REIMAGINING ACCESS RIGHTS

Jonathan Peters*

ABSTRACT

Lawsuits against public record requestors have been on-going over the last 27 years and are currently on the rise. Government officials argue it is best for the courts to step in immediately if an agency's disclosure obligations are unclear. Peters analyzes the dangers of these suits which present a clear risk to the free flow of information necessary for the press and the public. Peters examines the current patchwork of access rights derived from norms, FOI laws, state constitutional provisions, common law principles, administrative regulations, statutory privileges, and the First Amendment. Peters argues that a reimagined First Amendment right to receive information is needed to compel reliable access to the government and reduce frustration for citizens. This Article proposes finding a general First Amendment right of access to government records, meetings, places, and events.

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* Jonathan Peters is a media law professor at the University of Georgia, with faculty appointments in the School of Law and the College of Journalism and Mass Communication. He is the press freedom correspondent for the *Columbia Journalism Review*, and he has written about First Amendment issues for *Esquire*, *The Atlantic*, *Slate*, *Wired*, and CNN. He has also blogged about free speech for the *Harvard Law Review*, and his scholarship has appeared in the *Harvard Law and Policy Review* and the *Berkeley Technology Law Journal*, among others. He is coauthor of the textbook *The Law of Public Communication*, now in its 11th edition. Peters is grateful for the research assistance of UGA law student Sarah Ashley Trowbridge, and he thanks the staff of the *Washington University Journal of Law and Policy* for planning such a thought-provoking issue about the First Amendment [https://perma.cc/VW3A-SLUW].

INTRODUCTION

When Harry Scheeler mailed a public records request in 2015 to the New Jersey township where he lived, he expected a delayed response or some costs to fulfill it, even a denial—but he did not expect to be sued by the township.[1] Scheeler, a local gadfly, requested surveillance footage of two government buildings under the state Open Public Records Act (OPRA).[2] Several weeks later, instead of responding, the township sued Scheeler and asked the court for relief from any obligation to respond—and for attorney's fees.[3] Scheeler narrowed his request, but the township refused to withdraw its suit. Eventually, the court ruled that the right to initiate litigation under OPRA belonged solely to the requester.[4] The court also observed that permitting the government to circumvent that statutory design would generally offend the principles underlying freedom-of-information (FOI) laws:

> A government . . . lawsuit against . . . requestors subjects them to involuntary litigation with all of its concomitant financial, temporal, and emotional trimmings. A public policy that gives a government agency the right to sue a person who asks for a government document is the antithesis of the [interest in providing] citizens with a means of access to public information to keep government activities open and hold the government accountable.[5]

The court dismissed the suit[6] and later ordered the township to pay to

1. Twp. of Hamilton v. Scheeler, No. L-0833-15 (Atlantic Cnty. Ct. June 24, 2015), https://newjerseyfog.nfoic.net/files/2015/06/Atlantic-County-2015-6-24-Order-and-Opinion-Hamilton-Twp-v-Scheeler-et-al.pdf [https://perma.cc/R8AJ-F9BP] [hereinafter Township of Hamilton]; *see also* Beryl Lipton, *Requestor's Voice: Harry Scheeler*, MUCKROCK (May 8, 2015), https://www.muckrock.com/news/archives/2015/may/08/requestors-voice-harry-scheeler [https://perma.cc/WP85-ZKJN]; Jonathan Peters, *When Governments Sue Public-Records Requesters*, COLUM. JOURNALISM REV. (June 30, 2015), https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php [https://perma.cc/LDF5-UCG3].

2. Township of Hamilton, *supra* note 1, at 1-2.

3. *Id.*

4. Township of Hamilton, *supra* note 1; Peters, *supra* note 1.

5. Township of Hamilton, *supra* note 1.

6. *Id.*

Scheeler more than $40,000 in attorney's fees and court costs.[7]

Government actions against public record requesters are not a new phenomenon (they date back at least twenty-seven years), but they have been on the rise during the last decade. Consider some other examples: In 2017, Michigan State University sued ESPN after the network requested police reports related to a sexual assault investigation,[8] and the University of Kentucky sued its own student newspaper after the paper requested records related to a faculty member accused of groping students.[9] In 2016, the Louisiana Department of Education sued a nonprofit watchdog organization after it requested school enrollment data,[10] and a Michigan county sued a newspaper after it requested the personnel files of candidates for sheriff.[11] In 2014, the city of Billings, Montana, sued a newspaper after it requested landfill records.[12] The list goes on.[13]

Government officials typically claim that these actions are initiated in good faith and that it is prudent for courts to step in immediately if an

7. Donna Weaver, *Hamilton Township Must Pay More than $40,000 in Public Records Lawsuit*, PRESS OF ATL. CITY (Aug. 19, 2015), https://pressofatlanticcity.com/news/hamilton-township-must-pay-more-than-40-000-in-public-records-lawsuit/article_04bef52a-46c2-11e5-a09c-7777db1bb002.html [https://perma.cc/DRL5-T4A5].

