, don't do this.' And they just ignored her and ignored everybody else."<sup>397</sup>

Barr agreed it was issues such as the one in Phoenix that showed the ombudsman's office would, at times, have difficulty getting agencies to comply with its recommendations since it lacked the power to write legally binding opinions.<sup>398</sup> The result, according to Barr, is that the ombudsman may be able to help journal-

389. Merkel Interview, *supra* note 249.

390. *Id.*

391. Merkel Interview, *supra* note 249.

392. Cuillier Interview, *supra* note 351; Barr Interview, *supra* note 260.

393. Cuillier Interview, *supra* note 351.

394. See ARIZ. REV. STAT. ANN. § 41-4172 (2008) (ordering government agencies to "develop and establish commercially reasonable procedures to ensure that . . . personal identifying information . . . is secure and cannot be accessed, viewed or acquired unless authorized by law").

395. See Ray Stern, *Phoenix Police to Limit Release of Public Information Based on Anti-Identity-Theft Law*, PHOENIX NEW TIMES, Jan. 7, 2009, available at [blogs.phoenixnewtimes.com/valleyfever/2009/01/phoenix\\_police\\_to\\_limit\\_releas.php](http://blogs.phoenixnewtimes.com/valleyfever/2009/01/phoenix_police_to_limit_releas.php).

396. Kenneth C. Behringer, *Legislative Council Memo: Effect of Identity Theft Legislation*, Sept. 26, 2008, available at [www.azleg.gov/ombudsman/Effect\\_of\\_Identity\\_Theft\\_Legislation.pdf](http://www.azleg.gov/ombudsman/Effect_of_Identity_Theft_Legislation.pdf).

397. Cuillier Interview, *supra* note 351.

398. Eric Graf, *Ombudsman Office Helps Public Obtain Records*, TUCSON CITIZEN, Oct. 5, 2007.

ists on rare occasions, but the only real remedy for journalists was consistently seeking redress of open government law violations in court:

The founding fathers and the legislature, when they set up the system, they gave some special rights to the news media that they didn't give to anyone else. They protected private businesses and their right to publish. And they gave them some tools to deal with. But there was an unspoken quid pro quo. You have to go out and use them. Not using your powers and instead going to an agent of government to step in and help is a cop out.<sup>399</sup>

Sources generally agreed the ombudsman's office has been more successful in managing conflict between citizens and government than between media and government. According to Thomas, through training, education, and informal assistance, the office has created an environment that is less adversarial and more cooperative when dealing with government agencies and members of the public, ameliorating some of his initial concerns that the office may serve as an advocate for citizens at the expense of government interests:

Being an attorney who trains in it and being on a school board for four years, I've come to the understanding that some of the things I train boards on [about public records and open meetings] is not so easy to do. We could all do a little bit better job on that, and I think areas like creating the ombudsman and having somebody who is more there for assistance is a good thing as opposed to someone who's in a more adversarial position . . . . The ombudsman is out there more in a proactive way.<sup>400</sup>

In Hill's view, the roots of conflict between government and citizens often stem from a lack of trust, and dealing with this issue has been one of her primary concerns.<sup>401</sup> One way she does this is by responding to all inquiries within 24 hours, even if it means having her Blackberry on her at all times, including weekends.<sup>402</sup> She said she tries to have all inquiries resolved within three days unless they require more formal investigation.<sup>403</sup> Hill further explained her decision:

[It] goes back to people's perception of government. I'm still the government, but I think it goes a long way if you acknowledge people or respond to them soon. Even if I know I can't get right to it because I'm traveling, I can tell them to get me all of the information, but I won't be able to start this until next week. Nobody gets upset about that, if you contact them and let them know.<sup>404</sup>

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399. Barr Interview, *supra* note 260.

400. Thomas Interview, *supra* note 273.

401. Hill Interview, *supra* note 320.

402. Hill Interview, *supra* note 320.

403. *Id.*

404. *Id.*

Shannahan and Hill both said the tone of negotiations varies, but, when citizens are most upset, it is usually because of some history or personality conflict with the representative of the agency they are dealing with:

Some people who call, they think the government is against them, government is bad, and they automatically assume that whatever they want to do, the government is going to give them a hard time. How we handle that is explain to them how the process works and why the government may be reluctant in certain instances to provide information.<sup>405</sup>

Hill sees the same issues when talking with government agencies:

Usually, if it's the agency I need to disarm them and try to get the crux of what biases are with this person, because of the history, and try to figure out what those are and work around that. It's disarming them, working around problems, putting personal issues aside, and let's just focus on the request and what the law requires and see why we're having a problem here.<sup>406</sup>

Any improved levels of comfort and trust that have been built in the office's first two years working with government and citizens has not been reflected by managing the relationship between media and the government. In part, several sources noted, this has been because journalists use other resources to handle disputes arising in public access matters, such as the First Amendment Coalition's hotline. Fearing suggested there may be a more consistent personal relationship between journalists and government officials that may not require intervention by the ombudsman.<sup>407</sup> In addition, Fearing explained that the office "helps the general public far more than it benefits journalists . . . because journalists are smart enough to know the open records laws and are more persistent, [as well as] more well-known by the person they're trying to get records from, so there's less distrust."<sup>408</sup> However, several other sources noted distrust still lurks in the relationship between media and government—a situation Barr said is not only unavoidable but is virtually required by the American constitutional scheme:

My original thought is that the way the press and the government are set up, there's a tension between the two of them. It's systemic. There's tension, and I don't view that as a bad thing. But it's problematic for the press then to go to someone in government to turn to with issues about the government. Again, I don't view it as a bad thing. They have different interests. They're supposed to have different interests.<sup>409</sup>

One of the main interests that creates difficulties is having public records requests handled in a timely manner that satisfies journalists' need for information

405. *Id.*

406. *Id.*

407. Fearing Interview, *supra* note 242.

408. *Id.*

409. Barr Interview, *supra* note 260.

when they are on a deadline.<sup>410</sup> Barr elaborated: “It’s one thing for people who are not members of the media. But for my clients, the timeliness of getting access means everything. Delay means denial and getting a record four months from now is not a win.”<sup>411</sup> Hill keeps this in mind when dealing with inquiries from the media.<sup>412</sup> She said she often sees more tension between disputing parties when journalists make an inquiry, where matters of timeliness and the personal history between journalist and government officials make resolution challenging:

