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# THE INFORMATIONAL OMBUDSMAN: FIXING OPEN GOVERNMENT BY INSTITUTIONAL DESIGN.

by **Mark FENSTER**, Professor at the Levin College of Law,  
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The ombudsman has gradually emerged in the U.S. as a key tool among the various legal doctrines, institutions, and technologies used to reveal the government to the public. After the ombudsman's initial development and implementation in northern Europe, several prominent administrative law scholars brought the institution to American policymakers and academics' attention in the 1960s and 1970s during the initial wave of elite liberal disaffection with the regulatory state. Proponents during this initial period viewed the ombudsman as an independent entity within the administrative state that could, at least in theory, close the increasing distance between the bureaucracy and public. In its adaptation to the specific administrative task of open government law compliance and reform, the ombudsman has offered an institutional fix to the revealed deficiencies from which the legal rights approach to "freedom of information" suffers: the bureaucratic tendency to avoid complying with openness obligations and the expense and delays attendant to judicial review. This paper describes the ombudsman's role in supporting the open government mandates of U.S. state and the U.S. federal governments, and fits it into a framework for understanding transparency that I have developed in earlier articles. I characterize the ombudsman as an institutional transparency fix, one that follows other such fixes—including most prominently the creation of legal rights to government information—in attempting to address the bureaucratic tendency to hoard information. Each fix, including the ombudsman, proceeds from prevailing assumptions about the best means to reveal the state, both reflecting and furthering historically-situated conceptions of government and its reform. Like the other fixes of the past fifty years, the ombudsman has made marginal gains in reforming open government laws and bureaucratic compliance with them. But it has not and it cannot make the state fully transparent or sufficiently transparent for open government advocates, for reasons I will discuss.

## § 1 – THE TRANSPARENCY FIX

Political theories of the democratic, classical liberal, and utilitarian sort agree that a modern democratic state must be visible to the public. Depending upon one's preferred theory, the political norm of an open government enables the state to express or represent the beliefs and preferences of the public that it serves; and no matter one's political preference regarding the state's proper role



and size, the administrative norm of transparency enables a more accountable state that is capable of efficiently and effectively serving the public and performing its functions.<sup>1</sup> If, as I have argued in previous work, we view transparency as understanding the state in predominantly cybernetic terms—by claiming to solve the problem of governance through the free flow of information from the state to the public—then transparency constitutes a crucial means to engineer the state into properly serving its political and administrative functions.<sup>2</sup>

But the effort to impose transparency on the state must overcome bureaucracies' tendency to hoard information. The state holds the information that it produces and receives, and, as Max Weber described, it often works zealously to protect its asymmetrical advantage over its institutional and political competition (e.g., in interbranch disputes and against its opposition) as well as the public.<sup>3</sup> For nearly seven decades, transparency proponents in the U.S. have offered a series of fixes to this problem: most prominently, in the legal rights and administrative obligations that FOI and related laws have created; through civil society organizations like Transparency International that monitor, name, and shame corrupt states; by deploying information technologies that make government data widely available and usable through open source platforms; and through vigilante leaking of massive caches of government documents, as perpetrated most famously by WikiLeaks and Edward Snowden.<sup>4</sup> Each of these fixes has in turn claimed to transform the state by forcing it to open itself to public view. They have all no doubt succeeded to some extent, and the state is more accessible today as a result of these efforts. But their successes have been marginal. Most public polls have found that the public trusts the state less despite the presence of these new laws, institutions, and technologies, and transparency proponents and the public experience open government as a goal that either recedes from view or continually comes closer but never fully arrives.<sup>5</sup> To again frame the issue cybernetically, the state

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<sup>1</sup> See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006).

<sup>2</sup> See generally Mark Fenster, *Transparency in Search of a Theory*, 18 EUROPEAN JOURNAL OF SOCIAL THEORY \_\_\_\_ (forthcoming 2015).

<sup>3</sup> See 2 MAX WEBER, 2 ECONOMY & SOCIETY 992 (Guenther Roth & Claus Wittich eds., 1968) (“Bureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can.”). A full rendering of the literature that reiterates this point in a critical voice, arguing against its Weberian inevitability and in favor of reform, could fill a book. Two recent versions by American academics are JASON ROSS ARNOLD, *SECRECY IN THE SUNSHINE ERA: THE PROMISE AND FAILURES OF U.S. OPEN GOVERNMENT LAWS* (2014) and HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* (2015).

<sup>4</sup> Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443 (2012).

<sup>5</sup> This is in some ways an intuitive claim, as Gallup polling in the U.S. over the past four decades has shown a steady decline in public trust in the federal government, even after the key amendments to the U.S. Freedom of

regularly appears to control the flow of information excessively, preventing the communication necessary to democratic order and proper administrative function. Hence, the need to “fix” the state by making it transparent

§ 2 – The Ombudsman as Institutional Administrative Reform.

Since its initial enactment in 1966, the federal FOIA has been the source of frustration, especially for open government activists. Congress has regularly amended the statute. As of this writing, the most significant recent amendments, made in 2007 in the OPEN Government Act, established the federal Office of Government Information Services, the first federal ombudsman devoted to administering FOIA. But American states have a long history of innovations using ombudsmen and ombuds-like institutions to provide an institutional check on compliance with their open government laws. Hawaii created the first state ombudsman four decades before OGIS’s founding, and many states have widely used either general ombuds offices or open-government-specific ombuds offices to oversee government compliance with informational laws. The state experience and the OGIS’s early years reveal the ombudsmen’s promises, advantages, and shortcomings.

The practice of appointing officers to field and respond to complaints from their constituents dates to ancient civilizations and was part of medieval societies.<sup>6</sup> The first official ombudsman appeared in eighteenth century Sweden, when King Charles XII of Sweden created the “Chancellor of Justice” position to help maintain control over his kingdom’s administration, and the position was enshrined in the Swedish Constitution early in the following century.<sup>7</sup> The institution spread throughout Scandinavia during the first half of the twentieth century, with Finland adopting it in its constitution in 1991 and Denmark and Norway creating the office after World War II.<sup>8</sup> The Federal Republic of Germany established the first such office outside of Scandinavia in 1957 with its military ombudsman, and the first country of the British

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Information Act in 1974. See Gallup, *Trust in Government*, available at <http://www.gallup.com/poll/5392/trust-government.aspx> (tracking trust in government from 1972 through 2014 and revealing steady decline of those stating they trust the executive and legislative branches of government either a “great deal” or a “fair amount”). But academics have also found through experimental research that transparency has no correlation to trust-building—which is historically and culturally contingent—and may even have a negative correlation. See Stephan Grimmekhuysen et al., *The Effect of Transparency on Trust in Government: A Cross-National Comparative Experiment*, 73 PUB. ADMIN. REV. 575 (2013).

<sup>6</sup> Stanley V. Anderson, *Ombudsman Papers: American Experience and Proposals* 2 (U.C. Berkeley, 1969); Charles L. Howard, *The Organizational Ombudsmen: Origins, Roles, and Operations: A Legal Guide* 2-3 (2010). 2-3; Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 Ohio St. J. on Disp. Resol. 95, 97 (1996).

<sup>7</sup> Howard, *supra* note, at 2-3; Donald C. Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea* 3-4 (2nd ed. 1985).

<sup>8</sup> Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* 6-7 (2004).

