

**Society of American Archivists
Council Meeting
May 28 - 30, 2015
Chicago, Illinois**

**Issue Brief: State Freedom of Information Laws
(Prepared by the Committee on Advocacy and Public Policy)**

BACKGROUND / DISCUSSION

This issue brief addresses the following priority within the SAA Public Policy Agenda, as presented to the Council for approval in May 2015 (Agenda Item 0515-III-C-Public Policy Agenda):

“To hold government accountable and ensure its transparency, SAA will pursue the public’s right to equal and equitable access to government information found in archives. For example, SAA will ... support all efforts to strengthen access to state and local records.”

The Committee on Advocacy and Public Policy has prepared this issue brief for Council review and approval.

RECOMMENDATION

THAT the following issue brief on State Freedom of Information Laws be approved:

**SAA Issue Brief:
State Freedom of Information Laws**

SAA POSITION

SAA supports state government efforts to examine all freedom of information laws and strengthen all pertinent legislation according to the following recommendations:

1. All state records laws should define the records of publicly elected officials and other government employees (including governors, legislative representatives, judges, and their staffs) as government records, subject to government records and freedom of information laws, except where existing exemptions apply.
2. All state records laws should include specific language to prevent restrictions and exemptions for records of public officials and other government employees, other than those that are explicitly required by law. SAA specifically recommends that access to records of public officials subject to the

freedom of information law should be made available five years after an archives gains custody, as modeled in the Presidential Records Act.

3. All state records laws should require agencies and/or state officials that handle freedom of information requests to implement reasonable and specific guidelines for costs and fees for responding to these requests.
4. All state records laws should be format neutral. Government records should be defined based on their content and creation during the course of conducting public business.
5. All state records laws should implement penalties for noncompliance with requests that do not fall under exemptions.
6. All state records laws should prevent gubernatorial veto power in restricting access to records that do not fall under exemptions.
7. All states should implement or improve existing request processes to facilitate public access within a reasonable and specific time frame.
8. All states should work to keep to a reasonable minimum the number and types of permissible, reasonable exceptions to their freedom of information laws.
9. Adequate resources should be allocated to examine, amend, and reinforce freedom of information laws according to these recommendations.

SAA will:

Closely monitor state legislation pertaining to state records laws, work with other organizations that are interested in FOIA, and advocate for and support amendments to state laws in accordance with these recommendations.

THE ISSUE

During the past decade, interest in and expectations for government transparency have increased. At the same time, public concern has grown regarding obstacles preventing rightful access to government records. Because each state legislature passes its own freedom of information (FOI) law, there is not a central or unified means either to create or to enforce consistent standards for these laws or ensure consistency among states. As a result, several troubling instances have occurred¹ in which inadequate FOI laws resulted in the denial of public access to public records. These incidents have included misinterpretation of vague language in the state's FOI law, price gouging due to lack of specific fee structures, and omission of publicly elected officials from the language altogether.

It has become increasingly apparent that there are many areas in which state FOI laws must be evaluated to prevent unnecessary obstacles to the public's rightful access to government records. Even the basic definition of a "government record" that would be subject to these laws is often unclear, especially where publicly elected officials are concerned. It is especially important that elected officials be subject to the same FOI laws as the rest of their state government. Without very specific language and attention to gaps in the law in each state, the laws often fail to serve the citizens who request access.

Furthermore, the lack of standards and accepted best practices results in discrepancies among states as well as between states and the federal model. This has created an alarming inequality among citizens of

¹ Selected examples can be found in the following articles: "Deval Patrick is latest Massachusetts governor who says he's exempt from public records law": http://www.masslive.com/politics/index.ssf/2013/03/deval_patrick_is_latest_massac.html; "Governor, lawmakers off limits under public records law": <http://www.freep.com/story/news/local/michigan/2014/09/21/michigan-foia-law-exempts-governor-legislature/15881735/>; "The state of open records laws: Access denied": <http://www.publicintegrity.org/2012/06/01/9037/state-open-records-laws-access-denied>

various jurisdictions in gaining access to public records. Although the federal Freedom of Information Act (FOIA) applies only to federal agencies and the federal government does not dictate state FOI laws, the federal model outlines an assumption of openness and a commitment to disclosure that should be followed at the state level.

State laws should strive to emulate FOIA as well as the OPEN Government Act of 2007, which acknowledged and improved areas in which the law was not fulfilling its purpose in practice and put in place regular review of FOIA by Congress going forward. SAA urges states to review their FOI laws to ensure that citizens across states have the highest level of access to government records possible, both at the federal and state level.

BACKGROUND

State freedom of information laws are based on the tenets of the Freedom of Information Act,² the law governing access to federal government records. Although state laws neither mirror FOIA nor have any direct ties to the federal government, they have the same intent: to ensure transparent and open government. Strength and application of the laws varies widely from state to state, however.

FOIA was enacted on July 4, 1966, and took effect one year later. This federal law gave people the right to access federal agency records, except in cases in which one of nine exemptions or one of three special law enforcement record exclusions applied. The spirit of FOIA supports a transparent government to the highest degree possible by balancing the public's right to know with the need to protect national defense or foreign policy, individual privacy and security interests, business proprietary interests, and the efficient operation of government functions.

