
Scott Kimberly

Harding University, wkimberl@harding.edu

Follow this and additional works at: https://scholarworks.harding.edu/tenor

Part of the History Commons

Recommended Citation


Available at: https://scholarworks.harding.edu/tenor/vol1/iss1/8

This Article is brought to you for free and open access by the College of Arts & Humanities at Scholar Works at Harding. It has been accepted for inclusion in Tenor of Our Times by an authorized editor of Scholar Works at Harding. For more information, please contact scholarworks@harding.edu.
TOWARDS AN OPEN GOVERNMENT:
THE CONFLICT BETWEEN CITIZENS-ONLY PROVISIONS AND THE CURRENT TREND OF PUBLIC ACCESS

by Scott Kimberly

"Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed kings."1

The public availability of government information is a fundamental tenet upon which democracy rests.2 The Founding Fathers recognized the importance of government access, and that right has persistently influenced government operations throughout American history.3 As American government expanded in the early twentieth century, the public right to government information sparked a demand for government transparency.4 In 1966, Congress codified that right by enacting the Freedom of Information Act.5 Following the passage of the Freedom of Information Act, every state that did not already have an open records law adopted its own version of the Act. The congressional effort to promote government access, and the numerous amendments that followed, demonstrate a trend towards open and accessible government that persists in federal, state, and local governments.

The trend towards open government has its genesis in legislative action, both in federal and state governments. At the federal level, Congress passed the Freedom of Information Act in 1966, responding to the increased size and complexity of the administrative state.6 The Act codified the public's right to access government records, a right which, at that time, had yet to receive

---

6 Catherine Cameron, "Fixing FOIA: Pushing Congress to Amend FOIA Section B(3) to Require Congress to Explicitly Indicate an Intent to Exempt Records from FOIA in New Legislation," Quinnipiac L. Rev. 28 (2010): 856.
adequate protection under the law.\textsuperscript{7} Congress subsequently amended the Freedom of Information Act several times to ensure that the Act functions properly in contemporary society.\textsuperscript{8} Every time Congress amended the Act, it reinforced the principle upon which the Act rests: that the public has a right to access information from the government.\textsuperscript{9} State legislatures promptly followed Congress’s lead in protecting the public’s right to access government information.\textsuperscript{10} Indeed, any state that did not have an open records law prior to the passage of the Freedom of Information Act passed such a law shortly after.\textsuperscript{11} In the early twentieth century, the right to access public records received little recognition under the law. Following passage of the Freedom of Information Act, that right received increased government protection in both state and federal governments. The increased protection given to the right to access public records, which originated in legislative bodies, demonstrates a trend in favor of open government.

Despite the trend towards open government, some states maintain restrictions on the ability to access state records.\textsuperscript{12} The Virginia Freedom of Information Act, for example, provides that, “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth,” (emphasis added), effectively allowing the state to limit records access to citizens of Virginia.\textsuperscript{13}

\textsuperscript{7} Prior to enactment of the FOIA, the Administrative Procedure Act claimed to protect the public right to access government records. However, the Administrative Procedure Act insufficiently protected that right, an insufficiency that spurred the enactment of the FOIA.

\textsuperscript{8} See, e.g., 1974 FOIA Amendments (passed to ensure efficient access to government records in the wake of the Watergate scandal); 1976 FOIA Amendment (passed in conjunction with the Government in Sunshine Act); 1986 FOIA Amendment (passed to address fees charged by different categories of requesters and the scope of access to law enforcement and national security records); 1996 Amendment (passed to modernize the FOIA in regards to disclosure of electronic records).


\textsuperscript{10} Roger Nowadzky, “A Comparative Analysis of Public Records Statutes,” \textit{Urban Lawyer} 28 (1996): 65-66 (noting that, following the passage of FOIA, each state that did not already have an open records statute adopted its own version of the FOIA and that the majority of states have adopted an open records approach similar to the FOIA).

\textsuperscript{11} Ibid.