Commonwealth system to adopt one was New Zealand, which created a national ombudsman in 1962.<sup>9</sup>

Administrative law professors and progressive good-government public administration scholars in the U.S. developed a sincere crush on the ombudsman concept in the early 1960s, in part in response to its success in northern Europe. Among legal academics, Walter Gellhorn and Kenneth Culp Davis, two towering figures in the post-World War II development of administrative law as an academic field in the U.S., were among its leading cheerleaders.<sup>10</sup> Gellhorn wrote two books extolling the ombudsman's virtues. In *Ombudsmen and Others* (1966), he surveyed the ombuds and ombuds-like institutions in nine different nations (from Denmark to Japan to the Soviet Union), and then in *When Americans Complain* (1966), his Holmes Lectures at Harvard, he proposed importing the form into the U.S. as a best means to provide the public with a channel for their grievances and to allow a non-political, external check on administrative actions without the costs, delays, and impediments of judicial review.<sup>11</sup> Ombudsman offices would serve as impartial and non-political for constituents, as well as legitimate and sympathetic critics of civil servants whose advice would prove influential to those outside and inside government.<sup>12</sup> This potential offered not just a second-best alternative to self-correcting bureaucracy—as Gellhorn asked, after extolling its virtues, “what have we to lose?”—but also a neat institutional fix to the bureaucratic and legal inadequacies of the administrative state. Donald Rowat, a Canadian public administration scholar, characterized the fervor that followed Gellhorn's championing as an “ombudsmania” that spread the idea outside the academy and into the public consciousness.<sup>13</sup>

In a focused reflection on Gellhorn's role as ombudsman promoter published a decade after publication of *Ombudsmen and Others* and *When Americans Complain*, the American administrative law professor Paul Verkuil described the ombudsman as a large-scale institutional alternative to the adversarial system.<sup>14</sup> Writing against the backdrop of the expansion of social service entitlements, the rise of Charles Reich's theory of “new property,” and the Supreme Court's due process revolution in *Goldberg v. Kelly* and that decision's immediate aftermath, Verkuil viewed the stakes for developing the ombudsman as quite high. It was the means by which an immense bureaucratic system could deliver mass justice more efficiently and fairly than the traditional Anglo-American

<sup>9</sup> HOWARD, *supra* note, at 4-5.

<sup>10</sup> Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 845-46 & n.7 (1975).

<sup>11</sup> Walter Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (1966); Walter Gellhorn, *When Americans Complain: Governmental Grievance Procedures* (1966) [hereinafter Gellhorn, *When Americans Complain*].

<sup>12</sup> Gellhorn, *When Americans Complain*, *supra* note, at 224-31.

<sup>13</sup> Donald Rowat, *Introduction*, in *THE OMBUDSMAN: CITIZEN'S DEFENDER*, at xii (Donald Rowat ed. 1968).

<sup>14</sup> Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975).



adversarial system. With the right institutional framework in place, a hybrid of the adversarial and inquisitorial systems could emerge in a truly modern welfare state.<sup>15</sup> Verkuil wrote:

The fear of government oppression, raised by the use of management and quality control techniques to the exclusion or minimization of adversary decision-making, can be neutralized if the people's watchdog were to become a viable concept. In this way, the ombudsman signals the start of a new tradition; expedited public decision-making under the supervision of institutionalized external overseers of the system.<sup>16</sup>

Coming after Gellhorn and reflecting on his initial attraction to the ombudsman, Verkuil thus framed the ombudsman as a universal, systemic, and independent solution capable of playing a key role in a system subject to unfairness and inefficiency.

The ombudsman has not, however, become a central fixture in American administration, and its current proponents perceive the ombudsman's virtues more narrowly than their predecessors. Despite their best efforts, American ombudsman advocates failed to establish a centralized ombudsman for the federal government in 1967 and throughout the 1970s,<sup>17</sup> and although adoption in the U.S. has been relatively wide in public and private entities, the types of ombudsman and the range of their authority and role has been quite varied.<sup>18</sup> While Congress and agencies have since established a broad array of specialized ombudsman and similar offices within the executive branch, generally within existing agencies,<sup>19</sup> state and local governments took the lead in creating ombudsmen patterned on the Scandinavian model. Hawaii became the first state to establish an ombudsman when its office officially opened in 1969, two years after its creation by statute.<sup>20</sup> At the same time, academic and professional views of the model have scaled back their view of it as an instrument with bureaucratic healing powers. The trend, as a recent book published by the American Bar Association's Section of Dispute Resolution characterized it, has been to view the ombudsman as focused more on conflict resolution and mediation rather than widespread reform.<sup>21</sup> This is a narrower view than the definitions and functions provided in the earlier generation of

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<sup>15</sup> Verkuil, *supra* note , at 851-61.

<sup>16</sup> *Id.* at 856.

<sup>17</sup> Roger C. Cramton, *A Federal Ombudsman*, 1972 DUKE L.J. 1, 10-11; D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL. 549 (1998).

<sup>18</sup> Wiegand, *supra* note , at 102-112.

<sup>19</sup> For an overview of this trend, see Wendy R. Ginsberg and Frederick M. Kaiser, *Federal Complaint-Handling, Ombudsman, and Advocacy Offices*, Congressional Research Service Report RL34606 (Aug. 4, 2009), available at <https://www.fas.org/sgp/crs/misc/RL34606.pdf>.

<sup>20</sup> ANDERSON, *supra* note, at 34-37. U.S. newspapers began to adopt ombudsman during the same period. See James S. Ettema & Theodore L. Glasser, *Public Accountability or Public Relations? Newspaper Ombudsmen Define Their Role*, JOURNALISM Q., Spring 1997, at 3-12; Kate McKenna, "The Loneliest Job in the Newsroom," AM. JOURNALISM REV., Mar. 1993, at 41.

<sup>21</sup> HOWARD, *supra* note, at 75.

scholarship, which emphasized structure—with independence and impartiality serving as the touchstones—and a limited authority to recommend and publicize.<sup>22</sup> It is also quite different from the European ombudsman model, which expects a more interventionist institution headed by a widely-known figure who will independently challenge government decisions.<sup>23</sup>

The history of its development reveals a strong and weak form of the ombudsman as concept and model. The strong form presents the ombudsman as an essential element of governance—an institutional solution within the state that can bridge the gulfs among separate branches of government by enabling independent oversight of the administration, thereby augmenting oversight on behalf of and in place of the legislature without the bother and expense of relying upon the judiciary. The weak form views the ombudsman role as a safety valve that can resolve the disputes which inevitably arise from the system's functioning, providing individuals with a means to seek redress without the bother and expense of judicial review. Viewed this way, the ombudsman is less a part of the bureaucratic system and more of an adjunct to it. It can help ameliorate some of the system's occasional malfunctions through more informal mediation practices.<sup>24</sup>

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<sup>22</sup> See, e.g., ANDERSON, *supra* note , at 3 (listing ombudsman's key structure and functions as being "(1) independent, (2) impartial, (3) expert in government, (4) universally accessible, and (5) empowered only to recommend and publicize"); Rowat, *supra* note , xxiv (emphasizing independence and non-partisan status, the "power to investigate, criticize and publicize, but not to reverse, administration action," and serving to supervise the administration and deal with "specific complaints from the public against administrative injustice and maladministration"). These views seem more aligned with what Shirley Wiegand called the "classical ombudsman" model, as opposed to the "quasi-ombuds" model that has spread throughout the U.S. and is less independent. Wiegand, *supra* note, at 112.

<sup>23</sup> On the history of the European Ombudsman ("EO") and its role in addressing the refusal to disclose information as a form of "maladministration", see DAMIAN CHALMERS & ADAM TOMKINS, EUROPEAN UNION PUBLIC LAW 337-46 (2007); CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 43-44 (2002); Ian Harden, *The European Ombudsman's Efforts to Increase Openness in the Union*, in INCREASE TRANSPARENCY IN THE EUROPEAN UNION? 123 (Veerle Deckmyn ed., 2002). On the EO, its relationship to other ombudsman offices in Europe, and the network of accountability it provides, see generally Carol Harlow and Richard Rawlings, *Promoting Accountability in Multilevel Governance: A Network Approach*, 13 EUR. L.J. 542, 555-560 (2007). On the EO's role as part of a network of internal institutions pushing for transparency within the European Parliament and EU Council of Ministers, see Maarten Zbigniew Hillebrandt, Deirdre Curtin & Albert Meijer, *Transparency in the EU Council of Ministers: An Institutional Analysis*, 20 EUR. L.J. 1, 15-19 (2007).