8. Matt Mencarini, *Michigan State Loses FOIA Lawsuit Against ESPN for Second Time Since 2015*, LANSING STATE J. (Sept. 18, 2017), https://www.lansingstatejournal.com/story/news/local/2017/09/18/michigan-state-espn-foia-lawsuit-sexual-assault/676752001 [https://perma.cc/8DUJ-XYKX].

9. Ellie Kaufman, *University of Kentucky Sues Student Newspaper over Sexual Assault Case*, CNN (Sept. 1, 2016), https://www.cnn.com/2016/09/01//university-of-kentucky-sues-student-newspaper-sexual-assault/index.html [https://perma.cc/YD6E-UAXL].

10. Joe Gyan Jr., *Louisiana Education Activists Declare Victory in Public Records Fight*, THE ADVOCATE (Oct. 6, 2016), https://www.theadvocate.com/baton_rouge/ne/courts/article_76e860ca-8bd9-11e6-9963-cf5829bedcf3.html [https://perma.cc/PH2K-99FU].

11. Jonathan Peters, *How One Paper Filed a FOIA Request in Michigan—and Got Sued by the County*, COLUM. JOURNALISM REV. (Aug. 2, 2016), www.cjr.org/united_states_project/michigan_lawsuit_daily_news_ foia.php [https://perma.cc/2LPQ-UAT7]; *see also supra* note 2 and accompanying text.

12. Corey Hutchins, *Montana Paper Sued by City over Open-Records Request Wins in Court—and Gets Its Story*, COLUM. JOURNALISM REV. (Apr. 14, 2015), https://www.cjr.org/united_states_project/billings_gazette_mont ana.php [https://perma.cc/LQ9U-ZLMY].

13. *See generally* Patrick C. File & Leah Wigren, *SLAPP-ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?* 1 J. OF CIVIC INFO. 1 (2019); *see also* Ryan J. Foley, *Governments Turn Tables by Suing Public Records Requesters*, ASSOCIATED PRESS (Sept. 17, 2017), https://apnews.com/7f6ed0b1bda047339f22789a10f64ac4/Governments-turn-tables-by-suing-public-records-requesters [https://perma.cc/RYU9-3ECW].

agency's disclosure obligations are unclear.[14] But suing record requesters is democratically dangerous, because such actions present a clear risk to the free flow of information necessary for the press and public, respectively, to monitor and participate in the political process. More broadly, the actions are a worrisome exemplar of "the resources and creativity that the government expends to parry the press and public,"[15] making hostility to openness the rule rather than the exception.[16] Consequently, these actions have major implications for journalism and for public understanding of government activities.[17] This is true at both the state and federal levels, where to invoke access laws is generally "to deal with denials"[18] and where "[s]ecrecy has become ingrained." Indeed, government secrecy "has been on the rise for the past 40 years" as agencies "have become savvy in managing the message and gaming the system."[19] And "[a] growing body of evidence indicates that all levels of government in the United States are becoming more secretive and controlling of information."[20]

14. *See, e.g.*, Peters, *supra* note 11.

15. Jonathan Peters, *The Modern Fight for Media Freedom in the United States*, 18 FIRST AMEND. L. REV. 60, 85 (2020).

16. Editorial Board, *Our View: What Should Top Priority Be for Government? Answer Is Easy*, WILMINGTON STAR-NEWS (Feb. 23, 2020), https://www.starnewsonline.com/opinion/20200223/our-view-what-should-top-priority-be-for-government-answer-is-easy ("We believe government secrecy has become too routine, rather than the absolute last resort it should be.") [https://perma.cc/Q9ZK-ZTFX].

17. DAVID CUILLIER, KNIGHT FOUNDATION, FORECASTING FREEDOM OF INFORMATION 3 (2017), https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/232/original/FOI-final-unlink.pdf ("People must have access to reliable public information to make informed decisions and hold their elected officials accountable. Without transparent government at all levels—local, state and federal—representative democracy is threatened.") [https://perma.cc/2SDG-V7M5].

18. DAVID CUILLIER & CHARLES N. DAVIS, THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS 104 (2019).

19. *Id.* at 107.

20. CUILLIER, *supra* note 17, at 5.

I. GOVERNMENT EFFORTS TO FRUSTRATE OR DENY

Take, for example, the challenges of obtaining a public record.[21] Under the federal Freedom of Information Act (FOIA), there have been increases in backlogs, delays, and the use of exemptions since 1975.[22] Nearly four out of five requests produce either fully redacted records or nothing at all.[23] Penalties are seldom or sporadically enforced,[24] and fees vary widely.[25] A congressional report in 2016 found that "FOIA is broken" and described a governmental culture with an "unlawful presumption in favor of secrecy."[26] Furthermore, there has been a significant rise in the number of pending FOIA cases (702 at the end of 2016 and 1,448 at the end of 2019)[27] and in the number of FOIA cases pending for two or more years (138 at the end of 2016 and 330 at the end of 2019).[28] The pending load is growing because case closures lag behind new filings. Although it is not clear why FOIA cases are taking longer to close, one theory is that legal actions are increasingly initiated because agencies have not responded to a request, thus

21. CUILLIER, *supra* note 17, at 3-5 ("Many experts say access is worse today compared with four years ago: . . . 41 percent said access to federal records has worsened . . . Journalists [also] say it is getting more difficult to get information from the federal government") (emphasis omitted); *see generally Delayed, Denied, Dismissed: Failures on the FOIA Front,* PROPUBLICA (July 21, 2016, 8:01 AM), https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front [https://perma.cc/69F5-Y8N3]; CAROLYN CARLSON, DAVID CUILLIER & LINDSEY TULKOFF, SOC'Y OF PRO. JOURNALISTS, MEDIATED ACCESS: JOURNALISTS' PERCEPTIONS OF FEDERAL PUBLIC INFORMATION OFFICER MEDIA CONTROL (2012), http://spj.org/pdf/reporterssurvey-on-federal-PAOs.pdf [https://perma.cc/TG3K-8A5N].

22. A. Jay Wallace Wagner, A Most Essential Principle: Use and Implementation of the Freedom of Information Act, 1975-2014 (Nov. 2016) (Ph.D. Dissertation, Indiana University) (ProQuest); *see also Three Out of Five Federal Agencies Flout New FOIA Law*, NAT'L SEC. ARCHIVE (Mar. 11, 2017), https://nsarchive.gwu.edu/news-foia-audit/foia/2017-03-11/three-out-five-federal-agencies-flout-new-foia-law [https://perma.cc/7HH5-NXQE].

23. Ted Bridis, *U.S. Sets New Record for Censoring, Withholding Government Files*, ASSOCIATED PRESS (Mar. 12, 2018), https://apnews.com/714791d91d7944e49a284a51fab65b85/US-sets-new-record-for-censoring,-withholding-gov't-files [https://perma.cc/5A36-4LU6].

24. Daxton R. Stewart, *Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMMC'N L. & POL'Y 265 (2010).

25. Tae Ho Lee, *Public Records Fees Hidden in the Law: A Study of Conflicting Judicial Approaches to the Determination of the Scope of Impossible Public Records Fees*, 21 COMMC'N L. & POL'Y 251 (2016).

26. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 7 (2016), https://republicans-oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf [https://perma.cc/QT2B-889F].

27. *FOIA Lawsuits Are Taking Longer to Resolve*, THE FOIA PROJECT (Jan. 23, 2020), http://foiaproject.org/ 2020/01/23/lawsuits-annual-2019/ [https://perma.cc/X7TN-P75Z].

28. *Id.*

allowing agencies to continue to delay (through motions and appeals) after an action is initiated.[29] In any event, the litigation is costly to taxpayers. The Trump administration reported in 2017 that it spent $40.7 million defending FOIA actions, and the Obama administration reported in 2016 that it spent $36.2 million doing the same, up from $22.2 million in 2010.[30]

The challenges at the state level, as the Scheeler case demonstrates, are no less dramatic or consequential. There is considerable inconsistency among state FOI laws,[31] and an analysis of thirty-two state public records audits showed widespread noncompliance with them: government agencies improperly denied access to various records forty-one percent of the time.[32] Another study, based on data from over 50,000 requests sent to state agencies from 2010 to 2018, revealed that compliance rates ranged from a high of sixty-five percent (Washington and Idaho) to a low of ten percent (Alabama).[33] The most common access problems, according to yet another study, are agency delays or nonresponses, along with baseless exemption claims and unreasonable fees.[34] Moreover, record custodians often act arbitrarily in responding to requests,[35] and minorities can be more likely than others to receive a denial.[36] In a 2017 survey, roughly fifty percent of FOI experts responded that access to state and local records had gotten

29. *Id.*

30. *Scrutinizing Attorney Fee Awards in FOIA Litigation*, THE FOIA PROJECT (Dec. 19, 2018), http://foiaproject.org/2018/12/19/attorney-fee-awards-foia-litigation/ [https://perma.cc/H7PG-CBP9].

31. Terry Mutchler, *US Open Public Records Laws in Desperate Need for Unity*, LEGAL INTELLIGENCER (Oct. 18, 2018), https://www.law.com/thelegalintelligencer/2018/10/18/us-open-public-records-laws-in-desperate-need-for-unity/ [https://perma.cc/WA8P-QQ5Z].

32. CUILLIER & DAVIS, *supra* note 18*,* at 107.

33. NAT'L FREEDOM OF INFO. COAL., BLUEPRINT TO TRANSPARENCY: ANALYZING NON-COMPLIANCE AND ENFORCEMENT OF OPEN RECORDS LAWS IN SELECT U.S. STATES (2020), https://www.nfoic.org/sites/default/files/2020-02/Blueprint%20to%20Transparency_%20Enforcing%20Open%20Records%20Laws-4.pdf [https://perma.cc/JG36-Z5YL].

34. *Fewer Watchdogs, Uncooperative Public Officials Are Biggest Challenges to Open Government Today, According to Open Government Survey*, NAT'L FREEDOM OF INFO. COAL. (Mar. 13, 2020, 3:55 PM), https://www.nfoic.org/blogs/news-release-biennial-open-government-survey-reveals-big-challenges [https://perma.cc/KA4N-SNEZ].

35. Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMMC'N L. & POL'Y 313 (2003).

36. OPEN SOC'Y INST., TRANSPARENCY AND SILENCE: A SURVEY OF ACCESS TO INFORMATION LAWS AND PRACTICES IN FOURTEEN COUNTRIES (2006), https://www.justiceinitiative.org/uploads/016719b6-115e-40b8-ad00-00d24b1e3f71/transparency_20060928.pdf [https://perma.cc/7MZY-SV62].

worse in the past four years, and thirty-eight percent responded that they had been denied more frequently than before, with "[r]ising denials . . . particularly acute at the local level."[37] Nearly nine out of ten experts also predicted that access would get worse in the coming years.[38]

Mark Twain once wrote that "[f]ew things are harder to put up with than the annoyance of a good example,"[39] so I will offer here five examples, all at least annoying, of government efforts to frustrate or deny access to public information—to add life and color, as the Scheeler case does—to the assorted challenges discussed above.[40] First, when the *Myrtle Beach Sun News* asked nearby towns for records related to payments settling lawsuits, many towns sent the records free of charge or for a modest fee—but Horry County, home to Myrtle Beach, wanted to charge a $75,500 fee, for which the county did not provide a full accounting.[41] Second, U.S. Immigration and Customs Enforcement, unwilling to disclose to an attorney her own client's immigration file, simply invented a FOIA exemption that would deny "access to the FOIA process when the records requested could assist [an] alien in continuing to evade immigration enforcement efforts."[42] Third, high-level staffers to the Oregon governor secretly worked against a pro-transparency bill, after the governor had expressly and publicly promised to push for greater openness in her administration.[43] Fourth, when a reporter requested from numerous state agencies records related to crashes involving autonomous vehicles, the Michigan State Police claimed that each line of its dataset was its own record subject to an individual copying fee, leading

37. CUILLIER, *supra* note 17, at 3-4.

38. *Id.*

39. OXFORD DICTIONARY OF QUOTATIONS 212 (Susan Ratcliffe ed., 2nd ed. 2010).

40. Many of the examples were featured in "The Foilies," tongue-in-cheek awards given each year by the Electronic Frontier Foundation to government agencies that undermine the right of access to public information. *See The Foilies: Recognizing the Worst in Government Transparency*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/foilies [https://perma.cc/ZF8Z-CH3W].

41. David Weissman, *$75,500 for Public Records? Horry County Won't Say Why It Costs Thousands for Documents*, MYRTLE BEACH SUN NEWS (Jan. 7, 2019), https://www.myrtlebeachonline.com/news/local/article223920490.html; available at https://www.myrtlebeachonline.com.

42. Yesenia Robles, *ACLU Files Suit Claiming Immigration Officials Not Following Open Records Law*, DENVER POST (Aug. 24, 2016), https://www.denverpost.com/2016/08/24/aclu-suit-immigration-open-records-law/ [https://perma.cc/JGB6-VP6C].

43. Molly Young, *Oregon Open Records Bill Dies After Governor's Staff Privately Contradicts Her Transparency Pledge, Documents Show*, THE OREGONIAN (Sept. 11, 2019), https://www.oregonlive.com/politics/2019/09/oregon-open-records-bill-dies-after-governors-staff-privately-contradicts-her-transparency-pledge-documents-show.html [https://perma.cc/YCK2-ACK6].

to a total estimated cost of $485,645.24 to fulfill the request.[44] Finally, states have systematically suppressed records related to dangerous roads, bridges, and intersections;[45] contracts between public and private entities;[46] and footage from police body cameras.[47] Overall, the challenges at the state level are significant, and the efforts to frustrate access to public information are widely varied.

II. THE PATCHWORK OF SOURCES

Importantly, all of the points and examples discussed so far come from just one corner of the access space: public records. Other corners have their own challenges, some as great or greater and some less so: access to meetings,[48] judicial proceedings and records,[49] prisons and jails,[50] executions,[51] public places and events,[52] and press briefings and facilities,[53] among others. Because their sources vary, rights of access to government information and places have come to be a barely comprehensible patchwork—derived from norms, FOI laws, state constitutional provisions, common law principles, administrative regulations, statutory privileges, and the First Amendment.

Consider, for instance, that the First Amendment guarantees access to

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44. Dave Maass, Hayley Tsukayama, Camille Fischer & Aaron Mackey, *The Foilies 2019*, ELEC. FRONTIER FOUND. (Mar. 10, 2019), https://www.eff.org/deeplinks/2019/03/foilies-2019 [https://perma.cc/T92D-MUTH].

45. Miranda S. Spivack, *Hidden Dangers Ahead: How States Keep Accident-Prone Roads Secret*, REVEAL (Dec. 30, 2016), https://www.revealnews.org/article/hidden-dangers-ahead-how-states-keep-accident-prone-roads-secret/ [https://perma.cc/Q6F3-MS7V].

46. Miranda S. Spivack, *Public Contracts Shrouded in Secrecy*, REVEAL (Nov. 16, 2016), https://www.reveal news.org/article/public-contracts-shrouded-in-secrecy/ [https://perma.cc/6JQR-DFQB].

47. Jake Bleiberg, *Value of Police Body Cameras Limited by Lack of Transparency*, ASSOCIATED PRESS (June 16, 2020), https://apnews.com/99a772c44f58cde36dc33c91c4ee72de [https://perma.cc/P5HC-8W29].

48. WILLIAM E. LEE, DAXTON R. STEWART & JONATHAN PETERS, THE LAW OF PUBLIC COMMUNICATION 593-99 (11th ed. 2021).

49. *Id.* at 500-13.

50. *Id.* at 559-61.

51. *See generally* John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMMC'NS L.J. 355, 359-68 (1993); Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381, 383-86 (1992).

52. LEE ET. AL., *supra* note 48, at 563-68.

53. *Id.* at 562-63.

criminal trials and other judicial proceedings,[54] while much of the law guaranteeing access to judicial records is from the common law, court rules, and statutes.[55] But *not* from the federal FOIA, which does not apply to judicial records,[56] even though some such state laws do.[57] And what about prisons? Each one is basically a fiefdom, as *Wall Street Journal* reporter Gary Fields put it, with the warden "at the top of the feudal system."[58] The courts have not been receptive to claims of a First Amendment right of access to prisons,[59] so in practice such access is a privilege set out in statutes and regulations, applied at the warden's discretion and lightly checked by constitutional limits.[60] Meanwhile, states have enacted statutes restricting access to executions[61] (some designate the number or kind of witnesses who may attend, some do not;[62] some authorize press access or recordings, some do not[63]), and states have gone to great lengths, through statutes and

54. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Ct. of Cal. (Press-Enterprise I), 464 U.S. 501 (1984); Press-Enterprise Co. v. Superior Court Ct. of Cal. (Press-Enterprise II), 478 U.S. 1 (1986); El Vocero de P.R. v. Puerto Rico, 508 U.S. 147 (1993) (per curiam).

55. *See, e.g.*, Denoux v. Bertel, 96-0833 (La App. 4 Cir. 10/9/96); 682 So. 2d 300; Goldstein v. Superior Ct., 195 P.3d 588, 598 (Cal. 2008); Orange Cnty. Emps. Ass'n v. Superior Ct., 15 Cal. Rptr. 3d 201 (Cal. Ct. App. 2004); *In re* Est. of Hearst, 136 Cal. Rptr. 821, 823 (Cal. Ct. App. 1977); Globe Newspaper Co. v. Dist. Att'y, 788 N.E.2d 513, 519-20 (Mass. 2003); Ohio *ex rel.* Beacon J. Publ'g Co. v. Whitmore, 697 N.E.2d 640, 641 (Ohio 1998).

56. *See, e.g.*, United States v. Casas, 376 F.3d 20 (1st Cir. 2004); Warth v. U.S. Dep't of Just., 595 F.2d 521, 523 (9th Cir. 1979); *see also* 5 U.S.C. § 552(f) (defining an agency subject to the FOIA as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency").

57. *See, e.g.*, Denoux v. Bertel, 96-0833 (La App. 4 Cir. 10/9/96); 682 So. 2d 300; Ohio *ex rel.* Beacon J. Publ'g Co. v. Whitmore, 697 N.E.2d 640, 641 (Ohio 1998).

58. Jonathan Peters, *For Journalists Covering Prisons, the First Amendment Is Little Help*, COLUM. JOURNALISM REV. (July 3, 2018), https://www.cjr.org/united_states_project/first-amendment-reporters-jail.php [https://perma.cc/NSC2-2QTD].

59. *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974); Houchins v. KQED, Inc., 438 U.S. 1 (1978).

60. Peters, *supra* note 58.

61. *See generally* Bessler, *supra* note 51; Richards & Easter, *supra* note 51.

62. *See, e.g.*, ARIZ. REV. STAT § 13-758 (LexisNexis 2012); ARK. CODE ANN. § 16-90-502(d)(2) (West 2015); CAL. PENAL CODE § 3605 (West 2002); COLO REV. STAT § 18-1.3-1206 (2002); 725 ILL. COMP. STAT. § 5/119-5(d) (2010); IND. CODE § 35-38-6-6 (2020); LA. STAT. ANN. § 15:570 (2014); MASS. GEN. LAWS ch. 279, § 65 (2020); MO. REV. STAT. § 546.740 (2020); MONT. CODE ANN. § 46-19-103(6) (2019); NEB. REV. STAT. § 83-970 (2020); OR. REV. STAT. § 137.473 (2019); TEX. CODE CRIM. PROC. ANN. art. 43.20 (West 2019); WYO. STAT. ANN. § 7-13-908 (2020). Some of these states have abolished the death penalty: Massachusetts in 1984, Illinois in 2011, and Colorado in 2020. In addition, Oregon and California have severely restricted the use of the death penalty.

63. *See, e.g.*, ALA. CODE § 15-18-83(a)(6) (2020); CONN. GEN. STAT. § 54-100 (2011); FLA.

regulations, to maintain the secrecy of their capital-punishment protocols,[64] to which there is seemingly no First Amendment right of access.[65] There is, however, a right of access to public spaces and a First Amendment right to record police activity there,[66] although any police records related to that activity would not be subject to disclosure under the First Amendment. They would have to be requested under a public records law, subject to its generous exemptions for law enforcement.[67]

The problems here are manifold. It is generally too difficult to obtain access to government information and places under any source. And the patchwork of sources is so uneven that access, as a practical matter, is unnavigable or vastly frustrating for ordinary citizens—people who dutifully want to learn "what their government is up to," which is "a structural necessity in a real democracy."[68] For these reasons, it is time to reimagine access under the First Amendment and to remake it as a dynamic, reliable source of access rights that redresses the growing efforts to keep the public and press in the dark—a reimagining that would further engage the First Amendment in its central role of aiding self-government.[69] After all,

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STAT. § 922.11(2) (2020); FLA. ADMIN. CODE ANN. r. § 33-104.201 (2010); KY. REV. STAT. ANN. § 431.250 (West 2020); MISS. CODE ANN. § 99-19-55(2) (2020); OHIO REV. CODE ANN. § 2949.25 (West 2020); S.C. CODE ANN. § 24-3-550 (2020); TENN. CODE ANN. § 40-23-116 (2020); UTAH CODE ANN. § 77-19-11(4), (5) (West 2020); *see also* Death Sentences Procedures, 28 C.F.R. § 26.4 (2019). Connecticut abolished the death penalty in 2012.

64. Jonathan Peters, *Why Larry Flynt's Latest Court Victory is Good for the Media*, COLUM. JOURNALISM REV. (Apr. 9, 2015), https://www.cjr.org/united_states_project/larry_flynt_missouri_death_penalty.php [https://perma.cc/R2PU-6NJ8].

65. *See, e.g.*, First Amendment Coal. of Ariz., Inc. v. Ryan, 938 F.3d 1069, 1078-81 (9th Cir. 2019); Phillips v. DeWine, 841 F.3d 405, 417-20 (6th Cir. 2016); Zink v. Lombardi, 783 F.3d 1089, 1111-13 (8th Cir. 2015); Wellons v. Comm'r, Ga. Dep't of Corr., 754 F.3d 1260, 1266-67 (11th Cir. 2014).

66. *See, e.g.*, Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017); ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Gilk v. Cunniffee, 655 F.3d 78 (1st Cir. 2011); Smith v. Cumming, 212 F.3d 1332 (11th Cir. 2000); Fordyce v. Seattle, 55 F.3d 436 (9th Cir. 1995).

67. *See, e.g.*, 5 U.S.C. § 552(b)(7); CAL. GOV'T CODE § 6254(f) (West 2020); N.Y. PUB. OFF. LAW § 87(2)(e) (LexisNexis 2020); D.C. CODE ANN. § 2-534(a)(3) (West 2018) (formerly cited as D.C. CODE ANN. § 1-1524(a)(3)); MD. CODE ANN., GEN. PROVISIONS § 4-351 (West 2014) (formerly cited as MD. CODE ANN., STATE GOV'T § 10-618(f)); KY. REV. STAT. ANN. § 17-150(2) (West 2017); ARK. CODE ANN. § 12-12-211 (West 2019); DEL. CODE ANN. tit. 29, § 10003(d) (West 2020); TEX. GOV'T CODE ANN. § 552.108 (West 2005); W. VA. CODE § 29B-1-4(4) (2018).

68. U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

69. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-

"[f]ree expression and information access—indispensable to inclusive knowledge societies—lie at the heart of American democratic life, which demands that citizens be informed to participate in public affairs."[70] Moreover, government transparency improves civic participation, public trust, and financial management, all while reducing corruption.[71]

III. THE RIGHT TO RECEIVE INFORMATION

The democratic model of free expression, at least in the United States, is based on the premise of popular sovereignty. Political power resides in the people, who give their consent through participation in public life and ultimately the electoral process and exercise of the franchise.[72] That means the government, at all levels, is answerable to the people. And to perform its democratic role, the public must be free to debate public issues[73] and to access government information and places in order to inform such debate and related decisions.[74] The right of access, then, is a corollary of the right to speak.[75] These principles are consistent with views articulated by John Milton, who believed that people would be better citizens if they were knowledgeable;[76] John Locke, who believed that citizens, as rationale beings, needed to seek truth and information for themselves;[77] John Stuart Mill, who believed that the freedoms of thought, discussion, and investigation were "goods in their own right";[78] and James Madison, who

government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

70. Jonathan Peters, *Reimagining Access Rights Under the First Amendment*, QUILL (Nov. 2, 2017), https://www.quillmag.com/2017/11/02/reimagining-access-rights-under-the-first-amendment/ [https://perma.cc/R44S-YC48].

71. Maria Cucciniello, Gregory A. Porumbescu & Stephan Grimmelikhuijsen, *25 Years of Transparency Research: Evidence and Future Directions*, 77 PUB. ADMIN. REV. 131 (2017).

72. George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People's Unalienable Right to Make Law*, 4 DREXEL L. REV. 319, 321-22 (2012).

73. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* Whitney v. California, 274 U. S. 357, 375-376 (1927) (Brandeis, J., concurring) ("public discussion is a political duty" and "a fundamental principle of the American government").

74. CUILLIER, *supra* note 17, at 3 ("People must have access to reliable public information to make informed decisions and hold their elected officials accountable. Without transparent government at all levels—local, state and federal—representative democracy is threatened.").

75. Branzburg v. Hayes, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting).

76. *See generally* JOHN MILTON, AREOPAGITICA (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644).

77. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689).

78. *See* Todd G. Hartman, *The Marketplace vs. The Ideas: The First Amendment Challenges*

believed that "a popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[79]

Although the law and theory of free expression has focused on the right to communicate, the First Amendment also recognizes the right to receive information and ideas.[80] In *Grosjean v. American Press Company*, the Supreme Court held unconstitutional a newspaper tax because it "limit[s] the circulation of information to which the public is entitled [by] virtue of the constitutional guarantees,"[81] reasoning that an "informed public opinion is the most potent of all restraints on misgovernment. . . ."[82] In *Lamont v. Postmaster General*, the Court struck down a statute allowing the postmaster general to regulate the distribution by mail of "communist political propaganda."[83] As Justice Brennan observed in his concurring opinion, "the right to receive publications is . . . a fundamental right," the protection of which is "necessary to make the [First Amendment's] express guarantees fully meaningful."[84] In *Stanley v. Georgia*, the Court held plainly that "[i]t is now well established that the Constitution protects the right to receive information and ideas," describing it as "fundamental to our free society."[85] And in *Houchins v. KQED Inc.*, Justice Stevens wrote in dissent

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to Internet Commerce, 12 HARV. J. OF L. & TECH 419, 429 (1999).