\textsuperscript{12} Ibid. at 76 (highlighting state restrictions on public access, which include limiting access to “citizens” or “persons” or establishing a balancing test to weigh the purpose for disclosure with public interest considerations).

\textsuperscript{13} Va. Code Ann. § 2.2-3704.
The recent case of McBurney v. Young, decided by the Fourth Circuit Court of Appeals in February 2012, brought the constitutionality of citizens-only provisions to the forefront of open government law. In McBurney, the State of Virginia denied records access to a requestor based in part on the fact that the requestor was not a resident of Virginia, and therefore was not entitled to access under the Virginia Freedom of Information Act. The requestor challenged the constitutionality of the citizens-only provision under the Privileges and Immunities Clause of Article IV of the United States Constitution, claiming, among other things, that the provision interfered with his right to participate in a democratic government. The Fourth Circuit upheld the constitutionality of the provision.

The Fourth Circuit’s decision to uphold the citizens-only provision in the Virginia Freedom of Information Act permits the state to deny records access based solely on the residency of the requestor, a decision that seemingly conflicts with the aforementioned trend towards open and accessible government. The advent of open government laws in the middle of the twentieth century codified the right of the people to access government information and the subsequent development of state open government laws evinced a trend in favor of broad disclosure of government records. In order for the United States to advance the public right to government information and continue the trend towards open and accessible government, any states that maintain a citizens-only provision in their open records laws must either abolish or decline to enforce those provisions, thereby promoting effective government and encouraging the free flow of information to the people.

I. The Public Right to Government Information

The public right to government information is a long-recognized principle of American government. The Founding Fathers and early presidents acknowledged the right of the public to know what the government was doing. Numerous presidents subsequently acknowledged and endorsed the right to government information. Scholars debate the source of the right to government information, but agree that its underpinnings trace back to early American history. Regardless of its specific source, the right to government information existed as an invaluable restraint on American government, and, as the size and scope of government expanded in the early twentieth century, the right to

---

14 McBurney v. Young, 2012 WL 286915 (4th Cir. 2012) (only the Westlaw citation is currently available).
15 Ibid. at 12.
government information eventually spurned the enactment of modern open government laws.

The public right to government information is rooted in the early years of American history. James Madison recognized "the right of freely examining public charters and measures, and free communication thereon" as "the only effective guardian of every other right." Madison further emphasized the importance of government accountability in a representative democracy, stating that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." In support of open government operations, Patrick Henry stated: "The liberties of people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." Similarly, John Adams, in 1765, offered the following:

"[L]iberty cannot be preserved without a general knowledge among the people, who have a right ... and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers." 19

President Thomas Jefferson stated: "What I deem the essential principles of our government, and consequently those which ought to shape its administration . . . [include] the diffusion of information." 20 Woodrow Wilson emphasized the importance of government transparency, stating that "[l]ight is the

only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments...light that will open to view the innermost chambers of government.”21 Perhaps the most forceful, albeit tongue in cheek, support for government transparency came from President Harry Truman, who flatly declared: “I don’t care what branch of the government is involved...if you can’t do any housecleaning because everything that goes on is a damn secret, why, then we’re on our way to something the Founding Fathers didn’t have in mind. Secrecy and a free, democratic government don’t mix.”22

Though the public right to government information can be traced to early American history, scholars disagree over its precise source. Some submit that the right to government information is inherent in the principles of a representative democracy. In his groundbreaking book, The People’s Right to Know, published in 1953, Harold Cross concluded that “citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.”23 Cross argued that, in order for a representative government to function, the citizens of that government must be inherently entitled to knowledge of government conduct.24 Senator Thomas Hennings also endorsed the inherent nature of the public right to know when he declared: “Self-government can work effectively only where the people have full access to information about what their government is doing.”25 According to Hennings, the Constitution did not include an explicit provision concerning the public right to government information because the founders took that right for granted, thereby concluding that it was unnecessary to include such a provision.26 Hennings observed that, at the time the United States Constitution was written, England had developed a right of the people to access government information.27 According to Hennings, the framers of the Constitution were aware of the right of the people to know what the government was doing and