In recent years, FOIA has been amended to help the law better achieve the intended goals and address weaknesses in the original act. A major amendment to the law, the OPEN Government Act of 2007, aimed to improve on the original Act by implementing disciplinary actions for "arbitrary and capricious rejections" of requests, implementing a 20-day time limit for filling requests except under unusual circumstances, and including tracking numbers for requests, among other additions to the original law. The Act acknowledges that the original FOIA was intended to have a "strong presumption in favor of disclosure," as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 [1991]),³ but admits that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act." Notably the Act also implemented a regular review of the law by Congress "to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people,"⁴ ultimately acknowledging that freedom of information laws do not always achieve in practice what they set out to accomplish.

Several organizations that support government transparency and openness have recommended a similar reform of state FOI laws based on nationwide reviews of legislation in all 50 states. Investigations have revealed that often states suffer from problematic records laws, resulting in a significant impact on government transparency. These studies have identified common weaknesses across many state laws, pointing to very specific examples that highlight how rightful access to records is impeded by problematic legislation. One such investigation was the State Integrity Investigation, a partnership of the Center for

² "S.2488," [justice.gov](http://www.justice.gov), accessed March 29, 2015. <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/amendment-s2488.pdf>

⁴ S.2488," [justice.gov](http://www.justice.gov), accessed March 29, 2015. <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/amendment-s2488.pdf>

Public Integrity, Global Integrity, and Public Radio International. Undertaken in 2011, the study examined the strength of laws and practices that encourage openness and deter corruption in each of the 50 states. Each state received an overall grade and ranking, as well as grades in 14 different categories. An article on the findings⁵ stated that “nearly every law is riddled with holes,” citing up to 260 exemptions in a single records act, among other examples that bar access to records unnecessarily. These include states that exempt lawmakers from the policy entirely as well as examples of vague language, such as an exemption for records in the “deliberative process.” Among these criticisms, the investigation also made clear that a lack of enforcement and penalties is an underlying issue that undermines even the best state records laws.

Another assessment by The Better Government Association (BGA) and National Freedom of Information Coalition also examined various aspects of the FOI laws of all 50 states, reviewing response time, the ability of citizens to appeal a denial in a cost- and time-efficient manner, and penalties against an agency in violation of the statute, among other criteria for transparency. The study found that “in the vast majority of states, citizens have little to no recourse when faced with unlawful denial of access under their state’s FOI laws.”⁶ Charles N. Davis, executive director of the National Freedom of Information Coalition, called the findings “a cry for reform of FOI laws nationwide.”⁷ According to the grades assigned by the study, 38 states earned “F” ratings, with the majority of remaining states earning a “C” or “D.”

In addition to a growing number of organizations criticizing the effectiveness of state FOI laws, there are several that have begun compiling guides to navigating the different state laws. These guides reveal the inconsistencies among the state laws. One such compendium, created by the Reporters Committee for Freedom of the Press, allows users to compare different parts of state FOI laws. Another, the Digital Media Law Project, a project of Harvard University’s Berkman Center for Internet and Society, has compiled a state-by-state summary of FOI laws.⁸ These organizations aimed at assisting citizens in understanding their state’s FOI laws underscore that the ability of a citizen to understand and navigate these laws successfully is important to constituents, yet often a challenging and ineffective process.

ADDITIONAL RESOURCES

Digital Media Law Project, Access to Government Records:
<http://www.dmlp.org/legal-guide/access-government-records>

Digital Media Law Project, Access to Records from State Governments:
<http://www.dmlp.org/legal-guide/access-records-from-state-governments>

Reporters Committee for Freedom of Press, Open Government Guide:
<http://www.rcfp.org/open-government-guide>

Sunlight Foundation:

⁵ “50 States and no winners,” [stateintegrity.org](http://www.stateintegrity.org), accessed March 29, 2015.
<http://www.stateintegrity.org/state-integrity-investigation-overview-story>

⁶ “50 States and no winners,” [stateintegrity.org](http://www.stateintegrity.org), accessed March 29, 2015.
<http://www.stateintegrity.org/state-integrity-investigation-overview-story>

⁷ “50 States and no winners,” [stateintegrity.org](http://www.stateintegrity.org), accessed March 29, 2015.
<http://www.stateintegrity.org/state-integrity-investigation-overview-story>

⁸ “Access to records from State Governments,” [dmlp.org](http://www.dmlp.org), accessed March 29, 2015 <http://www.dmlp.org/legal-guide/access-records-from-state-governments>

<http://sunlightfoundation.com/>

National Freedom of Information Coalition:

<http://www.nfoic.org/state-freedom-of-information-laws>

<http://www.nfoic.org/states-failing-foi-responsiveness>

U.S. National Archives and Records Administration:

<http://www.archives.gov/foia/>

U.S. Department of Justice:

<http://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Approved by the SAA Council, May 2015.

Support Statement: In support of SAA's Public Policy Agenda, the issue brief provides members and other prospective audiences with SAA's considered opinion on the topic of strengthening state freedom of information laws to support the greatest possible public access to government records.

Relation to Strategic Plan: Addresses Goal 1 (Advocating for Archives and Archivists), Strategy 1.2. (Educate and influence decision makers about the importance of archives and archivists).

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort.