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Searching For Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools

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ESSAY

SEARCHING FOR PATTERNS IN THE LAWS GOVERNING ACCESS TO RECORDS AND MEETINGS IN THE FIFTY STATES BY USING MULTIPLE RESEARCH TOOLS

Bill F. Chamberlin, Cristina Popescu,** Michael F. Weigold,***
& Nissa Laughner*****

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I. INTRODUCTION

Freedom of Information (FOI) advocates, mass communication scholars, journalists, and public policymakers often have asked which public access laws are the “best” in the country. The answer is elusive, even using a variety of research methodologies. Prior research has focused on studying only one aspect of these laws in the fifty states or by ranking every state on a limited number of criteria considered by a scholar to be necessary for an “ideal” law. No study thus far has effectively and systematically attempted to rank all state public records and open meeting laws in their entirety.

Assuming that the “best” public access law means the law that at least facially creates the highest level of government transparency, scholars can use a variety of research approaches to better understand which laws are perceived as “more open” than others. Indeed, by using a combination of social science and legal research approaches, scholars can achieve not only an improved understanding of how state laws compare, but also what the concept of “openness” means in state public record and open meetings laws. To this end, the Marion Brechner Citizen Access Project (MBCAP) has implemented a long-term research project analyzing the access laws of all states by carefully combining social science methodology and traditional legal research techniques.¹

Although in its early stages, the MBCAP has already produced a unique methodological approach and significant data. In this Essay, the authors explain how the combination of social science and legal methodologies can effectively answer complex questions involving public access laws. Discussing the project’s methodology could also be useful to legal and communication scholars wishing to develop and improve state law compilations in order to identify in greater detail public policy

1. The researchers working for the MBCAP under project director, Bill Chamberlin, are either students at the College of Journalism and Communications (CJC) or the Levin College of Law at the University of Florida, or both. All of the students doing legal research have had at least one course in legal research methods, and most have had more. Most of them are doctoral or masters students specializing in media law or working toward a joint communications and law degree (M.A. and J.D. or Ph.D. and J.D.). A few undergraduate students assist in non-legal research aspects of the project. A number of faculty members from the CJC, as well as other universities around the country, have also worked closely with the project director, providing methodological and technical expertise. The project director particularly appreciates the assistance of Michael Weigold, Debbie Treise, Melinda McAdams, David Carlson, and Craig Lee of the CJC; Shannon Martin of the University of Maine; and the late Robert Stevenson of the University of North Carolina at Chapel Hill.

established by state legislatures and the courts. Furthermore, although the MBCAP so far has focused on aspects of state public records laws, the methodology presented here may be replicated or modified for other areas of law where ranking and comparison of multiple jurisdictions would be useful.

Now, after an overview of the problem statement set out here, the Essay provides background by reviewing the relevant literature in Part II. Part III outlines the objectives of the project and the methodology used to meet those objectives. It will also provide solutions to complex problems that arise in a study of the laws of the fifty states and the District of Columbia. Part IV presents project results to demonstrate how state public records laws are being analyzed through use of the project. Part V concludes by discussing the practical and academic applications of the project as well as its limitations.

II. BACKGROUND AND PREVIOUS RESEARCH

Lawyers and judges have long accepted the value of combining social science research and legal analysis. For example, as early as 1908, Louis Brandeis relied on social, economic, and public health research, before he became a U.S. Supreme Court Justice, to provide factual evidence for his legal brief in *Muller v. Oregon* (1908).² A 1980 study of U.S. Supreme Court decisions reported that in about one-third of 601 cases analyzed, “the justices [sic] resorted to identifiable social science materials, although these were not necessarily crucial to the *ratio decidendi* in a case.”³ In two landmark cases, *Brown v. Board of Education* (1954)⁴ and *Chandler v. Florida* (1981),⁵ Justices writing for the majority relied on data produced by social science research. In *Brown*, social research findings were used to demonstrate that separating black and white children in school led to unequal learning environments.⁶ In *Chandler*, the Supreme Court considered research showing the psychological effects of using cameras in the courtroom.⁷

2. See JEREMY COHEN & TIM GLEASON, *SOCIAL RESEARCH IN COMMUNICATION AND LAW* 16 (1990).

3. See HENRY JULIAN ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 248 (4th ed. 1980).

4. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. See *Chandler v. Florida*, 449 U.S. 560 (1981).