23 Cross, *The People’s Right to Know*, xiii.

24 Ibid. at xiii-xiv.


26 Ibid.

27 Ibid.
were strongly influenced by that right in writing both the original Constitution and the Bill of Rights.  

Another theory is that the right to government information is indeed found in the United States Constitution. Article I of the Constitution requires that “[e]ach House shall keep a journal of its proceedings, and from time to time publish the same.” The United States Supreme Court has observed that the clear purpose of this constitutional provision is “to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.” The First Amendment also lends support to the argument for a constitutional right to government information. Cross believed that the First Amendment was broad enough to include, and possibly require, the right to access government information. First Amendment scholar Alexander Meiklejohn went one step further, asserting that the right of the citizen to access information was the exclusive justification for providing freedom of speech and other First Amendment rights to United States citizens. As these scholars undoubtedly believed, freedom of speech, the right to petition the government, and other rights guaranteed by the First Amendment are ineffective rights if the government can withhold information necessary for citizens to understand the issue in controversy.

Regardless of the source of the public right to government information, the purposes behind such a right are both clear and abundant. First, the public availability of government information is necessary to the maintenance of a democratic government. Without the public availability of government information, it is impossible to maintain an effective democratic government. Accordingly, Hennings concluded that “freedom of information about governmental affairs is an inherent and necessary part of our political system.”

___

28 Ibid.
29 U.S. Const. art.1, § 3.
31 Cross, The People's Right to Know, 131.
35 Cross, The People's Right to Know, xiii (arguing that, without freedom of government information, a democracy effectively reverts to a monarchy).
democratic government necessarily requires an informed public.\footnote{Houchins v. KQED, 438 U.S. 1, 32 (1985) (Stevens, J., dissenting); Gerry Lanosga and Shannon E. Martin, “The Historical and Legal Underpinnings of Access to Public Documents,” Law Library Journal 102 (Fall 2010): 618.} Former Representative William Dawson recognized as much when, in a letter to Representative John Moss, he concluded: “An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on governmental activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.”\footnote{U.S. House Subcommittee on Government Information, June 9, 1955, Letter from Representative William L. Dawson to Representative John E. Moss (cited in Foerstel, Freedom of Information and the Right to Know, 22).} Third, an informed democratic society maintains a critical check on government conduct. Without access to government information, the public may never know whether the government is serving its best interest. The Supreme Court has observed: “It is not the function of our Government to keep the citizen from falling into error, it is the function of the citizen to keep the Government from falling into error.”\footnote{Am. Commc’ns Ass’n, C.I.O. v. Douds, 339 U.S. 382, 442-43 (1950) (Jackson, J., concurring and dissenting)} The Court has also concluded that “an informed public opinion is the most potent of all restraints upon misgovernment.”\footnote{Grosjean v. American Press Co., 297 U.S. 233 (1936).} As President Harry Truman keenly observed, secrecy is dangerous in a democratic government because it robs the people of the right to monitor their own government.\footnote{Miller, Plain Speaking, 392.} Despite the historical recognition of the public right to government information, and its recognized necessity in a democratic government, the public has not always enjoyed access to government records. Federal and state governments have not afforded the same protection of the availability of government information to the public that has been given to the right to life, liberty, the pursuit of happiness, or any other entitlement enumerated in the Bill of Rights.\footnote{Leanne Holcomb and James Isaac, “Wisconsin’s Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records,” Wisconsin Law Review 2008 (2008): 522-523.} In fact, legislatures did not enact the Freedom of Information Act and, for the most part, corresponding state open records acts until the middle of the twentieth century. These laws, which created an affirmative right of the citizen to access government information, followed decades of government secrecy, as described below, and initiated a trend towards open government in the United States, both in the federal and state governments.
II. Federal Open Government Law

A. The Administrative Procedure Act

The legal demand for government information is a product of the bureaucratic complexities of early twentieth century government.\(^{43}\) With the expansion of government in the New Deal, the public recognized the importance of open access to government records for the purpose of government regulation.\(^{44}\) Congress enacted the Administrative Procedure Act (APA) in 1946 to provide greater accessibility to the public in the rule-making process.\(^{45}\) Specifically, Congress enacted Section 3 of the APA, which governed disclosure of government records, based upon the theory that administrative operations and procedures were public property that the general public had a right to know.\(^{46}\) The APA required government agencies to make records public, but also contained several unrestrained exceptions, which invited government abuse.\(^{47}\)

The APA never fully lived up to its intended purpose. Congress described the APA’s disclosure rule as “full of loopholes which allow agencies to deny legitimate information to the public,” and noted that “improper denials occur again and again.”\(^{48}\) In assessing the APA, Congress found several deficiencies and concluded that Section 3 was “of little or no value to the public in gaining access to records of the Federal Government.”\(^{49}\) In theory, Congress intended the APA to limit government secrecy and provide access to government information. In practice, however, the APA became known more as a withholding statute, through which government agencies maintained secrecy, than a disclosure statute, through which the public received government information.\(^{50}\)

\(^{43}\) Dearborn, “Ready, Aim, Fire,” 16.


\(^{46}\) Ibid.

\(^{47}\) Fuchs, “Judging Secrets,” 143.


The Administrative Procedure Act failed to provide the public with adequate access to government information. Cross's The People's Right to Know, published in 1953, sparked a movement in Congress to create effective statutory remedies that enabled public access to government information. 

Abuse of the APA had become so commonplace that in April 1956, the American Society of Newspaper Editors declared that “[i]t has become apparent that so far as federal secrecy is concerned, it is entrenched behind a host of statutes and regulations and the only real and lasting remedy is new legislation.” Demand for efficient access to government information fueled a Congressional inquiry that lasted over a decade and culminated in the enactment of a new law governing access to government information, aptly titled the Freedom of Information Act.

B. The Freedom of Information Act

In 1966, Congress passed the Freedom of Information Act (“FOIA”), which provided that any person had a right, enforceable in court, to obtain access to federal agency records, to the extent that such records were not protected from public disclosure by statutory exemptions. The purpose of the FOIA was “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” As Congress eloquently stated, “[a] government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.” Upon signing the FOIA into law, President Lyndon Johnson decreed:

This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public.

---


52 Foerstel, Freedom of Information and the Right to Know, 28 (quoting “Editorial: ASNE's Unanswered Question,” Editor and Publisher, April 28, 1956, p.6).


interest...I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and protected. 55

The FOIA revised the public disclosure section of the APA, which Congress and the courts recognized as an inadequate means of obtaining access to government information. 56 The Act sought to balance the competing interests involved in public records access: society’s strong interest in an open government and the public’s interest in efficient government operations. Interpretation of the FOIA remained consistent with the goals of an open government. Courts interpreted the FOIA as implementing a strong presumption in favor of disclosure, which placed the burden on the government to justify withholding the requested documents. 57 Consistent with the Act’s goal of broad disclosure, courts construed exemptions narrowly, to encourage open access to government records. 58

Despite improvement over the APA, the initial FOIA contained several loopholes that allowed government agencies to circumvent compliance. As one commentator bluntly concluded, the law did not work. 59 The initial FOIA contained no deadlines for compliance and no limitations on fees, which allowed agencies to take extremely long periods of time to respond and to charge unreasonably high fees. Shortly after the Act’s passage, one commentator concluded that “government at all levels in many of these agencies has systematically and routinely violated both the purpose and specific provisions of the law. These violations have become so regular and cynical that they seriously block citizens understanding and participation in government.” 60 Noncompliance was so widespread that the Chairman of the House Subcommittee responsible for monitoring administration of the Act admitted: “Many government agencies seem to be doing everything possible to ignore the Freedom of Information Act.” 61

In an effort to extend the FOIA disclosure requirements, and possibly in reaction to the abuses of the contemporary

59 Foerstel, Freedom of Information and the Right to Know, 45.
Watergate investigation, Congress substantially amended the Act in 1974. The proposed amendments were not a direct response to the growing Watergate inquiry, but they gained extensive support as Congressional investigators revealed the details of the scandal. The 1974 amendments narrowed the overall scope of the Act's exemptions, most notably the law enforcement and national security exemptions, and reinforced the commitment to the principle of open government. The amendments resulted in several improvements to the FOIA, including: (1) agencies could now provide documents to requesters without charge or at reduced cost if the material was in the public interest; (2) courts were allowed to conduct in camera review of contested materials to determine whether they were properly withheld; (3) a judge could award attorney fees and litigation costs when a complainant had "substantially prevailed" in seeking records; (4) a court could take notice of "arbitrary and capricious" withholding of documents and require an investigation to determine whether disciplinary action against agency officials was warranted; (5) any record containing segregable portions of exempted material must be released after the necessary deletions; (6) exemptions pertaining to classified information and law enforcement materials were narrowed; (7) the definition of agencies covered by FOIA was expanded and clarified; and (8) specific response times were established for agency action on initial requests, appeals, and lawsuits.

The FOIA has undergone several amendments since 1974, but the primary structure of the Act remains the same. With each amendment, Congress and the president repeatedly reinforce the purpose and benefits of the FOIA. Upon signing the 1976 amendment into law, President Gerald Ford explicitly stated support for "the concept which underlies this legislation, that the decision-making process and the decision-making business of regulatory agencies must be open to the public." Twenty years later, upon signing the 1996 amendment into law, President Bill Clinton reinforced "the crucial need in a democracy for open access to government information by citizens."

---

63 Ibid. at 46-47.
66 Statement by President Gerald Ford upon Signing the 1976 Amendment to the Freedom of Information Act (September 13, 1976).
67 Statement by President Bill Clinton upon Signing the 1996 Amendment to the Freedom of Information Act (October 2, 1996).
The FOIA and its subsequent amendments established a policy of broad disclosure of government information. Ineffective access to public records under the APA prompted Congress to pass the FOIA. Continuing ineffective access under the initial FOIA prompted Congress to pass subsequent amendments, each of which promoted increased access to federal government information. By expanding availability of federal government information, Congress initiated a national trend towards open and accessible government. As this trend gained momentum, the individual states followed suit, enacting state open records acts that encouraged public access to information held by state and local agencies.

III. State Open Government Law

Following the passage of the FOIA, each state that did not already have an open records act passed such an act to provide access to government information. Where the FOIA applied to information held by federal agencies, state open records acts applied to information held by state and local government agencies. In this sense, state open records acts were a logical extension of the trend towards open and accessible government, recognizing the demand that FOIA created for broad disclosure of federal government information, and imposing an equal demand for access to government information in state and local governments.

State open records acts unanimously endorse a policy of free and open access to government information. The Kansas Open Records Act, for example, states: "It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act." The New Mexico Inspection of Public Records Act similarly provides, in verbose fashion:

Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information

---


69 K.S.A. § 45-216.
regarding the affairs of government and the official acts of public officers and employees.\textsuperscript{70}

Though the language of each state open records act is not identical to the federal FOIA, state courts often look to on-point FOIA jurisprudence for guidance in interpreting state open records acts.\textsuperscript{71} For example, in Trahan v. Larivee, the Louisiana Court of Appeals, after finding no state cases on point, turned to federal case law to determine whether certain personnel records should be disclosed under the Louisiana Public Records Act.\textsuperscript{72} Similarly, in Board of Trustees of Woodstock Academy v. Freedom of Information Commission, the Supreme Court of Connecticut observed that the purposes of the FOIA and corresponding state open records acts were virtually identical, and that it was therefore appropriate for state courts to look to the FOIA for guidance in interpreting state open records acts.\textsuperscript{73}

A notable consequence of using federal jurisprudence for construction of state open records acts is the consistent recognition in state open records acts of both a broad presumption in favor of disclosure and a narrow construction of statutory exemptions.\textsuperscript{74} Federal courts interpreting the FOIA recognize a broad presumption in favor of disclosure, subject only to narrowly construed exceptions.\textsuperscript{75} Following federal FOIA jurisprudence, nearly every state has either statutory language or case law, sometimes both, which requires this liberal construction of open records acts.\textsuperscript{76} In adopting this construction, individual states have either expressly or impliedly accepted the FOIA broad mandate of government disclosure.

By adopting the FOIA broad presumption in favor of disclosure, state open records laws have endorsed, if not championed, the modern trend towards open and accessible government. Indeed, at least one commentator observed that the passage of state open records acts was part of an international

\begin{footnotesize}
\textsuperscript{70} N.M.S.A. § 14-2-5.


\textsuperscript{72} Trahan v. Larivee, 365 So. 2d 294 (La. Ct. App. 3d 1978).

\textsuperscript{73} Board of Trustees of Woodstock Academy v. Freedom of Information Commission, 181 Conn. 544, 553, 436 A.2d 266 (Conn. 1980).

\textsuperscript{74} Nowadzky, "A Comparative Analysis of Public Records Statutes," 66.

\textsuperscript{75} See e.g. Trentadue v. Integrity Committee, 501 F.3d 1215 (10th Cir. 2007) ("In considering whether information should be disclosed under the Freedom of Information Act (FOIA), two guiding principles apply: first, FOIA is to be broadly construed in favor of disclosure, and second, its exemptions are to be narrowly circumscribed.").

\textsuperscript{76} Ibid.; see e.g. N.R.S. § 239.001 ("The provisions of this chapter must be construed liberally... Any exemption... must be construed narrowly.").
\end{footnotesize}
trend towards access to information, a trend which has gained momentum since the passage of the FOIA nearly fifty years ago.\(^{77}\)

Although state open records acts explicitly provide for open access to government information, the statutory right of access, in some states, is sharply limited.\(^{78}\) Several impediments to public access remain in state open records acts, including explicit restrictions on who may request state records and the specific limitations on the purpose for which records may be requested.\(^{79}\) The most prominent method by which states continue to restrict access to public records is through so-called “citizens-only” provisions, i.e., provisions that grant access to state records only to state citizens.

The recent case of McBurney v. Young brought the continued enforcement of citizens-only provisions to the forefront of open government law.\(^{80}\) At issue in McBurney was whether a state open records act could deny access to non-citizens based solely on that citizen’s residence. In April 2008, Mark McBurney, a citizen of Rhode Island, made a request under the Virginia Freedom of Information Act (“VFOIA”) for all information related to a child support application that he had filed with the Virginia Department of Social Services. The Department of Social Services denied his request, in part because he was not a Virginia citizen. In May 2008, McBurney filed a second request under the VFOIA, but the Department of Social Services again denied his request because he was not a Virginia citizen.

McBurney filed a lawsuit challenging the validity of the citizens-only provision of the VFOIA. The VFOIA states, in relevant part, “[a]ll public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records” (emphasis added).\(^{81}\) McBurney claimed that the citizens-only provision violated the Privileges and Immunities Clause, Article IV, Section 2, of the United States Constitution, which provides that “[t]he Citizens of each State shall be entitled to the all the Privileges and Immunities in the several states.”\(^{82}\) The Fourth Circuit Court of Appeals upheld the citizens-only provision of the Virginia

---


\(^{79}\) Nowadzky, “A Comparative Analysis of Public Records Statutes,” 76-86.

\(^{80}\) McBurney, 2012 WL 286915.


\(^{82}\) U.S. Const. art. IV § 2.
Freedom of Information. In response to McBurney's argument that the citizens-only provision violated his right to access government records, the Fourth Circuit concluded:

To the extent Appellants urge us to adopt the position that there is a 'broad right of access to information' stemming from the policy of open government undergirding freedom of information acts generally and grounded in 'the First Amendment's guarantees of free speech and free press,' we are similarly not persuaded.83

IV. Citizens-Only Provisions and the Trend towards Open Government

There are currently eight states with citizens-only provisions in their open records act: Alabama; Arkansas; Delaware; Georgia; New Hampshire; New Jersey; Tennessee; and Virginia.84 Citizens-only provisions stand in direct conflict with the trend towards open and accessible government, a conflict that can be resolved favorably towards open government in one of three ways: (1) courts can hold a citizens-only provision unconstitutional; (2) the state can decline to enforce the language of its citizens-only provision; or (3) the state can amend its open records act to remove its citizens-only provision.