<sup>24</sup> This distinction is akin to what Charles Howard characterizes between the classic ombudsman with formal prosecutorial and investigative powers and the "organizational ombudsman" who instead serves as "a distinct, informal, meditative, and confidential channel." HOWARD, *supra* note, at 23-24.

### § 3 – THE OMBUDSMAN AS TRANSPARENCY FIX: STATES AS LABORATORIES

Viewed in this larger context, when subnational units in the U.S. attempt to use the ombudsman model to assist in the administration and enforcement of their open government laws, they have sought to engineer an institutional fix to non-compliant, secretive bureaucracies. In theory, the ombudsman should serve simultaneously as a valve operating within the state's machinery that can help release information and as an independent monitor capable of providing objective counsel to legislatures and bureaucracy. It can help improve the flow of information and the larger system in which the state keeps information and makes it available.

States adopted the ombudsman model long before the federal government did. Although they vary considerably in their approach to their institutional innovations, states' creations include or exclude a series of discrete options:

- Institutional independence: in which branch are they located and are they freestanding or part of another entity?
- Institutional structure: are they a multi-member commission or headed by one individual?
- What procedures are they to use in settling disputes between government entities and requesters? Dispute settlement? Administrative appeal? Inquisitorial investigation?
- Formal authority: Are they delegated investigatory authority? Do they have subpoena power? What kind of enforcement power do they have? Can they impose penalties?
- Are they required to report to the legislature regarding their work and proposed legal reforms?

The choices that states have made when establishing a formal ombudsman office or its informal equivalent reflect, among other things, local legal and institutional history, the political conditions at the time of the institutions' creation, and the role of non-governmental organizations in their founding. The resulting institutions' effectiveness in assisting requesters and legislatures is similarly contingent on numerous factors, including especially the success of their initial leadership at institution-building and gaining the trust of agencies and repeat requesters. And their role in making the public more informed—the ultimate purpose of the open government laws the ombuds administer—is impossible to gauge. It is therefore difficult to derive specific theories or even working hypotheses as to whether and how well ombudsmen work, besides some general, rather banal best practices. They are clearly better than nothing in most instances, especially for those requesters they assist, but how much of an improvement that they make is the subject of active debate within the states themselves. Even deriving a typology the help categorize them in order to judge their effectiveness is difficult, as the leading academic chronicler of the

form has shown.<sup>25</sup> To illustrate the variance, consider my effort at typology.

### **A) Traditional ombudsmen (general jurisdiction and focused on open government)**

Some states have created a formal, identifiable institution specifically intended to achieve the classic public ombudsman goal of assisting the public in its dealings with government, and have included the administration of open government laws either within a general portfolio or in a standalone ombudsman with a narrow focus.

Hawaii created the first state-wide ombudsman by statute in 1967 and two decades later created a new ombuds institution devoted specifically to its open records act (which it later expanded to take jurisdiction over open meeting law disputes). Established initially as a “temporary office,” the Office of Information Practice (OIP) operates from within the office of the lieutenant governor, with a director appointed by the governor.<sup>26</sup> Its primary duty is to resolve complaints filed by a requestor, in aid of which it may provide advice or conduct an investigation and examine requested records itself (for which it can seek court enforcement against a reluctant agency) and recommend discipline against government officers.<sup>27</sup> It should also assist agencies in understanding and complying with their legal obligations and recommend statutory reforms to the legislature.<sup>28</sup> Requesters need not use the OIP before proceeding with litigation and retain the right to file suit after the OIP completes its review, and an agency has the right to seek judicial review of an adverse decision by the OIP.<sup>29</sup> The Hawaii legislature recently amended the records act and open meetings law in 2012 to establish a quite deferential standard of review for OIP decisions

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<sup>25</sup> See Daxton R. “Chip” Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, 1 J. MED. L. & ETH. 49, 60-79 (2009), which posits an overlapping and not particularly cogent series of models that include “Multiple Process,” “Administrative Facilitation” (which can include a “Mediation Path” or an “Ombuds Path,” or simply be “Other”), “Administrative Adjudication” (itself included in some of those he groups within “Multiple Process”), “Advisory,” and “Litigation”—which is to say, those jurisdictions that have no discernible alternative path to dispute settlement. The effort is worthy but the results suggest that it may not have been worthwhile, because the states’ varied innovations resist anything but the roughest categorization. My typology is more akin to that provided in Henry Hammitt, *Mediation without Litigation* (Nat’l Freedom of Info. Coalition, FOI Reports Vol. 2 No. 3, n.d.), available at; [http://www.nfoic.org/sites/default/files/hammitt\\_mediation\\_without\\_litigation.pdf](http://www.nfoic.org/sites/default/files/hammitt_mediation_without_litigation.pdf) (last visited Apr. 11, 2015).

<sup>26</sup> HAW. REV. STAT. ANN. § 92F-41(a) (2014). The statute states that the OIP is temporary and for a special purpose. However, the OIP has continued to exist since its creation in

<sup>27</sup> HAW. REV. STAT. ANN. § 92F-42(1)-(6) (2014).

<sup>28</sup> HAW. REV. STAT. ANN. §§ 92F-42(7), (9) & (10) (2014).

<sup>29</sup> HAW. REV. STAT. ANN. §§ 92F-15, 92F-15.5, 92F-43 (2014).

in favor of requestors.<sup>30</sup> In fiscal year 2014, OIP received over \$500,000 in appropriations for operations, and the number of both informal and formal requests it receives for assistance from the public has steadily risen over the past four years.<sup>31</sup>

Other states incorporate open government issues within a traditional ombudsman that handles all manner of citizen complaints about the state agencies. Like Hawaii, Alaska has a traditional ombudsman office that was established in 1975; unlike Hawaii, however, Alaska's ombudsman investigates complaints about agency actions under the open government as the state has no separate office focused on open government.<sup>32</sup> Arizona calls its ombudsman a "citizen's aide," but its appointments process<sup>33</sup> and authorities are similar to Alaska's and Hawaii's.<sup>34</sup> The Arizona legislature has granted the citizen's aide specific authority to train the public and agencies regarding open government laws.<sup>35</sup> Iowa's citizens' aide, appointed by the legislature,<sup>36</sup> also has investigatory authority and enjoys the power to issue subpoenas and seek their enforcement. It can seek a civil penalty against a person who willfully hinders its investigation.<sup>37</sup>

Pennsylvania's Office of Open Records (OOR), housed within the Department of Community and Economic Development and

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<sup>30</sup> HAW. REV. STAT. ANN. § 92F-15 (2014) (setting the standard of judicial review of agency opinions as "palpably erroneous" except where the OIP upholds the agency's denial of access, in which case the standard of review is *de novo*).

<sup>31</sup> State of Hawaii Office of Information Practices, 2014 Annual Report, 6-8, available at <http://oip.hawaii.gov/wp-content/uploads/2013/04/ANNUAL-REPORT-2014-FINAL.pdf>.

<sup>32</sup> ALASKA OFFICE OF THE OMBUDSMAN, ALASKA'S OMBUDSMAN: <http://ombud.alaska.gov/about-the-O.php> (last visited Apr. 11, 2015).

The Alaska ombudsman is appointed by a two-thirds vote of the legislature and must receive the approval of the Governor. ALASKA STAT. ANN. § 24.55.020 (West 2014). The legislature also has a limited removal power. *Id.* at § 24.55.050. The ombudsman can investigate administrative acts of agencies regardless of the finality of the act and has the authority to investigate on its own motion. *Id.* at § 24.55.100, 120 (West 2014). To enforce its investigatory powers, the ombudsman has subpoena power over both testimony and records that the ombudsman believes to be reasonably related to its investigation, and can seek court enforcement of the subpoenas it issues. *Id.* at § 24.55.170.

<sup>33</sup> The citizens' aide candidate, nominated by a committee comprised of legislators and the public, needs a two-thirds vote from both legislative houses. While the governor may veto an appointment, the legislature can successfully appoint the citizens' aide candidate despite a gubernatorial veto with a three-fourths vote. ARIZ. REV. STAT. ANN. § 41-1373 (West 2014). The legislature has limited removal powers. *See Id.* at § 41-1375.

<sup>34</sup> The citizen's aide may issue subpoenas, but must seek assistance from other government entities to enforce them. ARIZ. REV. STAT. ANN. §§ 41-1378(d)(5) 41-1376(b) (West 2014).

<sup>35</sup> *Id.* at § 41-1376.01(a) (West 2014).

<sup>36</sup> IOWA CODE ANN. § 2C.3 (West 2014). The legislative council makes the appointment which is then confirmed by the vote of both legislative houses.

<sup>37</sup> IOWA CODE ANN. §§ 2C.9, 2C.9(5), 2C.22 (West 2014); *Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 903 (Iowa 1996) (upholding Citizen's Aide's authority to issue subpoena in its role as "people's watchdog").



headed by an executive director appointed by the Governor,<sup>38</sup> plays a dual role: overseeing a formal administrative appeal process for requesters prior to litigation<sup>39</sup> and running an informal mediation program intended to resolve disputes prior to an agency's issuance of a denial.<sup>40</sup> Once an agency issues a denial, a requester cannot use the mediation program because of the strict timelines the statute establishes for administrative appeals and litigation.<sup>41</sup> The number of administrative appeals OOR conducts vastly outnumber the mediations it oversees.<sup>42</sup> Tennessee's Open Records Counsel, housed within the Comptroller of the Treasury (who is elected by the state's General Assembly), also informally mediates disputes but lacks any investigatory authority besides the power to issue informal advisory opinions.<sup>43</sup> It must confer with a statutorily created advisory committee, composed of members from NGOs that represent government, press, and public interests, to review proposed legislative changes to the open records laws.<sup>44</sup>

## **B) Multi-member commissions**

The quite powerful Connecticut Freedom of Information Commission exemplifies a quite different model of internal oversight than the traditional ombudsman office, one that far fewer states have adopted. Established in 1975 to enforce the state's broad right of access,<sup>45</sup> Connecticut's commission resides within the legislatively created Office of Governmental Accountability<sup>46</sup> and consists of nine voting members, five of whom are appointed by the governor (with the advice and consent of the General Assembly), including the Chairman, and four of whom are

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<sup>38</sup> 65 PA CONS. STAT. ANN. § 67.1310 (West 2014). The executive director has the authority to appoint appeals officers and additional staff members. *Id.*

<sup>39</sup> 65 PA CONS. STAT. ANN. § 67.1101 (West 2014).

<sup>40</sup> 65 PA CONS. STAT. ANN. § 67.1310(a)(6) (West 2014);

<sup>41</sup> See 65 PA CONS. STAT. ANN. § 67.1101(a)(1) (West 2014); Pennsylvania Office of Open Records, Informal Mediation:

[http://openrecords.state.pa.us/portal/server.pt/community/open\\_records/4434/informal\\_mediation/488137](http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/informal_mediation/488137) (last visited Apr. 11, 2015).

<sup>42</sup> In 2013, for example, OOR conducted 2478 appeals and only 4 mediations. See PENNSYLVANIA OFFICE OF OPEN RECORDS, 2013 ANNUAL REPORT 6, 24 (2014), available at

<https://www.dced.state.pa.us/public/oor/2013AnnualReport.pdf> (last visited Apr. 11, 2015).

<sup>43</sup> TENN. CODE ANN. § 8-4-601 (West 2014).

<sup>44</sup> TENN. CODE ANN. §§ 8-4-602, 8-4-603 (West 2014).

<sup>45</sup> *Dir., Dept. of Info. Tech. of Town of Greenwich v. Freedom of Info. Comm'n*, 874 A.2d 785, 791 (Conn. 2005) (noting that the general rule of disclosure is well established); see e.g. *Town of W. Hartford v. Freedom of Info. Comm'n*, 588 A.2d 1368 (Conn. 1991).

<sup>46</sup> See CONN. GEN. STAT. ANN. § 1-205; STATE OF CONNECTICUT, CONNECTICUT'S EXECUTIVE BRANCH OF GOVERNMENT:

<http://www.ct.gov/ctportal/cwp/view.asp?a=843&q=246450> (last visited Apr. 11, 2015).

appointed by various members of the legislature.<sup>47</sup> Upon receiving an appeal from a person denied the right to attend an agency's meeting or to inspect public records,<sup>48</sup> the Commission can hold a hearing, administer oaths, examine witness, receive evidence, issue subpoenas to compel attendance and require the production of any evidence relevant to the investigation and seek their judicial enforcement, and grant appropriate administrative relief as well as impose civil fines.<sup>49</sup> To file suit against an agency, a requestor must first exhaust the Commission's administrative remedies,<sup>50</sup> and courts review the Commission's decisions under a deferential "substantial evidence" test.<sup>51</sup> The Commission may intervene or participate in the initial appeal and appeal any lower court ruling that overrules it.<sup>52</sup> It also performs an educational function for state and local agencies and makes legislative recommendations regarding the administration of the open government laws.<sup>53</sup> To summarize, then, Connecticut's commission has remarkable investigatory powers and institutional independence, and is granted standing to challenge any lower court that overrules its decisions. New Jersey, Virginia, and Utah share Connecticut's commission structure but do not endow their commissions with such authority.<sup>54</sup> New Jersey's five-member Government Records

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<sup>47</sup> CONN. GEN. STAT. ANN. § 1-205(a) (West 2014). The Office of Governmental Accountability was established by the Connecticut legislature. CONN. GEN. STAT. ANN. § 1-300 (West 2014).

<sup>48</sup> CONN. GEN. STAT. ANN. § 1-206(b)(1) (West 2014).

<sup>49</sup> CONN. GEN. STAT. ANN. §§ 1-205(d), 1-206(b)(2) (West 2014); *see generally* Ethics Comm'n of Town of Glastonbury v. Freedom of Info. Comm'n, 23 A.3d 1211, 1215-17 (Conn. 2011) (recognizing Commission's broad remedial power but holding that the Commission must tailor its remedy to the nature of the violation).

<sup>50</sup> Any party aggrieved by the Commission may appeal in accordance with section 4-183. CONN. GEN. STAT. ANN. § 1-206(d) (West 2014). The exhaustion of administrative remedies doctrine, codified by statute, gives "the Superior Court jurisdiction only over appeals from a final decision of an administrative agency." *Fromer v. Freedom of Info. Comm'n*, CV030521936, 2004 WL 1926010 (Conn. Super. Ct. 2004); *Fairfield v. Connecticut Siting Council*, 679 A.2d 354, 369 (Conn. Super. Ct. 1996); CONN. GEN. STAT. ANN. § 4-183 (West 2014).

<sup>51</sup> *Lucarelli v. Freedom of Info. Comm'n*, 43 A.3d 237, 240 (Conn. App. Ct. 2012) (defining "substantial evidence" review as based on whether the Commission's decision "resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts"); *Carpenter v. Freedom of Information Commission*, 755 A.2d 364, 368 (Conn. App. Ct. 2000) (upholding Commission decision under substantial evidence test).

<sup>52</sup> CONN. GEN. STAT. ANN. § 1-242 (a) (West 2014); CONN. GEN. STAT. ANN. § 1-242 (b) (West 2014). The Commission is granted standing to sue under CONN. GEN. STAT. ANN. § 1-206(d) (West 2014).

<sup>53</sup> *See* Conn. Gen. Stat. Ann. §§ 1-205(e), (f) (West 2014).; Paula Sobral Pearlman, Connecticut Freedom of Information Commission, Final Report: Public Access and Accountability Legislation 2014 Regular Session, (2014), available at <http://www.ct.gov/foi/cwp/view.asp?a=4314&Q=547006> (last visited Apr. 11, 2015).

<sup>54</sup> New York, too, has a formal commission—the Committee on Open Government—but it only has the power to issue advisory opinions regarding New York's Freedom of Information Law and to recommend legislative changes, and has no authority to investigate or mediate disputes. *See* N.Y. PUB.

Council (GRC)<sup>55</sup> offers voluntary mediation at no cost to frustrated requesters,<sup>56</sup> followed by an investigation if the mediation fails<sup>57</sup>—although the GRC has no subpoena power and can only issue fines to public officials who knowingly and unreasonably deny access to public records.<sup>58</sup> GRC’s decisions regarding a public record are subject to judicial review.<sup>59</sup> Virginia’s Freedom of Information Act established the Virginia Freedom of Information Advisory Council, which exists within the state’s legislative branch and contains twelve members, including the Attorney General, the Librarian of Virginia, and the Director of the Division of Legislative Services, or their respective designees, and appointees from each legislative branch and the governor.<sup>60</sup> Its purpose is “to help resolve disputes over Freedom of Information Act issues,”<sup>61</sup> and the Council attempts to resolve disputes between requesters and government agencies by conferring with requesters and issuing advisory opinions—opinions that it has no legal authority to impose, although agencies are required to “cooperate with, and provide such assistance to, the Council as the Council may request.”<sup>62</sup> Utah’s seven-member State Records Committee performs only administrative appeals (without any authority to conduct or oversee mediation), but has broad authority, including the authority to issue and seek judicial enforcement of subpoenas, as part of its power to investigate.<sup>63</sup>

### C) Informal dispute resolution institutions

Florida takes an opposite approach from Connecticut. In response to a rising number of disputes over the laws’ application and

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OFFICERS LAW § 89(1)(b) (McKinney 2012); N.Y. COMM. ON OPEN GOV’T, FAQ – FREEDOM OF INFO. LAW (FOIL) (2012):

<http://www.dos.ny.gov/coog/freedomfaq.html#requestresponse>.

Texas’s Open Records Steering Committee, which has representatives from various agencies as members and is overseen by the Attorney General, advises the Attorney General and Governor regarding the law and state agencies’ compliance with it. TEX. GOV. CODE ANN. §552.009(a), (b), (d) (Vernon 2012). It serves no dispute resolution function.

<sup>55</sup> The GRC exists within the Department of Community Affairs and consists of the Commissioner of Community Affairs (or his designee), the Commissioner of Education (or his designee) and three members of the public appointed by the Governor. N.J. STAT. ANN. § 47:1A-7(a) (West 2014).

<sup>56</sup> N.J. STAT. ANN. § 47:1A-7(b), (d), (e) (West 2014); *see generally* NEW JERSEY GOVERNMENT RECORDS COUNCIL, MEDIATION PROCESS (2012): <http://nj.gov/grc/mediation/brochure>.

<sup>57</sup> N.J. STAT. ANN. § 47:1A-7(c) (West 2014).

<sup>58</sup> N.J. STAT. ANN. § 47:1A-11 (West 2014).

<sup>59</sup> N.J. STAT. ANN. § 47:1A-7(e) (West 2014). These decisions are appealable to the Appellate Division of the New Jersey Superior Court. *Id.*

<sup>60</sup> VA. CODE ANN. § 30-178(A), (B) (West 2014).

<sup>61</sup> VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL, SERVICES OF THE COUNCIL (2012), available at: <http://foiacouncil.dls.virginia.gov/Services/welcome.htm> (last visited Apr. 11, 2015).

<sup>62</sup> VA. CODE ANN. § 30-181 (West 2014).

<sup>63</sup> UTAH CODE ANN. §§ 63G-2-403(8), (10), (11), 63G-2-501 (West 2014).

increasing litigation costs, the Florida Legislature established a Voluntary Mediation Program within the Attorney General's Office to help resolve disputes involving access to public records.<sup>64</sup> Florida's mediation program differs from the traditional ombudsman approach used in both the commission and single-officer models. Disputes that have not reached litigation are eligible for the Mediation Program, so long as both parties agree to utilize it.<sup>65</sup> The mediator lacks investigatory authority and subpoena power over testimony and records and can only provide the assistance that the mediating parties' request.<sup>66</sup> The results of the mediation do not bind the parties.<sup>67</sup> It applies only to disputes over records and does not extend to open meetings. Relying on one or more mediators as employees rather than appointees—and therefore with no independence from the elected Attorney General or job protection<sup>68</sup>—the Program does nothing more than offer a neutral third person to encourage the resolution of a public records dispute by facilitating a mutually acceptable agreement.<sup>69</sup> Although the Office of the Attorney General had the authority to adopt rules of procedure to govern the Mediation Program's proceedings, it had never adopted any and did not object when the legislature removed its rule-making authority in 2012.<sup>70</sup> A recent statewide Open Government Commission established to review Florida's "Sunshine Laws" and to suggest reforms for their enforcement proposed moving the Mediation Program from the Attorney General's office to a cabinet-level position in the Governor's office. The Commission reasoned that this institutional independence would improve executive branch agency compliance with open records and meeting laws.<sup>71</sup> The proposal has not been adopted.

Indiana's Public Access Counselor, appointed by the Governor without legislative confirmation,<sup>72</sup> also lacks authority to resolve conflicts between requesters and public agencies. It enjoys the authority to investigate public agencies, which are required to cooperate with the counselor during a public records

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<sup>64</sup> See FLA. STAT. ANN. § 16.60 (West 2014).

<sup>65</sup> *Areizaga v. Bd. of County Com'rs of Hillsborough County*, 935 So. 2d 640, 643 (Fla. 2d DCA 2006).

<sup>66</sup> FLA. STAT. ANN. §§ 16.60(3), (4) (2014).

<sup>67</sup> COMMISSION ON OPEN GOVERNMENT REFORM, REFORMING FLORIDA'S OPEN GOVERNMENT LAWS IN THE 21<sup>ST</sup> CENTURY 32 (2009), available at: <http://floridafaf.org/files/2012/12/Commission-On-Open-Government-Final-Report-Open-Government-Reports.pdf> (last visited Apr. 11, 2015).

<sup>68</sup> FLA. STAT. ANN. § 16.60 (West 2014).

<sup>69</sup> FLA. STAT. ANN. § 16.60(1) (West 2014).

<sup>70</sup> FLA. STAT. ANN. § 16.60(3)(a) (West 2014); Florida Staff Analysis, H.B. 7055, 3/19/2012.

<sup>71</sup> Commission on Open Government Reform, *supra* note, at 33-34.