With the media, I find that when I read their requests, with the tone that they use, I can see why the government gets defensive. They put them on the defensive. It almost becomes accusatory in the request before the government has chance to respond. When I contact them, I try to be as neutral and impartial as possible, be professional and assertive without putting them on the defensive. The same goes for the government. Sometimes the responses are overly harsh, and they could deny access nicer, rather than saying, “We’re the government, we get to decide.”<sup>413</sup>

Other statements from interview sources made it clear that managing conflict between media and government would be a very difficult thing for the ombudsman. Merkel, an attorney representing local government interests, noted other incentives were what motivated his clients to deal with journalists: “I think having good relations with the media if you work for government is an essential qualification.”<sup>414</sup> Merkel expanded by mentioning two aphorisms he likes to tell his clients: “Don’t get into pissing contest with a skunk, and don’t get in an argument with man who buys ink by the barrel. They can get the last laugh.”<sup>415</sup>

While participating in a public records law compliance audit conducted by a newspaper, Fearing personally experienced the tension in the relationship between a media person seeking access and the government agencies who wish to block it:

I was in a small town in northern Arizona. I go down to the police station and go to ask to look at a current log of calls. Holy crap, you’d have thought that what’s-his-name from Afghanistan was there in person. The sheriff asked me, “Who are you?” and “Why do you want them?” I said, “My name is John Fearing,” and he said, “You can’t have that, it’s not a public record.” I didn’t get anywhere.<sup>416</sup>

According to Shannahan, the creation of the public access program in the ombudsman’s office was “an effort to increase government awareness and provide the citizens of Arizona an effective and efficient means to get answers and resolve public access disputes” by providing a free service to help people “untangle the

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410. *Id.*

411. *Id.*

412. Hill Interview, *supra* note 320.

413. *Id.*

414. Merkel Interview, *supra* note 249.

415. *Id.*

416. Fearing Interview, *supra* note 242.

public access web.”<sup>417</sup> In a little over two years, the office has unquestionably made inroads with people in government and with citizens to establish itself as a resource for open government matters, issues of public records in particular.

The creation of the public access program in the Arizona Ombudsman-Citizens’ Aide office was largely a legislative matter pushed by the executive director and the lobbyist of the Arizona Newspapers Association, which mostly represents smaller, community-based newspapers. The office was created despite skepticism and the outright lack of support from those who are usually on the same side in access matters, such as the First Amendment Coalition of Arizona, metro newspapers, and citizen representatives who, for one reason or another, were not involved in discussions about creating the program. Opposition from government groups, while presented during consideration of the legislation by a representative of the Arizona School Boards Association, also did not seem to have any impact on shaping the legislation that created the office. This lack of stakeholder involvement and lack of consensus-building at the early stages of the program’s creation would create obstacles that the ombudsman’s office would have to deal with as the program was implemented in 2007.

However, the program appears to have worked as intended for both citizens and people in government, two groups who have historically been the most likely to make public access inquiries to the ombudsman.

## V. RESULTS AND ANALYSIS

After the three case studies were conducted, the author looked for common themes and analyzed them to answer the research questions identified in Section III. Below, each of these questions are addressed. The first examines the implications of these studies on Dispute Systems Design theory; the second examines how these three programs operate as ombuds; and the third applies the lessons learned from the cases and theory to outline best practices for designing a public access ombuds office.

### A. RQ1—Dispute Systems Design

The first research question addresses the Dispute Systems Design theory implications of the case studies. DSD provides a framework both for designing new dispute resolution systems and for evaluating dispute resolution systems that are already in place. The case studies of public access ombuds programs in Iowa, Virginia and Arizona provide illustrations of the design process as these programs were created and implemented.

None of the three states explicitly used a Dispute Systems Design process in the design and creation phase of their public access ombuds programs. As outlined by Costantino and Merchant, the ideal way to design a dispute resolution system to ensure its effectiveness is to involve stakeholders in the process,<sup>418</sup> to

417. 2007 OMBUDSMAN ANNUAL REPORT, *supra* note 307, at 14.

418. COSTANTINO & MERCHANT, *supra* note 21, at 49.

train and educate the stakeholders about resolving disputes,<sup>419</sup> and to constantly evaluate the effectiveness of the system once it has begun.<sup>420</sup>

All three of the public access ombuds programs examined in this study were developed through the legislative process. Of them, only Virginia approached this depth of self-assessment through convening relevant stakeholders, considering multiple options, and building consensus in the design process.

In Iowa, the legislative council and the ombudsman discussed the possibility of adding a new position to handle public records, open meetings, and privacy matters. After a brief consideration about funding for a new position and the new responsibilities of the office, the matter was approved. Stakeholders such as local government groups, law enforcement agencies, citizen advocates, and the news media did not take part in the discussions or in the implementation of the program once the decision was made to fund the new group. Outreach to these groups was not made until after the office began work in 2001, though since then, the ombudsman's office has worked to educate citizens and government employees on both public access matters and how to handle disputes without the assistance of the office. The activities of the public access program have been reviewed each year in the ombudsman's annual reports, and the program was scrutinized further during the 2008 legislative session when a new enforcement agency was being considered as an option for handling public access disputes.

Similar to Iowa, Arizona's public access program was created by legislation that added new duties to an existing ombudsman's office in 2007. Because the creation involved passage of a bill in the legislature, some stakeholders were present for hearings, including the lobbyist and executive director of the Arizona Newspapers Association, the legal advisor to the Arizona School Boards Association, and the ombudsman himself. However, there were several interested organizations that did not participate, or necessarily approve, of these new duties being created in the ombudsman's office. In spite of this, the office has had some success in its implementation phase, largely due to the efforts of the Assistant Ombudsman for Public Access, Elizabeth Hill, who has reached out to stakeholder groups to inform them about the office and to get them to consider it as a resource. Reviews of the program in its first two years were largely positive, though some sources from the news media expressed skepticism about the usefulness of the office as a resource for them.

Virginia's FOI Advisory Council was also a legislative creation, but it came as a result of a two-year study conducted by a legislative subcommittee that involved major stakeholders from government, law enforcement, schools, citizens, news media, and other interested groups. The subcommittee was chaired by Chip Woodrum, a longtime member of the House of Delegates, who encouraged parties with competing interests to seek consensus through informal negotiations. Frosty Landon, who lobbied for and participated in the subcommittee as the head of an advocacy group called the Virginia Coalition for Open Government, recalled the situation: "We had good, strong players, but they weren't there looking for a fight. They wanted to resolve conflict between the press and the government, particular-

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419. *Id.* at 134-35.

420. *Id.* at 168.

ly local government. They wanted some fixes. They wanted to stop seeing such bloody conflict, particularly between the press and the local government.”<sup>421</sup>

Not only were the stakeholders involved in the design of the program, they also reached consensus on all major issues before submitting a proposal to the legislature. This process, which seems to be part of the legislative culture in Virginia, may have helped to train the stakeholders about dispute resolution skills and “joint problem-solving techniques,” which Costantino and Merchant say groups “will need in order to use the system with satisfaction and empowerment.”<sup>422</sup> Once the program officially began work in 2000, stakeholder groups such as the Virginia Coalition for Open Government and the Local Government Attorneys group helped to raise visibility of the council as a resource for inquiries and dispute resolution. The effectiveness office has constantly been evaluated, not just through its annual reports but also through audits of government compliance with open government laws by news media groups.

Considering that the Virginia design and implementation experience closely emulate the tenets of Dispute Systems Design in this area, it is not surprising that it continues to have strong support from stakeholders years after its creation. As Costantino and Merchant note:

When the system’s stakeholders are involved collaboratively in the design process, they become true partners in identifying, understanding, and managing their disputes—and have a more vested responsibility for the successful operation of the conflict management system.<sup>423</sup>

While it may be a product of the legislative culture in Virginia that is difficult to replicate elsewhere, other jurisdictions should strongly consider applying a similar stakeholder process when designing open government dispute resolution programs.

To what extent, then, do the public access ombuds programs themselves reflect the principles of Dispute Systems Design—which call for an interest-based approach to resolving disputes through early identification and intervention in disputes while using low-cost processes and “loop-backs” to less formal options as disputes progress? Because these principles were developed in the organizational dispute resolution context, it is unsurprising that they are perhaps better reflected by an “organizational ombudsman” approach.<sup>424</sup> Rowe notes that in the organizational context, such as ombuds programs in the corporate workplace, ombuds have more facilitative powers such as “shuttle diplomacy” and mediation, with the ability to conduct informal investigations that rarely advance to formal investigations.<sup>425</sup>

The classical ombudsman approach belongs more to the “adversarial dispute resolution” tradition, Gadlin notes, distinguishing it from the voluntariness and flexibility of a more mediation-oriented approach.<sup>426</sup> Rather than taking an inter-

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421. Landon Interview, *supra* note 40.

422. COSTANTINO & MERCHANT, *supra* note 21, at 54.

423. *Id.*

424. See Rowe, *supra* note 11, at 353.

425. *Id.* at 356-57.

426. Gadlin, *supra* note 6, at 42.

est-based approach, which would allow the parties more flexibility to create solutions outside of the legal framework, a classical ombuds focuses more on dealing with parties' rights.<sup>427</sup>

The public access ombuds programs clearly fall more into the classical ombuds conceptualization, particularly when it comes to ensuring the legal rights and duties created by the open government laws are followed. The somewhat legalistic approach is not typical for ombuds. Maria Everett, the executive director of the Virginia FOIA Council, is an attorney, and her legal knowledge and skills were praised by sources as key to her effectiveness. Hill is the only attorney in the Arizona ombudsman's office, and sources said having an attorney in this position was necessary. One source in Iowa, while praising public access ombuds Angela Dalton, also expressed a desire that the public records, open meetings, and privacy position be filled by an attorney to address the complex legal issues involved. Representatives from each office described their role as advocates for the open government laws, a rights-based approach which seems to supersede the interests of parties disputing public access matters and may overlook power issues between the parties. This focus on rights fulfills just one of the three major issues Ury, Brett and Goldberg identified as essential for effective dispute resolution systems.<sup>428</sup>

However, the public access ombuds programs also embrace some of the Dispute Systems Design principles more common in organizational ombuds programs. Each of the offices operates at no cost, a benefit not only for citizens seeking help but also for people in government to be provided free training and free educational materials. Further, each office emphasizes the importance of handling inquiries at an informal level as much as possible. Beginning with training, the ombuds programs try to educate both the public and government employees about freedom of information matters to avoid confusion and disputes in the future. When disputes arise, the programs prefer to resolve matters through informal investigation, with most matters resolved in a short period of time after making phone calls and answering questions. This kind of informal facilitation could, if the dispute was not resolved, result in a more formal investigation or a written advisory opinion, though the offices viewed these as a last resort option and a less-than-desirable outcome. While loop-backs from more formal processes to less formal processes were not evident, the public access ombuds programs are able to remain flexible in serving the needs of disputing parties.

Another issue complicates the evaluation of the public access ombuds programs, particularly in Iowa and Arizona. In Virginia, the FOIA Council is the only formal dispute resolution option available for parties with open government issues that does not involve filing a lawsuit. Iowa and Arizona, on the other hand, have attorneys general with the power to prosecute violations of open government laws, and both have made some efforts at enforcement; Arizona's attorney general mostly deals with meetings issues with its OMLET, while Iowa's attorney general

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427. *Id.* at 42-43.

428. URY ET AL., *supra* note 19, at 15-18.



has recently assigned investigation and enforcement duties on freedom of information law matters to an assistant attorney general.<sup>429</sup>

While the public access ombuds programs in Iowa and Arizona often serve as a primary point of contact on open government matters, people can seek the aid of the attorney general in addition to, or instead of, going to the ombudsman's office. The more formal enforcement options available at the attorney general's office are not necessarily coordinated with the operations of the public access ombuds program, meaning disputes may not begin with the less formal options offered by the ombuds.