79. Letter from J. Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (S. Hunt ed., 1910).

80. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (a citizen's right to receive information is necessary to ensure "meaningful exercise of his own rights of speech, press, and political freedom"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising. . . ."); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (acknowledging that the Supreme Court had recognized a First Amendment right to "receive information and ideas" and that free expression "necessarily protects the right to receive"); Citizens United v. FEC, 558 U.S. 310, 341 (2010) ("[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."); Michael J. Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111 (1987); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980); *see also* Saxbe v. Wash. Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) ("[P]ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.").

81. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

82. *Id.*

83. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

84. *Id.* at 308 (Brennan, J., concurring).

85. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

that "[w]ithout some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."[86]

These are critically important principles under the democratic model of free expression, of which the philosopher Alexander Meiklejohn wrote in 1960:

> [J]ust so far as . . . the citizens who are to decide an issue are denied acquaintance with information . . . relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the public good. It is the mutilation of the thinking process of the community against which the First Amendment . . . is directed.[87]

In other words, as the Eleventh Circuit put it more recently, "First Amendment freedoms are also understood to be essential to the maintenance of our democratic polity, which depends upon an informed citizenry to hold government officials accountable."[88] Citizens must have access to information if they are to discharge their democratic duties.

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86. Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978) (Stevens, J., dissenting).

87. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).

88. Cooper v. Dillon, 403 F.3d 1208, 1214 (11th Cir. 2005).

IV. RESTORING OPEN AND ACCESSIBLE GOVERNMENT

Notably, the right to receive information is not absolute (the Court noted in *Zemel v. Rusk* that "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information"),[89] and it has not been interpreted to create an affirmative obligation for government to provide access or otherwise to make information publicly available.[90] But that is exactly what is now needed, a radically reimagined First Amendment right to receive information that would be an operative and reliable authority to compel access to government. It would replace the current patchwork of FOI laws, state constitutional provisions, common law principles, administrative regulations, statutory privileges, and First Amendment doctrines, cutting across everything from public records and meetings, to prisons and jails and executions, to public places and events, and beyond. The effect would be to make government more accessible and the system more navigable and less frustrating for citizens.

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89. Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (emphasis added).

90. *See generally* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 133-59 (1991); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 517 (1980); David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980).

There is precedent, too, for constitutionalizing access: Some states have done so through articles in their founding documents.[91] California's constitution states that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[92] Louisiana's constitution references a "right to direct participation" and states that "[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."[93] And, finally, New Hampshire's constitution states:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.[94]

That would be one possible solution—to amend the federal constitution to guarantee and effectively harmonize access rights nationwide—but the simpler path would be to reimagine and invigorate the First Amendment right to receive information, as it is already "well established."[95] Indeed, the best approach may be to find a general First Amendment right of access to government records, meetings, places, and events. Although the exact contours of the right are beyond the scope of this essay, which is meant to offer a radical idea and generate discussion (How would the reimagined right interact with the public forum doctrine? How would government agencies cover the costs of providing access?), this approach would usefully elevate access to the status of a fundamental right subject to strict scrutiny. That means any government action restricting it, such as an exemption from access to a public record, would have to further a compelling government

91. *See, e.g.*, FLA. CONST. art. I, § 24; ILL. CONST. art. VIII, § 1(c); MONT. CONST. art. II, § 9; N.D. CONST. art. XI, § 6.
92. CAL. CONST. art. I, § 3(b)(1).
93. LA. CONST. art. XII, § 3.
94. N.H. CONST. art. VIII.
95. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

interest and be narrowly tailored to achieve it.[96] Because this is the highest standard of judicial review,[97] it would effectively ensure that access be taken seriously and be given a wide regulatory berth, and at the same time it would allow the government to enact restrictions to serve truly crucial interests and nothing less.

More broadly, reimagining the First Amendment right to receive information would help to halt what Thomas Jefferson once called the "natural progress of things"—that is, "for liberty to yield, and government to gain ground"[98]—insofar as the government is becoming more secretive and more controlling of information. Radical change is needed, perhaps now more than ever, to help restore open and accessible government at all levels. And this would return to its rightful place the role of a well-informed people in a well-functioning representative democracy, affirming that the people have not surrendered their sovereignty to those whom they selected to conduct their business. After all, "[n]othing so diminishes democracy as secrecy."[99]

96. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007).

97. Kristapor Vartanian, *Equal Protection*, 10 GEO. J. GENDER & L. 227, 230 (2009).

98. THE POLITICAL WRITINGS OF THOMAS JEFFERSON 138 (Edward Dumbauld ed., 1955).

99. James Bovard, *Washington Secrecy is Creating a Know-Nothing Democracy*, THE HILL (May 9, 2018, 4:30 PM), https://thehill.com/opinion/civil-rights/386972-washington-secrecy-is-creating-a-know-nothing-democracy [https://perma.cc/66B2-YCDU].