<sup>72</sup> The governor appoints the counselor and may remove the counselor for cause. IND. CODE § 5-14-4-6;7 (West 2014). While Indiana uses an appointment scheme, its scheme contrasts with the majority of schemes discussed *supra* because it calls on the governor, without any requirement of consent or confirmation from the legislature, to appoint the counselor.

investigation.<sup>73</sup> But it lacks subpoena power over persons or records and its statutory authority does not allow it to initiate legal proceedings to enforce its powers. A recalcitrant agency therefore faces no consequences for its refusal to cooperate.<sup>74</sup> Instead, the counselor's main role when a requester seeks assistance is to issue an advisory opinion regarding the dispute and public access laws—opinions that are not binding on courts or required for requesters as a precursor to filing suit.<sup>75</sup> Nevertheless, Indiana courts have found the Counselor's opinions to be informative when deciding open records issues,<sup>76</sup> and requesters who file suit without seeking an advisory opinion from the counselor are generally not entitled to recover attorney's fees, court costs, and other reasonable expenses.<sup>77</sup> The Counselor is required to educate the public and agencies about the rights and obligations created by the state's open government laws,<sup>78</sup> is also responsible for making recommendations to the general assembly regarding the improvement of public records access.<sup>79</sup> Maine's Public Access Ombudsman also has little affirmative legal authority to meet its statutory charge to "[r]espond to and work to resolve complaints made by the public and public agencies and officials regarding the State's freedom of access laws."<sup>80</sup> It can only issue non-binding advisory opinions, request "assistance" from agencies, engage in educational efforts, and issue an annual report documenting its activities and making recommendations to improve public access to meetings and documents.<sup>81</sup>

#### **D) Conclusion: Diverse Models, But Are They Effective?**

American states have adopted a general idea—that judicial review should not be the only external check on an agency's compliance with open government laws—and taken innovative steps to establish distinct institutions within their own constitutional and bureaucratic systems to further it. At one extreme, Connecticut has created a powerful, multi-member commission, with wide-ranging and extensive authority; at the other, Florida has established a

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<sup>73</sup> IND. CODE § 5-14-5-5 (West 2014).

<sup>74</sup> IND. CODE § 5-14-4-10 (West 2014).

<sup>75</sup> IND. CODE §§ 5-14-4-10(6), 5-14-5-9 (West 2014).

<sup>76</sup> See, e.g., *Smith v. Maximum Control Facility*, 850 N.E.2d 476, 479 (Ind. Ct. App. 2006) (noting, when ruling against agency in public records dispute, that requester had the support of the Public Access Counselor").

<sup>77</sup> IND. CODE §§ 5-14-3-9(i), 5-14-5-4 (West 2014). While the Indiana public records statutes do not require an aggrieved requester to submit a complaint to the counselor, the statutes highly incentivize the use of the counselor's complaint process. IND. CODE § (West 2014).

<sup>78</sup> IND. CODE § 5-14-4-10(1) (West 2014). It does so in great part by making its advisory opinions freely available on its website. INDIANA PUBLIC ACCESS COUNSELOR, <http://www.in.gov/pac/index.htm> (last visited Apr. 11, 2015).

<sup>79</sup> IND. CODE § 5-14-4-10(7) (West 2014).

<sup>80</sup> ME. REV. STAT. ANN. tit. 5 § 200-I(4) (West 2014) (stating that the Ombudsman's recommendation regarding a dispute is not binding on agencies and officials and withholding authority to issue a subpoena or file suit).

<sup>81</sup> *Id.*



single-person entity under its Attorney General with little but the moral authority to assist in settling disputes. In the middle, most other states with ombudsmen or ombuds-like institutions have chosen among the various institutional structures and legal authorities in establishing their own independent offices.

How can we evaluate the performance of these institutions? In the most extensive analysis (albeit only qualitative and impressionistic), Professor Daxton Stewart has noted that three ombudsman programs that he studied, those in Iowa, Virginia, Arizona, had “provided valuable services to citizens, government, and journalists.”<sup>82</sup> His chronicle of each state’s adoption of a program, however, recounted the political conflicts that they worked within and engendered, and conceded their imperfections as agents of open government.<sup>83</sup> Although his work largely praises the institution, he frequently heard from activists and participants that, for example, the new ombudsman “‘didn’t turn out to be the panacea we all thought’”<sup>84</sup> or that it too often “split the baby” in a dispute, leaving the requester unsatisfied.<sup>85</sup> There is no doubt that they are better than nothing; however, as Stewart notes in another article, they “have not proven to be a magic solution.”<sup>86</sup>

Moreover, it is difficult to predict whether and how any particular ombudsman component or form will function. For example, Florida’s very small, informal mediation program—which one might assume would have little success, since it has no authority—in fact is widely praised within the state. This is in part because its costs of operation and use are low—considerably lower than litigation for both government and requester, especially for requestors who have not yet retained an attorney—and in part because it proceeds by informal phone and electronic communication, saving the parties travel costs.<sup>87</sup> Its success also clearly comes from the attorney who serves as the mediator, who has run the program for most of its existence and who has built up enormous legitimacy and good will among government attorneys and who can persuade recalcitrant agencies of their duty to disclose documents.<sup>88</sup> The extent of its influence is unclear, however. Between 1995 and 2000, the Mediation Program handled over 400

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<sup>82</sup> Daxton R. Stewart, *Evaluating Public Access Ombuds Programs: An Analysis of Experiences in Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising Under Open Government Laws*, 2012 J. DISP. RESOL. 437, 496.

<sup>83</sup> See, e.g., *id.* at (quoting *id.* at 458-60 (noting the Iowa Citizens’ Aide has been perceived by some agencies as partial to journalists, and compliance with the state’s open government laws “remains problematic”); *id.* at 477-478, 483-484 (quoting activists as complaining that Arizona’s Ombudsman-Citizens’ Aide was not a solution to dealing with recalcitrant, non-compliant agencies, and that it is not serving as a useful alternative to litigation).

<sup>84</sup> *Id.* at 449 (regarding the Iowa ombudsman)

<sup>85</sup> *Id.* at 477 (regarding the Arizona ombudsman).

<sup>86</sup> Daxton R. Stewart, *Systems in the Shadow of Sunshine Laws*, RUTGERS CONF. RESOL. J., Spring 2012, at 21.

<sup>87</sup> Email from Pat Gleason, Special Counsel for Open Government for Attorney General Pam Bondi, to Adolph Posey (Nov. 13, 2012, 22:30 EST).

<sup>88</sup> See Stewart, *Shadow of Sunshine Laws*, *supra* note, at 15-16.

disputes, successfully settling 325 of them.<sup>89</sup> The Attorney General stopped publishing official statistics on the mediation program in 2000, when the legislature repealed the subsection that required the Attorney General to provide an annual report.<sup>90</sup> According to a count kept by its chief mediator, the number of cases remained relatively steady throughout the decade and after showing an initial promise of evolving into a pervasive alternative to litigation, the number of disputes mediated through the Mediation Program has remained stagnant.<sup>91</sup> It is difficult to measure the actual success of an apparently successful program.

## § 2 – THE FEDERAL OMBUDSMAN

Similarly seeking to fix agencies' imperfect compliance with its open government mandates, the U.S. Congress in 2009 established the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). Congress' purpose was for OGIS to oversee agency compliance with FOIA and to offer mediation services to resolve disputes between persons making requests and administrative agencies "as a non-exclusive alternative to litigation."<sup>92</sup> As the OGIS homepage explains, "Congress refers to OGIS as 'the Federal FOIA ombudsman.' What does this mean? In short, OGIS serves as a bridge between requesters and agencies, particularly in situations where clear, direct communication has been lacking."<sup>93</sup> The Office also makes official recommendations for policy changes to Congress and the President, works collaboratively with the Office of Information Policy in the Department of Justice to implement these changes, suggests best practices for FOIA compliance and information sharing to federal agencies, and assists requesters both

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<sup>89</sup> The case statistics were taken from the Open Government Mediation Program 2000 Annual Report. OPEN GOVERNMENT MEDIATION PROGRAM, ANNUAL REPORT AND RECOMMENDATIONS (March 2000).

<sup>90</sup> 2000 Fla. Sess. Law Serv. Ch. 2000-158 (H.B. 1063). The Florida legislature found the annual report subsection obsolete and no longer needed by the Attorney General. Florida Staff Analysis, H.B. 4021, 2/8/2000. The annual report had been established in FLA. STAT. ANN. § 16.60(5) (2000).