The first way that states can resolve citizens-only provisions in favor of access to government information is through judicial review—courts holding that a citizens-only provision is unconstitutional. In McBurney, the Fourth Circuit Court of Appeals refused to invalidate the citizens-only provision of the VFOIA. However, McBurney was not the first case in which an out-of-state citizen challenged a citizens-only provision of a state open records act. In fact, in upholding the citizens-only provision of the VFOIA, the McBurney Court explicitly declined to follow a previous decision in which the Third Circuit had invalidated a similar provision.85

In Lee v. Minner, the Third Circuit Court of Appeals invalidated the citizens-only provision of the Delaware Freedom of Information Act ("DFOIA") as an unconstitutional violation of the

83 McBurney, 2012 WL 286915 at 8.
Arti cle IV Privileges and Immunities Clause. Matthew Lee, a citizen of New York, filed multiple record requests under the DFOIA. The Delaware State Solicitor repeatedly denied Lee's requests on the grounds that Lee was not a citizen of Delaware. The DFOIA provided, in relevant part: "All public records shall be open to inspection and copying by any citizen of the State" (emphasis added). Lee challenged the constitutionality of the citizens-only provision of the DFOIA, claiming, among other things, that the law infringed upon his right to access public records and engage in the democratic process. The Third Circuit invalidated the citizens-only provision, holding, in part, that every citizen has a fundamental right to engage in political advocacy with regard to matters of both national political and economic importance, and that the DFOIA unconstitutionally violated that right.

As demonstrated by McBurney and Lee, the Third Circuit and Fourth Circuit have reached different conclusions on the issue of whether citizens-only provisions are unconstitutional under the Article IV Privileges and Immunities Clause. Of the eight states who maintain citizens-only provisions in their open records laws, only two, Delaware and New Jersey, are within the jurisdiction of the Third Circuit, and only one, Virginia, is within the jurisdiction of the Fourth Circuit. As a result, the citizens-only provisions in the DFOIA and New Jersey Open Public Records Act are invalid, while the citizens-only provision of the VFOIA, for the time being, has been upheld. The remaining five citizens-only provisions, however, remain in their respective open records laws, and, so long as the federal circuit courts are split on the issue, judicial review remains a viable tool to challenge these provisions.


The second way that states can resolve citizens-only provisions in favor of access to government information is through individual states declining to enforce their respective citizens-only provisions. Of the six states with valid citizens-only provisions following Lee v. Minner, at least three (Alabama, Arkansas, and Georgia) have explicitly declined to enforce their citizens-only provisions. Despite the presence of a citizens-only provision in their respective open records acts, these states require agencies to disclose records to all requestors, regardless of residency.

87 29 Del. C. § 10003.
88 Lee, 458 F.3d at 198.
The Alabama Public Records Law provides, "every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." Despite this language, which limits disclosure to citizens, the Alabama Attorney General has stated: "Neither this Office nor the courts have restricted citizens who have access to public records to mean only in-state citizens.

The Arkansas Freedom of Information Act provides, "all public records shall be open to inspection and copying by any citizen of the State of Arkansas." The Arkansas Attorney General initially maintained the position that the Act only required access to public records for Arkansas citizens. Accordingly, state agencies were advised that if the requester was not a citizen of Arkansas, then that was a legitimate basis for denying an open records request. However, following Lee v. Minner, the Arkansas Attorney General observed:

The Third Circuit Court of Appeals has issued a decision that—while not binding in Arkansas—used the Privileges and Immunities Clause of the U.S. Constitution to hold that the citizen restriction in Delaware's FOIA was unconstitutional. Additionally, given that the FOIA does not prohibit the release of public records to non-citizens of Arkansas, a custodian might reasonably decide to grant the FOIA request in light of the Third Circuit decision.