The public access ombuds programs in Iowa, Virginia, and Arizona do not reflect all the tenets of Dispute Systems Design, but they do illustrate some of the important principles that should be considered when creating a dispute resolution system, particularly in the open government context. The attention Virginia paid to involving stakeholders and seeking consensus while creating its Freedom of Information Advisory Council seems to have paid off in the stakeholders' efforts to support the program as it began work and tried to build trust with both the public and the government. The emphasis each program places on training and education can work as a dispute avoidance mechanism, one important way for these programs to be an effective resource on public access matters at a very informal, low-cost level. Additionally, the programs' attempts to manage disputes at an informal level as much as possible makes them more efficient resources for parties with public access inquiries or complaints, allowing a more flexible approach even while the programs remain committed to ensuring the rights and duties established by the open government laws are handled properly. Still, a level of formality may be necessary to ensure that the complex legal issues involved are handled in a way that can vindicate the public policy underlying open government laws. Thus, having an attorney serving as public access ombuds is advisable.

### *B. RQ2—Evaluating Public Access Ombuds Programs*

The three ombuds programs examined in this study seem to fit into the conceptualization of the classical ombudsman. All three programs were established by statute and created to be independent and impartial reviewers of inquiries and complaints about public access matters. The Iowa and Arizona programs were built into ombuds offices that were already in existence; the heads of these programs, Iowa Citizens' Aide/Ombudsman, Bill Angrick, and Arizona Ombudsman-Citizens' Aide, Patrick Shannahan, are both members of the United States Ombudsman Association and mentioned the organization as providing guiding principles for their respective offices. Angrick was on the standards committee of the association that adopted these guidelines in 2003. The Virginia Freedom of Information Advisory Council was not formally created as a "classical ombudsman" office; the words "ombuds" or "ombudsman" do not appear in the statute that created it, though the word was often used in discussions during the legislative study group that recommended creation of the office. However, by its establish-

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429. Hill Interview, *supra* note 320; Iowa Department of Justice, Office of the Attorney General, *Ensuring Open Government* (Dec. 30, 2008), [www.state.ia.us/government/ag/latest\\_news/releases/dec\\_2008/Ensuring\\_Open\\_Government.html](http://www.state.ia.us/government/ag/latest_news/releases/dec_2008/Ensuring_Open_Government.html).

ment as an independent agency with similar powers and duties as the Iowa and Virginia programs, and by executive director Everett's own description the council "serving as an ombudsman" on open government matters,<sup>430</sup> the Virginia FOIA Council also fits into the "classical ombudsman" conceptualization.

The case studies of these three offices revealed that each aims to comport with these standards, but that some issues have arisen as they try to follow them in the context of handling inquiries and complaints in public access. The studies did not specifically address confidentiality of the complaint process, though the Iowa and Arizona programs allow the offices to provide confidentiality to complainants;<sup>431</sup> in Virginia, sources confirmed the council and staff could provide confidentiality as well. The other three standards—*independence, impartiality and credibility of the review process*—are addressed in more detail below.

### *1. Independence*

All three of the ombuds programs have safeguards in place to ensure they are free of control or persuasion by other political bodies, and nearly every source interviewed agreed these offices had succeeded in being politically independent. As the Arizona and Virginia programs were being considered in the legislation process, the executive and judicial branches of government were rejected as possible homes for the programs because of the potential of political interference. The independent reputation of the already-existing ombuds offices in Iowa and Arizona made them natural homes to provide independent oversight of public access matters.

Each program is located in the legislative branch, meaning each technically serves in the same branch of government that created it. All three ombuds programs serve as advisors to the legislature on public access matters, and as the programs have developed, they have increasingly proposed legislation to solve problems with loopholes and exemptions and other procedural and substantive matters in the open government laws.

Further, the hiring and firing of personnel remain in the discretion of each agency; Shannahan and Angrick have the power to control these decisions without outside influence in Arizona and Iowa, respectively, while the 12-member Virginia Freedom of Information Advisory Council has the power to hire its employees, including the executive director. The heads of the Iowa and Arizona ombuds programs are also chosen through bipartisan committees, with Iowa using the legislative council to appoint the citizens' aide to a four-year term,<sup>432</sup> and Arizona using an "Ombudsman-Citizens' Aide selection committee" to hire a person to serve a five-year term.<sup>433</sup> The 12 members on Virginia's council include a broad array of political and non-political appointees who serve four-year terms.<sup>434</sup>

The main concern for each office is continued funding, particularly in a time of shrinking state budgets. The programs are small—Iowa has one assistant om-

430. VA. H. DOC. NO. 25, *supra* note 69, at 2.

431. See IOWA CODE ANN. § 2c.9(4) (2009); see also ARIZ. REV. STAT. ANN. § 41-1376(A)(3) (2008).

432. IOWA CODE ANN. §§ 2c.3, 2c.5.

433. ARIZ. REV. STAT. ANN. §§ 41-1373, 41.1375(C).

434. VA. CODE ANN. § 30-178(B)-(C) (2009).

budsman, Virginia has one-and-a-half positions, and Arizona has two positions—and operate on annual budgets of \$200,000 or less. None of the sources interviewed thought the programs would be targeted during budget cuts, though sources in Arizona mentioned hiring freezes were a possibility in the ombuds office there.

## 2. Impartiality

In its nine years of existence, the Virginia Freedom of Information Advisory Council has built a strong reputation for being fair and even-handed in handling inquiries, conducting investigations, and writing opinions. Every source interviewed affirmed this, mentioning it as essential in the council's success as a resource on open government matters. In her early outreach efforts, Everett had to establish the council as an impartial agency on open government matters, particularly to government employees and representatives. After a hostile reception at a conference of local government attorneys in the first year of the program, Everett penned an article in early 2001 aimed at people in local government entitled "Friend or Foe? The Virginia Freedom of Information Advisory Council."<sup>435</sup> The article noted the council's goal of providing an independent resource for handling open government matters for anybody, whether from government, media, or the public, but it particularly emphasized what the council offered to government employees and officials. This and other outreach efforts were critical developments in Virginia, leading sources from both government and news media to praise Everett and her efforts.

Sources generally praised the efforts of the primary contacts in the Arizona and Iowa programs—Elizabeth Hill and Angela Dalton, respectively—to handle public access inquiries and complaints. However, sources expressed concerns about the impartiality, either real or perceived, of the approaches in these programs. In Arizona, sources generally said it was too early to gauge the impartiality of the public access program, though a couple of representatives for the news media expressed concerns that the program may lean toward the government perspective too often. The opposite was the case in Iowa, with every source outside the ombudsman's office expressing a perceived bias against government agencies by the program. "It appears because they tend to side with citizens long before they talk to the public body with whom they have a beef," said Mary Gannon, who represents the state school board association. "The office comes across as significantly biased."

Dalton and Angrick both expressed their desire to approach public access cases in Iowa impartially, and it is reasonable to assume outside perceptions that believe the program favors citizen and media complainants stem from the structure of the state's open government laws, which presume records and meetings to be open and require government agencies to give specific reasons for exempting records or closing meetings. In these cases, being an impartial advocate of the law could mean being perceived as the open government police, who only come calling when a complaint has been made. Dalton and Angrick also both touted the

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435. Everett Interview, *supra* note 62.

program's availability as a resource to government agencies, which make inquiries to and receive training on public access matters from the ombudsman's office.

Any perceptions that the public access ombuds programs are partial in their approach will make it difficult for them to perform their duties effectively. A program perceived as being biased will face grave challenges when it comes to voluntary compliance and having its recommendations taken seriously.

### *3. Credibility of Review Process*

Any perceived lapses in independence or impartiality will necessarily implicate the credibility of an ombuds program as it handles inquiries and complaints. As Gadlin noted:

[W]ith no formal authority to compel compliance, the effectiveness of the ombudsman's advocacy depends to a very large extent on the respect that the office and the person command as well as on the independence of the office—its ability to be free of direct attempts at political influence.<sup>436</sup>

Each of the three public access ombuds programs in this study have made efforts to build credibility among the parties who are most commonly involved in open government disputes. Through their education and training missions, each program has had its agents with the lead public access duties—Everett in Virginia, Dalton in Iowa, Hill in Arizona—involved in outreach efforts, which can help build relationships between the people in the ombuds program and the people most likely to use it as a resource. Any concerns about the council's impartiality in Virginia were met forcefully in its earliest days. When local government groups in Virginia expressed skepticism about Everett and the FOIA Council, she made several direct overtures to assure them the council was intended to be an impartial resource, not an advocate for citizens or news media.<sup>437</sup> A similar forceful, persuasive response to skeptics from the programs in Iowa and Arizona could help build the credibility of those offices.

All three programs prefer to operate at an informal level first, conducting inquiries by phone and trying to avoid escalation to more formal investigations. Once cases reach a formal level, each program has the powers of a classical ombudsman to issue public recommendations and to seek voluntary compliance. The offices in Iowa and Arizona have another option, one that is unavailable in Virginia. The attorneys general in Iowa and Arizona have taken on enforcement authority in public access matters and have made pledges to pursue violations of open government laws. In these states, the ombuds programs have worked to coordinate with the attorney general when enforcement may be necessary. The effectiveness of these enforcement options is unclear. Iowa's attorney general only recently announced its intentions to cooperate with the ombudsman on open government matters. Arizona's attorney general does not have formal enforcement authority on public records matters, and the public access program is still in its early years of coordinating with the office on open meetings matters.

436. Gadlin, *supra* note 6, at 42.

437. Everett Interview #2, *supra* note 62.

The only state in which sources did not express concerns about compliance or credibility was Virginia, which is without the attorney general to turn to as an enforcement option. The FOIA Council appears to have established itself as the authoritative voice on open government matters in the state, and those who come to it as a resource seem to be satisfied with its advice and decisions. Some situations still end up in litigation, but sources said these were usually the kinds of cases focused on narrow legal issues which required more formal judicial interpretation; for example, one source mentioned an outlier case involving a closed meeting about a three-way contract with a school board, a county board, and an architectural firm that went to the Virginia Supreme Court.<sup>438</sup>

Building a similar level of credibility would be ideal for the programs in Iowa and Arizona. When a program lacks this kind of credibility, as the Iowa experience shows, stakeholders may work to create another option, such as the independent open government enforcement agency that was supported by several groups and considered by the legislature in 2008.

While the public access ombuds programs in Iowa, Virginia, and Arizona all are formally representative of the “classical ombudsman” concept, in practice, they may actually have elements more representative of other kinds of ombuds offices. For example, the experience recounted by several sources in Iowa makes the public records, open meetings, and privacy duties appear to be more like an “advocate ombudsman,” one that becomes an advocate once it finds violations have occurred. When this happened, one commentator notes, it can cause “an adversarial situation to develop with those being investigated.”<sup>439</sup>

While its development seems to fit into the major standards outlined for being a “classic ombudsman,” Virginia’s Freedom of Information Advisory Council may in fact be distinct from the Iowa and Arizona programs because it is more of a “quasi ombudsman,” a term one researcher used to describe a uniquely American phenomenon of an office being created to “perform functions similar to those of an ombudsman” without the same structural requirements of a “true ombudsman.”<sup>440</sup> The Virginia program was modeled after New York’s Committee on Open Government, an agency in the executive branch that does not refer to itself as an ombuds office but has similar powers to answer inquiries, conduct informal and formal investigations, and write advisory opinions.<sup>441</sup>

Regardless of categorization or nomenclature, the public access programs in Iowa, Arizona, and Virginia have made important contributions to the understanding of open government laws in each state. Equally, they have provided valuable services to citizens, government, and journalists. These programs are at their best when they are perceived to be independent, impartial, and credible agencies for people to turn to when open government issues arise. The long-term effectiveness of these programs will hinge on the extent to which they can be seen as an authoritative source in public access matters.

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438. See *White Dog Publ’g, Inc. v. Culpeper Cnty. Bd. of Supervisors*, 634 S.E.2d 334 (Va. 2006).

439. Hill, *supra* note 7, at 37. Hill noted an orientation toward citizen advocacy despite the fact that the ombudsman was not supposed to be a citizens’ advocate in Hawaii. *Id.* at 34.

440. *Id.* at 36.

441. N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 2009).

*C. RQ3—Best Practices for Designing a Public Access Ombuds Program*

After interviewing two dozen sources closely involved in public access matters, conducting case studies of public access ombuds programs in Iowa, Virginia, and Arizona, and in light of the tenets of Dispute Systems Design theory, the following recommendations for best practices in designing a public access ombuds office became evident.

*1. Involve Stakeholders in the Design*

Dispute Systems Design suggests that stakeholders—the people most impacted by a dispute processing system—should have a significant role in evaluating the need for a new system and in designing that system.<sup>442</sup> Of the three public ombuds programs examined in this study, only Virginia engaged in a thorough stakeholder evaluation and design process at the front end, and it appears to be more successful than Iowa and Arizona in terms of stakeholder satisfaction with the system and in stakeholder use of the system. Bringing major players in disputes to the table—citizen advocates, news media organizations, state and local government representatives, and others who are interested in access to public records and meetings—and building consensus on an approach to access policy seems to have worked out well in Virginia. This level of consensus also helps to build confidence in the system in its early years, when buy-in by stakeholders is crucial to the long-term success of the program.

It may seem obvious that people are more likely to appreciate and participate in a system they have helped to design. However, this does not appear to have been considered when public access ombuds programs were created in other jurisdictions. Rather, as showed by Arizona, the more traditional process of lobbying and legislation pursued by John Fearing and the Arizona Newspapers Association seems to be the norm. When stakeholders are not involved at all, as was the case in Iowa, there may be growing discontent among stakeholders on the goals and procedures of the ombuds program, and there may be perceptions, accurate or otherwise, about the way the program intends to process disputes. While a more thorough stakeholder process in the Iowa legislature failed to come up with consensus on a new program in the 2008 legislative session, the eager participation by several interest groups signaled dissatisfaction with the current system of handling disputes on public access manners in the ombudsman's office.

*2. Ensure Impartiality*

The concern most often voiced by sources interviewed in Iowa was that the ombudsman's office was not impartial, violating one of the central tenets of ombuds programs. Though sources within the ombudsman's office denied this was the case, the appearance of partiality by the office in favor of citizen complaints—noted by advocates for both news media and government organizations—is a fatal flaw for an ombuds office.

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442. See COSTANTINO & MERCHANT, *supra* note 21, at 49.

Part of the difficulty is housing the public access ombuds program within a larger ombuds office that includes “citizens’ aide” as part of its title, as is the case in both Arizona and Iowa. Government employees perceive an organization serving as “citizens’ aide” as leaning toward citizen advocacy, thus they may expect undue hostility from that organization. This is the case even if the organization intends to be impartial, holds itself out as impartial, and tries to act in an impartial manner. The appearance of partiality is almost as damaging as actual partiality because it negatively impacts use of the office by government groups and, perhaps more importantly, it can lead them to doubt the legitimacy of the ombuds program’s findings and recommendations. For an office that has no formal enforcement authority and relies on voluntary compliance, stakeholder acceptance of these findings and recommendations is essential.

Each of the three public access ombuds programs has made efforts to hold itself out as an impartial resource for anybody with a question or complaint about public access matters, and years of data show citizens and government are the primary users of these programs in each jurisdiction, combining to make up more than 80 percent of the inquiries in Virginia and more than 90 percent of the inquiries in Arizona.<sup>443</sup> While these are good signs for the programs, they still must be able to encourage cooperation with their recommendations to be effective. Sources in Iowa and Arizona complained about government agencies that refused to cooperate with the ombuds’ advice, but sources in Virginia did not perceive the same problem. The structure of Virginia’s FOI Advisory Council—as more of a quasi-ombuds program which can give informal advice and engage in telephone diplomacy but does not have the power to conduct investigations—is more likely to encourage cooperation by government agencies, which may not feel as threatened as they would by a more traditional ombuds. Jurisdictions should strongly consider the quasi-ombuds approach of Virginia and New York that eschews formal investigative powers and instead calls for answering inquiries, informally mediating disputes, and writing non-binding advisory opinions when considering options for creating a new public access ombuds program.

Creating a program that is specifically designed to address public access matters also has its benefits. Because the Iowa and Arizona programs were housed in existing ombuds offices, they came with the expectations and perceived “citizens’ aide” role attached to that structure. Virginia’s experience as an independent, public-access-specific program enhances its perception as an authoritative, impartial resource for any citizen, government employee, or journalist who has a question about an open government law dispute.

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443. See Appendix B: Inquiries and Requests from the FOI Ombuds Offices. The Iowa ombuds office does not keep records of requests categorized by requester, but sources agreed that news media were in the minority of requesters. Kathleen Richardson, former executive director of the Iowa Freedom of Information Council, said she was “aware of relatively few cases where journalists went through the ombudsman’s office.” Richardson Interview, *supra* note 80. In 2007, Dalton wrote, “Most of our cases stemmed from citizen complaints. A few complaints came from journalists.” Dalton, *supra* note 160, at 3.

### 3. Choose a Strong Leader

Sources interviewed in every jurisdiction emphasized the need for strong leadership in the program. The Virginia FOI Advisory Council's selection of Maria Everett as executive director was universally praised, and every source interviewed in Virginia said this was a critical step in ensuring the program's success. Arizona Ombudsman Patrick Shannahan said he was also seeking a strong leader when he hired Elizabeth Hill to be the assistant ombuds for public access, and Iowa Ombudsman Robert Angrick and other sources praised Angela Dalton's work as the assistant in charge of Public Records Open Meetings and Privacy.

However, different dynamics shape these offices, meaning there is a different role for the leader in each. As executive director of the FOI Advisory Council, Everett is in charge of day-to-day operations and is seen as the face and voice of the council. The council itself comes to decisions on advisory opinions, but it is Everett who fields most of the phone calls and who coordinates most of the training for the program. Her forceful personality and her depth of knowledge in public access matters are widely respected, giving her and the council a sense of authority when inquiries are made. As Schrad said about Everett:

She's very independent in her thinking, and she doesn't look to protect anybody or any group in particular. The litmus test for her is, 'Does it comply with the law?' She does a very good job of researching issues rather than rushing to judgment. She's very professional, very forthcoming, and very exacting in her assessment of situations. She knows our FOIA act inside and out, and I trust her and her understanding of FOIA policy.<sup>444</sup>

Hill appears to be building a similar level of authority in her less than two years as the lead ombuds on public access matters. Hill works in the ombudsman's office and reports to Shannahan, but she is largely free to conduct matters as she sees fit.

Dalton is in a different organizational structure in Iowa ombudsman's office, one that makes her role more challenging. Because she is one of several assistant ombuds who handle public access matters, there is no one person of authority for people with inquiries to consult with in Iowa. This could diminish the effectiveness of the office.

Further, one source<sup>445</sup> noted the lead ombuds in charge of public access matters in Iowa should be an attorney because of the complexity of the freedom of information laws in the state. Sources in both Virginia and Arizona cited the importance of Everett and Hill being attorneys in serving their roles. Because an attorney has both a depth of experience in the analysis and application of laws, and because an attorney has a more easily apparent credibility in dealing with legal matters, public access ombuds offices should strongly consider requiring leaders to be attorneys.

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444. Schrad Interview, *supra* note 60.

445. The source, a representative of an organization of government bodies, requested to remain confidential. Confidential Source #3 Interview, *supra* note 209.



Each of the three leaders in the case studies had some background in public access matters before being elevated to their ombuds positions. Dalton had some background in dealing with public records in her career as a law enforcement officer; Everett had experience drafting the laws and serving on the legislative council considering revisions to the public access laws; and Hill had experience as an assistant attorney general dealing with public meetings disputes. However, sources generally said that a specific background in freedom of information matters was not a necessity for serving as a public access ombuds. More important were general legal knowledge and experience, the ability to do outreach and training, and skills as both a mediator and a decision-maker that can be respected by disputing parties.

#### *4. Get Stakeholders Invested Early*

Stakeholder involvement in the design process is an essential element in ensuring that they have an opportunity to provide their input and experience and to make sure their voices are heard and considered as a dispute system is created. This kind of process will help to ensure that the stakeholders support, use, and promote the dispute system once it has been established.

However, stakeholder involvement should not stop there. Public access ombuds programs should immediately reach out to potential users and establish themselves as an independent and impartial resource on public access matters. This is an essential step toward establishing the office as the authority to turn to for public access inquiries or when disputes arise.

In the case studies, sources gave several examples of the value of outreach and building stakeholder buy-in. Dalton mentioned her early outreach efforts through training sessions and at a booth at the State Fair as ways of connecting with potential users of the Iowa ombudsman's office. In Virginia, when Everett sensed concern about the office's impartiality from local government attorneys, she worked to address their concerns by speaking at their conferences and penning an article touting the benefits of the FOI Advisory Council for government groups. Further, the Virginia Coalition for Open Government secured funding to help promote the council by printing informational posters in its first year of existence. In Arizona, Hill offers numerous information sessions throughout the state, regularly writes in the ombudsman's newsletter, and she wrote introductory letters and press releases announcing the creation of the program in its early days. These efforts to build credibility with potential users of the office should, in the long term, help them establish themselves as their respective states' authority on public access issues.

#### *5. Emphasize Training and Education*

Perhaps the greatest difference between traditional ombuds offices and the public access ombuds programs is the training mission. Each public access ombuds program examined here takes a proactive approach to conflict management, offering educational sessions to various groups of citizens, news media, government employees, students, and others to build a culture of knowledge and understanding about freedom of information laws and how they are supposed to work.

Every source interviewed agreed the training mission was a crucial one for public access ombuds programs. Besides being another way for the public access ombuds to reach out and build connections with stakeholders and potential disputants who could turn to the office in the future, training can lead to fewer conflicts in the future by building the knowledge base among stakeholders about freedom of information matters.

Training is not only conducted by the public access ombuds, nor should it be. However, to ensure people are receiving a consistent message about the role and importance of government openness, the public access ombuds should reach out to advocacy organizations, both those representing government interests and those representing citizen and news media interests, to offer assistance or to take part in joint training sessions. This is an area in which the more formalized ADR system in an ombuds office can work in conjunction with less formal channels of dispute resolution involving knowledgeable experts in organizations to build trust and knowledge among potential disputants. Publication of handbooks and newsletters on public access matters for the public are another way ombuds programs can build knowledge about freedom of information laws.

### *6. Periodically Evaluate the Program*

Costantino and Merchant recommend that dispute systems build in a mechanism for regularly evaluating their effectiveness and performance, thus allowing modifications as circumstances demand over time.<sup>446</sup> Each of the public access ombuds programs reviewed in this study generates annual reports detailing the activity of the office from the prior year, but no other formal mechanisms to evaluate effectiveness are in place.

Outside investigations, such as compliance audits typically conducted by news media organizations, also provide an alternate route for evaluation of a program's effectiveness. In Iowa, Arizona, and Virginia, people in the ombuds office admitted to keeping a close eye on these audits and use them to gauge effectiveness of the office. However, while these independent investigations have value, they are more relevant to understanding how public officials apply freedom of information laws rather than the function of the ombuds office in particular. Regular surveys of public access ombuds program users, similar to one reviewing Indiana's Public Access Counselor in 2006 conducted by the Indiana Coalition for Open Government and the Indiana University School of Journalism,<sup>447</sup> would help programs understand the interests and needs of users.

## V. CONCLUSION

By following the six aforementioned recommended best practices for creating a public access ombuds program, jurisdictions can move closer to creating a flexi-

446. COSTANTINO & MERCHANT, *supra* note 21, at 168.

447. YUNJUAN LUO & ANTHONY L. FARGO, MEASURING ATTITUDES ABOUT THE INDIANA PUBLIC COUNSELOR'S OFFICE: AN EMPIRICAL STUDY (2008), [indianacog.org/files/PAC\\_final2.pdf](http://indianacog.org/files/PAC_final2.pdf). In the survey of 120 people who had used the program, 68.3 percent rated their experience with the office as "excellent" or "good," and more than 90 percent said they wanted the Public Access Counselor to have enforcement powers. *Id.*

ble and impartial office that serves the interests of all stakeholders—citizens, government, and news media—who in turn would be more likely to use, promote, and support the program. A program with this kind of support can build its reputation over time, establishing itself as the authority for people to turn to when questions about freedom of information matters arise. Such an office would not necessarily serve as an alternative to litigation, but it could help to create a culture of knowledge and trust among sunshine law disputants. Conflict may be avoided through effective training of potential disputants, and the destructive elements evident in the conflict among parties in public access matters could be addressed in a more constructive manner.

Transforming the long-standing conflict between people seeking access to information and those who control information is a difficult challenge requiring long-term commitments by all parties; improvement of public access dispute resolution systems is one important step in the right direction. Though public access ombuds programs are just one avenue for jurisdictions to consider, the states examined in this study have shown that, if such programs are designed, implemented, and administered properly, they have great potential to serve the needs of disputants and improve the culture of conflict.

## **Appendix A: Sources Interviewed for the Case Studies**

### Iowa

William P. Angrick II, Citizens' Aide/Ombudsman – Jan. 9, 2009

Angela Dalton, assistant ombudsman for public records, open meetings and privacy – Jan. 14, 2009 and Feb. 12, 2009

Mary Gannon, counsel for Iowa Association of School Boards – Feb. 17, 2009

Kathleen Richardson, director, Drake University School of Journalism and Mass Communication, former executive secretary of the Iowa Freedom of Information Council – Feb. 3, 2009

Terry Timmins, general counsel for the Iowa League of Cities – March 5, 2009

Confidential Source #1, attorney working with local government entities – Feb. 3, 2009 and Feb. 6, 2009

Confidential Source #2, source working with local government entities – Feb. 5, 2009

Confidential Source #3, attorney working with local government entities – Feb. 13, 2009

### Virginia

Maria J.K. Everett, executive director, Virginia Freedom of Information Advisory Council – Aug. 27, 2008 and Jan. 7, 2009

John W. Jones, the executive director of the Virginia Sheriff Association – Feb. 19, 2009

Forrest M. "Frosty" Landon, current council member of Virginia Freedom of Advisory Council and former executive director of the Virginia Coalition for Open Government – Feb. 2, 2009

Leo W. Rodgers, county attorney for James City County – Feb. 26, 2009

Dana Schrad, executive director of the Virginia Association of Chiefs of Police – Feb. 19, 2009

Ginger Stanley, counsel to the Virginia Press Association – Feb. 6, 2009

Roger C. Wiley, current council member of Virginia Freedom of Information Advisory Council and attorney for several local government entities – Feb. 9, 2009

Arizona

Daniel C. Barr, media law attorney, partner at Perkins Coie – Feb. 24, 2009

Paula Bickett, assistant attorney general and member of the Public Records Task Force – Feb. 24, 2009

David Cuillier, assistant professor, University of Arizona School of Journalism, and national chairman of the Freedom of Information committee of the Society of Professional Journalists – Jan. 30, 2009

John Fearing, deputy executive director, Arizona Newspapers Association – Feb. 11, 2009

Elizabeth Hill, assistant ombudsman for public access, Arizona Ombudsman-Citizens' Aide – Feb. 4, 2009

David Merkel, general counsel for Arizona League of Cities and Towns – Feb. 11, 2009

Chris Munns, assistant attorney general and member of the Open Meetings Law Enforcement Team – Feb. 24, 2009

Patrick Shannahan, Arizona Ombudsman-Citizens' Aide – Feb. 23, 2009

Chris Thomas, director of legal services and general counsel for the Arizona School Boards Association – Feb. 18, 2009

**Appendix B:  
Inquiries and Requests from the FOI Ombuds Offices**

**Table 1 – Annual Contacts at the Iowa Office of Citizens’ Aide/Ombudsman for Public Records, Open Meetings and Privacy Matters.**

| Year | Total Contacts | Complaints | Information Requests |
|------|----------------|------------|----------------------|
| 2003 | 163            | 118        | 45                   |
| 2004 | 179            | 111        | 68                   |
| 2005 | 247            | 141        | 106                  |
| 2006 | 266            | 167        | 99                   |
| 2007 | 295            | 197        | 98                   |
| 2008 | 289            | 181        | 108                  |

Source: Iowa Office of Citizens’ Aide/Ombudsman<sup>448</sup>

**Table 2 – Sources of Inquiries Made to the Virginia Freedom of Information Advisory Council**

|       | Public     | Government | News Media | Other*   | Total |
|-------|------------|------------|------------|----------|-------|
| 2000  | 54 (38%)   | 54 (38%)   | 33 (23%)   | 0 (0%)   | 141   |
| 2001  | 365 (44%)  | 295 (35%)  | 179 (21%)  | 0 (0%)   | 840   |
| 2002  | 339 (34%)  | 465 (47%)  | 165 (17%)  | 21 (2%)  | 990   |
| 2003  | 313 (31%)  | 472 (47%)  | 198 (20%)  | 18 (2%)  | 1001  |
| 2004  | 397 (33%)  | 616 (52%)  | 145 (12%)  | 32 (3%)  | 1190  |
| 2005  | 627 (38%)  | 756 (46%)  | 209 (13%)  | 60 (4%)  | 1652  |
| 2006  | 611 (35%)  | 845 (49%)  | 232 (13%)  | 53 (3%)  | 1741  |
| 2007  | 628 (37%)  | 854 (50%)  | 167 (10%)  | 46 (3%)  | 1695  |
| 2008  | 649 (39%)  | 828 (49%)  | 208 (12%)  | 0 (0%)   | 1685  |
| TOTAL | 3983 (36%) | 5185 (47%) | 1536 (14%) | 230 (2%) |       |

\*Other includes out-of-state contacts, which were included as a separate category in annual reports from 2002 to 2007.

Source: Annual Reports of the Virginia Freedom of Information Advisory Council

**Table 3 – Public Access Inquiries to Arizona Ombudsman-Citizens’ Aide**

| Year  | Government (pct) | Citizens (pct) | Media (pct) | Total |
|-------|------------------|----------------|-------------|-------|
| 2007  | 138 (38%)        | 198 (54%)      | 32 (9%)     | 368   |
| 2008  | 231 (36%)        | 351 (55%)      | 54 (9%)     | 636   |
| TOTAL | 369 (37%)        | 549 (55%)      | 86 (9%)     | 1,004 |

Source: 2007 Annual Report of the Arizona Ombudsman-Citizens’ Aide and interviews with Ombudsman-Citizens’ Aide Patrick Shannahan

448. OMBUDSMAN’S REPORT 2005, *supra* note 158, at 2.