<sup>91</sup> In 2003, 149 cases were handled by the program, and from July 2008 through June 2009, the total number of cases dropped to fifty-four. From July 2009 to December 2010, the case load remained stable with seventy-six of the eighty-seven mediated cases being resolved. Email from Pat Gleason, Special Counsel for Open Government for Attorney General Pam Bondi, to Adolph Posey (Nov. 13, 2012, 22:30 EST).

<sup>92</sup> 5 U.S.C. § 552(h)(3) (2014); *see also* 5 U.S.C. § 552(h)(2) (2014) (requiring OGIS to review agency policies, procedures, and compliance with FOIA, and to recommend policy changes). The Archivist of the National Archives appoints the OGIS director. *See* National Archives and Records Administration, *National Archives Appoints Miriam Nisbet as Director of the Office of Government Information Services* (June 10, 2009):

<http://www.archives.gov/press/press-releases/2009/nr09-93.html> (last visited Apr. 11, 2015).

<sup>93</sup> Office of Government Information Services, About OGIS: <https://ogis.archives.gov/about-ogis.htm> (last visited Apr. 11, 2015).

in drafting FOIA requests and working with agencies to procure the information they seek.<sup>94</sup>

Requesters initiate OGIS's dispute resolution process by submitting a written request for assistance from OGIS that includes identifying information about its original FOIA request, authorization for OGIS's participation, and a description of the kind of assistance the requester seeks.<sup>95</sup> OGIS pledges to "work cooperatively" with agencies' existing administrative process that process, encouraging the requester to exhaust his or her remedies within the agency but recognizing that the requester might justifiably request OGIS's earlier intervention if the agency fails to reply to the request in a timely manner.<sup>96</sup> OGIS also works with requesters to help narrow their requests, explain agency procedures and legal issues to them, and obtain information from the agency about the stage of their review and issues relating to information an agency has concluded is exempt from disclosure under FOIA.<sup>97</sup> OGIS's role, then, is to help the disputants to "facilitate communication and try to reach amicable resolutions" by, among other things, "attempting to make contact with FOIA specialists and other appropriate agency staff, working through the appeal process, and/or working with FOIA Public Liaisons to resolve disputes."<sup>98</sup> If these informal efforts to facilitate a resolution fail to reach a satisfactory conclusion, OGIS offers to arrange or conduct formal mediation.<sup>99</sup>

Congress appears to like OGIS and has sought to address the limitations it has faced, first in the proposed but unenacted FOIA Improvement Act of 2014 and more recently in a bill that is moving through Congress at the time of this writing (April 2015).<sup>100</sup> The

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<sup>94</sup> See 5 U.S.C. § 552(h)(2) (2014); Office of Government Information Services, *OGIS Procedures*, <https://ogis.archives.gov/about-ogis/ogis-procedures.htm> (last visited Apr. 11, 2015) Office of Government Information Services, *Improving FOIA*, <https://ogis.archives.gov/about-ogis/Improving-FOIA.htm> (last visited Apr. 11, 2015).

<sup>95</sup> See Office of Government Information Services, *How does a customer make a request for OGIS assistance?*

<https://ogis.archives.gov/about-ogis/ogis-procedures.htm#Request+OGIS+assistance> (last visited Apr. 11, 2015).

<sup>96</sup> Office of Government Information Services, *When does OGIS get involved in FOIA disputes?*

<https://ogis.archives.gov/about-ogis/ogis-procedures.htm#FOIA+disputes> (last visited Apr. 11, 2015).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Office of Government Information Services, *What guidelines will OGIS follow when conducting alternative dispute resolution (ADR) proceedings?*

<https://ogis.archives.gov/about-ogis/ogis-procedures.htm#Alternative+dispute+resolution> (last visited Apr. 11, 2015) (noting that, whether conducted by OGIS or the agency from whom the request was made, the mediation will follow procedures established by the Administrative Dispute Resolution Act, 5 U.S.C. §§571-84).

<sup>100</sup> See Daniel J. Richardson & Wendy Ginsberg, Cong. Res. Serv., R43924, *Freedom of Information Act Legislation in the 114th Congress: Issue Summary and Side-by-Side Analysis* (2015) (describing and comparing S. 337, FOIA

Senate Judiciary Committee report in 2015 declared that OGIS had been “largely successful in carrying out its mission and serving as a bridge between Federal agencies and FOIA requesters,” but complained that the Department of Justice frustrated the Office’s effort to review agency compliance with FOIA and propose appropriate reforms.<sup>101</sup> Since OGIS’s inception, the Committee wrote, “DOJ has required OGIS to submit its findings and recommendations to several executive agencies for final approval before receiving permission to deliver its findings to Congress.”<sup>102</sup> DOJ was interfering with what Congress intended to serve as an independent overseer and mediator. The proposed FOIA amendment would make plain that OGIS is not required to obtain the prior approval or comment of any agency before submitting its findings and recommendations to Congress and the President.<sup>103</sup> It would also require agencies to advise requesters that they can turn to OGIS for dispute resolution services rather than rely on expensive and time-consuming litigation.<sup>104</sup>

OGIS also has admirers in the open government advocacy community. The website for the Reporters Committee for Freedom of the Press, for example, refers requesters to OGIS, noting that the entity can serve as a “good alternative to litigation,” and “may be particularly helpful where you believe the agency is unreasonably delaying processing your FOIA request, or is not timely corresponding with you regarding your request.”<sup>105</sup> A policy advisor at the Sunlight Foundation noted that, “Overall we’re big fans of OGIS. The folks there are committed to making FOIA work better.”<sup>106</sup>

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Improvement Act of 2015 and H.R. 653, The FOIA Act, both of which would expand certain OGIS authorities and place additional mandates on OGIS).

<sup>101</sup> SENATE JUDICIARY COMMITTEE, REPORT ON FOIA IMPROVEMENT ACT OF 2015, S. REP. 114-4, at 3 (2015) [hereinafter SENATE JUDICIARY COMMITTEE REPORT]. This frustration is longstanding. *See, e.g.*, Jacob Gerstein, “Patrick Leahy, Chuck Grassley on warpath over stalled FOIA recommendations,” POLITICO (Mar. 13, 2012), <http://www.politico.com/blogs/under-the-radar/2012/03/patrick-leahy-chuck-grassley-on-warpath-over-stalled-117303.html> (describing senators’ anger at Department of Justice for holding up OGIS’s FOIA reform recommendations).

<sup>102</sup> Senate Judiciary Committee Report, *supra* note, at 3.

<sup>103</sup> S. 337, 114<sup>th</sup> CONG. §2(5) (2015), H.R. 653, 114<sup>th</sup> CONG. §2(c) (2015).

<sup>104</sup> S. 337, 114<sup>th</sup> CONG. §2(1)(C) (2015), H.R. 653, 114<sup>th</sup> CONG. §2(d) (2015).

<sup>105</sup> Reporters Committee for Freedom of the Press, *Pre-Litigation Option: Office of Government Information Services*.

<http://www.rcfp.org/federal-foia-appeals-guide/pre-litigation-option-office-government-information-services> (last visited Apr. 11, 2015).

<sup>106</sup> Adam Mazmanian, *OGIS' Miriam Nisbet heads for the exits*, FCW: THE BUSINESS OF FEDERAL TECHNOLOGY (Nov. 11, 2014):

<http://fcw.com/articles/2014/11/11/nisbet-leaves-ogis.aspx> (last visited Apr. 11, 2015) (quoting Matthew Rumsey, policy associate at the Sunlight Foundation). *See also* Matt Ehling, *OGIS helps to resolve three-year old FOIA request*, TWINCITIES.COM (Aug. 28, 2014), available at:

[http://www.twincities.com/columnists/ci\\_26425935/matt-ehling-foia-improvement-act-will-help-keep](http://www.twincities.com/columnists/ci_26425935/matt-ehling-foia-improvement-act-will-help-keep) (praising OGIS for its work generally and for its assistance in helping the author, staff member for a freedom of information NGO, in his FOIA request).