The Georgia Open Records Act provides: "All public records of an agency... shall be open for a personal inspection by any citizen of this state." Despite this language, which limits disclosure to citizens, the Georgia Attorney General stated that government records should also be made available for inspection upon request by any non-citizen. As Alabama, Arkansas, and Georgia have demonstrated, even if state open records acts have citizens-only provisions, state agencies may decline to enforce those provisions, thereby promoting open government access.


89 Ala. Code 1975 § 36-12-40.
91 A.C.A. § 25-19-105
The third way that states can resolve citizens-only provisions in favor of access to government information is through state legislatures amending open records acts to remove citizens-only provisions. The events surrounding passage of the FOIA provide guidance on how citizens can persuade state legislatures to remove citizens-only provisions. In the middle of the twentieth century, the American media, concerned about the increasing size of the federal government, advocated for the enactment of open records laws. Citing the increased size of the federal bureaucracy and the dangers of state secrecy, the American media appealed to Congress to protect the public’s right to government information. Congress responded by passing the FOIA, which codified the public’s right to access government records.

Citizens-only provisions are a continuing infringement of the public’s right to government information. If citizens appeal to the states that maintain citizens-only provisions, the respective state legislatures may abolish those provisions in an effort to encourage public availability of government information. Just as Congress recognized the importance of government access by passing the FOIA, state legislatures may choose to emphasize the importance of government access by removing citizens-only provisions from state open records acts.

As the above solutions demonstrate, citizens-only provisions are susceptible to attack through all three branches of government. The judicial branch can declare the citizens-only provision invalid, the executive branch can decline to enforce the citizens-only provision, or the legislative branch can remove the citizens-only provision from its respective open records act.

V. Conclusion

Federal, state, and local laws that regulate access to government records demonstrate a trend towards open government. Even the McBurney Court, while refusing to recognize the right to access government records as a protected constitutional privilege, observed that access to public records is of “increasing importance . . . in the information age.” As the size and scope of federal government grew in the early twentieth century, citizens demanded access to government records. When the early federal statutes addressing access to government records proved unproductive and prone to abuse, Congress

98 McBurney, 2012 WL 286915 at 8.
quickly amended those statutes to provide effective access to
government information. In light of the efficiency and desirability
of the FOIA, every state that did not already possess an open
records law subsequently passed its own, and these open records
laws unanimously stood for the proposition that a functioning
democratic society requires an informed citizenry.

Citizens-only provisions for state open records acts stand
in direct conflict with this marked trend towards open and
accessible government law. Where open government laws
maintain a presumption of government access, citizens-only
provisions allow states to arbitrarily deny access based on the
requestor's residency. Where open government laws demand an
informed citizenry, citizens-only provisions deny knowledge to the
same citizenry that open records laws purport to protect. If laws
promoting open government are to succeed in state governments,
you must do so once citizens-only provisions have been
abolished.

Reflecting on the initial FOIA and the future of open
government law, Representative John Moss, a noted champion of
open government legislation, observed:

At the time the [FOIA] was debated on the House
floor, I characterized it as a timid first step. The
fact is, more must be done on a continuing basis if
we are to truly ensure that information is available
to the people of this nation and that no
withholding will be tolerated except that small part
that truly touches upon the real security of the
nation. 99

The current trend towards open and accessible
government reflects the "continuing basis" that Representative
Moss advocated. One notable impediment to that trend, which
attracted national attention in McBurney v. Young, is the
continuing enforcement of citizens-only provisions in open
records laws. In order for the United States to advance the public
right to government information and continue the trend towards
open and accessible government, any states that maintain a
citizens-only provision in their open records laws must either
abolish or decline to enforce those provisions, thereby promoting
effective government and encouraging the free flow of information
to the people.

99 Foerstel, Freedom of Information and the Right to Know, 163 (quoting
Statement by John E. Moss, Access Reports, December 17, 1997, 4-5).