OGIS has almost no power, however, as open government advocates frequently note and complain. One friendly critic from the National Security Archive, an NGO that frequently makes FOIA requests and complains of widespread agency non-compliance with the statute, has complained that OGIS's lack of authority to compel agencies to disclose records renders it less capable of fixing widespread government secrecy than it ought to be.<sup>107</sup> In its mediation work, OGIS explicitly notes that it has no authority either to enforce FOIA, independently investigate agency action, or, ultimately, to compel disclosure. If the parties do not agree to resolve the dispute, OGIS closes the case.<sup>108</sup> The somewhat variable boilerplate language that OGIS uses when its director issues Final Response Letters to requesters upon the closing of a case reads:

In cases such as this where an agency is firm in its position, there is little for OGIS to do beyond providing more information about the agency's actions. While I understand that this is not the result for which you hoped, I hope that this additional information about your request is useful to you. Thank you for bringing this matter to OGIS; at this time there is no further action for us to take and we will consider this matter closed.<sup>109</sup>

Although it has the authority to issue advisory opinions—opinions that would have no binding authority but might at least influence future agency practices and decisions—it has not yet done so.<sup>110</sup> If OGIS's mediation services could transform FOIA's administration, we would expect to see FOIA litigation decline; in 2014, however, frustrated requesters filed more FOIA suits than in any year since at least 2001, according to a nonpartisan research center.<sup>111</sup> Nor has agency compliance with FOIA's mandates

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<sup>107</sup> Nate Jones, *Department of Justice Not Qualified to Be FOIA Ombudsman*, NAT. SEC. ARCH. (Mar. 29, 2012):

<http://nsarchive.wordpress.com/2012/03/29/departement-of-justice-not-qualified-to-be-foia-ombudsman>. See also Mazmanian, *supra* note (quoting same Sunshine Foundation policy associate as complaining about OGIS's relative powerlessness).

<sup>108</sup> See Office of Government Information Services, *Mediation Services*: <https://ogis.archives.gov/for-federal-agencies/working-with-ogis/mediation-services.htm> (last visited, Apr. 11, 2015).

<sup>109</sup> Final Response Letter re: OGIS Case No. 201400856, Feb. 4, 2015, available at: <https://ogis.archives.gov/Assets/2015-02-04-final-response-letter-201400856.pdf>. See also Final Response Letter re: OGIS Case No. 201500005, No. 20, 2014, available at <https://ogis.archives.gov/Assets/2014-11-20-final-response-letter-201500005.pdf> (similar final paragraph); Final Response Letter re: OGIS Case No. 201400015, Jan. 27, 2014, available at: <https://ogis.archives.gov/Assets/2014-01-27-final-response-letter-201400015.pdf>.

<sup>110</sup> Office of Government Information Services, *Advisory Opinions*: <https://ogis.archives.gov/about-ogis/ogis-procedures.htm#Advisory+Opinions> (last visited, Apr. 11, 2015).

<sup>111</sup> Greg Munno, *FOIA Suits Jump in 2014*, THE FOIA PROJECT (Dec. 22, 2014): <http://foiaproject.org/2014/12/22/foia-suits-jump-in-2014/> (reporting on analysis of court records by Transactional Records Access Clearinghouse, "a nonpartisan data research center that is a joint center of the



improved considerably; according to one recent audit, a majority of federal agencies fail to comply with the legal requirement to proactively create online document libraries.<sup>112</sup>

Two internal audits by external government entities concurred with this account of OGIS's reputation and influence—that it affirmatively assists in FOIA's administration, but that for a variety of reasons, its impact has thus far been modest. Congress' Government Accountability Office (GAO), in a 2013 audit, found that OGIS had not yet begun to proactively review agencies' policies, procedures, and compliance with FOIA, and that its impact through its mediation services has been relatively small and could not yet be adequately evaluated because OGIS had not yet developed goals and metrics to measure its success.<sup>113</sup> In all, GAO found, OGIS successfully resolved via facilitation and mediation only 30 disputes of the 44 it initiated in the 2012 fiscal year.<sup>114</sup> This is both a small number of disputes, given the size of the federal government and the number of FOIA disputes it engenders, and an even smaller number of successes.<sup>115</sup> Reviewing OGIS's first two years of operation, the Inspector General of the National Archives and Records Administration (the agency of which OGIS is a part) concluded in 2012 that the agency has met its general statutory mandate to assist with FOIA's administration, but the combination of its limited authority, lack of resources, and some issues with information technology inhibited the agency's operation.<sup>116</sup> In a 2014 memorandum generally supporting OGIS's project and work, the Administrative Conference of the United States, a nonpartisan, independent federal agency established to study and improve the administrative process, advised Congress, the executive branch, and OGIS to promote and expand mediation as an alternative mechanism to resolve FOIA disputes.<sup>117</sup> Its review of OGIS concluded, in other words, that OGIS had not yet made

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Newhouse School of Public Communications and the Whitman School of Management at Syracuse University”).

<sup>112</sup> National Security Archive, *Most Agencies Falling Short on Mandate for Online Records* (Mar. 13, 2015), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB505/>.

<sup>113</sup> U.S. Government Accountability Office, Office of Government Information Services Has Begun Implementing Its Responsibilities, but Further Actions Are Needed (GAO Report 13-650, Sept. 2013), available at: <http://www.gao.gov/assets/660/657697.pdf>.

<sup>114</sup> *Id.* at 12-15.

<sup>115</sup> Nearly 350 FOIA lawsuits were filed in the same period, so that at most—assuming all of the disputes OGIS resolved would have ended up in litigation but for OGIS's assistance—it prevented less than 10% of the lawsuits that would have been filed. *See* Munno, *supra* note. Ten percent is surely better than nothing, but it is not terribly much.

<sup>116</sup> National Archives and Records Administration Office of Inspector General, Audit of NARA's Office of Government Information Services (OIG Audit Report No. 1214, Sept. 11, 2012), available at: <http://www.archives.gov/oig/pdf/2012/audit-report-12-14.pdf>.

<sup>117</sup> ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RESOLVING FOIA DISPUTES THROUGH TARGETED ADR STRATEGIES (Administrative Conference Recommendation 2014-1, June 5, 2014), available at: <https://www.acus.gov/sites/default/files/documents/Recommendation%202014-1%20%28Resolving%20FOIA%20Disputes%29.pdf>.

the impact that an ombudsman surely should have in helping impose a fully open, responsive government.

## CONCLUSION

The ombudsman promises a significant fix for FOIA compliance and an open government in the same way that, for American administrative law scholars working five decades previously, it promised a fix for what was increasingly seen as a sprawling, insufficiently accountable bureaucracy. Its adoption to promote open government has been incremental and variable. Although its successes have been real, they have proven marginal and contingent on the political, administrative, and bureaucratic context in which the ombudsman was formed and works.<sup>118</sup> The institution has not put an end either to state secrecy or to insufficient compliance with transparency mandates. It seems doubtful—indeed, it seems improbable—that it can transform the state any more comprehensively than FOIA’s institution of legal mandates accomplished, or than new developments in information technology and the threat of massive government leaks have imposed. My skepticism about the ombudsman as a transparency fix is not intended to deny the real, marginal gains ombudsmen have made in sub-federal American government, or that the OGIS might make in the future. It extends only to claims that an institutional fix like the ombudsman can in fact overcome the Weberian nature of bureaucratic practice.

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<sup>118</sup> In this regard, the ombudsman is not unlike advisory committees, see Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239 (2008), and inspectors general, see Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013), as innovative means to provide a measure of external accountability and transparency that can, in certain circumstances, have some success.