6. See *Brown*, 347 U.S. at 495 n.11.

7. See *Chandler*, 449 U.S. at 576 n.11.

Scholars have also accepted the value of social science methodology in analyzing law. Mass communication scholars Jeremy Cohen and Timothy Gleason noted that, “[L]egal scholars have been interested in social research for nearly a century.”⁸ Professor Vincent Blasi, currently at both the University of Virginia School of Law and Columbia Law School, used a survey to study journalists’ use of confidential sources in the early 1970s.⁹ In 1980, Stanford University law professor Marc Franklin used a content analysis of libel cases to determine the nature of the words that led to libel suits.¹⁰

An early attempt at combining the study of media law with social science research was the work of John Adams in 1974 at the University of North Carolina.¹¹ He wanted to analyze state laws as they facilitated or restricted public access to official information under the presumption that “all meetings of all bodies at all levels of government should be conducted before citizen or media spectators.”¹² Adams used a two-step method to evaluate open meeting laws in all fifty states. First, he used content analysis to determine whether the then current as well as pending state laws on open meetings had eleven elements that he self-determined, with little explanation, to be descriptive of an “ideal” law.¹³ For each criterion met by a state law, Adams assigned one point to the state. Thus, a state

8. See COHEN & GLEASON, *supra* note 2.

9. See Vincent Blasi, *The Newman’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 236 (1971).

10. See Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 481-82.

11. JOHN B. ADAMS, STATE OPEN MEETINGS LAWS: AN OVERVIEW (Freedom of Information Series No. 3, July 1974).

12. *Id.* at 1.

13. *Id.* at 4-5. Adams’s criteria used to evaluate the “openness” of state laws were:

- (1) Include a statement of public policy in support of openness.
- (2) Provide for an open legislature.
- (3) Provide for open legislative committees.
- (4) Provide for open meetings of state agencies of [r] bodies.
- (5) Provide for open meetings of agencies and bodies of the political subdivisions of the state.
- (6) Provide for open County Boards.
- (7) Provide for open City Councils (or their equivalent).
- (8) Forbid closed executive sessions.
- (9) Provide legal recourse to halt secrecy.
- (10) Declare actions taken in meetings which violate the law to be null and void.
- (11) Provide for penalties for those who violate the law.

Id.

with “an ‘ideal’ law” could score as many as eleven points and “a state with no law would score zero.”¹⁴

Adams’s quantitative content analysis of state open meetings laws revealed that one state, Tennessee, met all 11 criteria, while Arizona, Kentucky, and Colorado received 10 points.¹⁵ At the other end of the scale, Mississippi, West Virginia, and New York had no provisions whatsoever regarding open meetings, and the states of Maryland and Rhode Island met only one of the criteria.¹⁶ The mean rating was 6.7.¹⁷ Adams made no effort to weight his criteria but acknowledged that “substantial differences might exist between two states with the same score since some characteristics have more value for *openness* than others.”¹⁸

The second step in Adams’s research involved a survey in which editors of newspapers in the capital cities of the fifty states were asked to evaluate the effectiveness of the open meetings laws.¹⁹ Thirty-three editors sent in their answers, for a response rate of 66%.²⁰ The majority of editors said they favored open meetings laws, with or without specifically named restrictions.²¹ According to Adams, however, two editors stated that “laws create loopholes and things are therefore better without law.”²² Another two editors, although in favor of open meetings legislation, did not know that their respective states had such provisions.²³

A second comparative analysis of state open meetings laws published in 1985 by Sharon Iorio updated the Adams study.²⁴ Iorio first compared the 1974 and 1984 open meetings statutes using Adams’s criteria “[t]o clarify the nature of the executive session and provide a more realistic perspective of current law.”²⁵ She found that all 50 states, compared to 47 states in 1974, had adopted laws requiring open meetings. The mean score in 1984 across all the eleven categories was 8 (or 73.8% compliance), whereas in the previous study the mean was 6.7. Overall, 36 states had

14. *Id.* at 5.

15. *Id.* at 5-6.

16. ADAMS, *supra* note 11, at 3-4, 6.

17. *Id.* at 6.

18. *Id.* at 5 (emphasis added).

19. *Id.* at 18-19.

20. *Id.* at 18.

21. ADAMS, *supra* note 11, at 18.

22. *Id.*

23. *Id.* at 19.

24. See Sharon Hartin Iorio, *How State Open Meeting Laws Now Compare with Those of 1974*, 62 JOURNALISM Q. 741, 741-49 (1985).

25. *Id.* at 743.

increased their score since 1974.²⁶ Iorio also found that 7 states had not changed their scores since the original 1974 analysis, while 7 states' scores actually decreased since 1974.²⁷ As in the earlier Adams study, only Tennessee scored a perfect 11.²⁸ Eight states scored a 10, while Alabama, Minnesota, and South Dakota scored the lowest at 5.²⁹ Iorio did not weight the importance of individual categories.

Iorio's research also rated open meetings laws "in four additional categories developed to judge the laws in terms of precise delineation for their operation"³⁰ and "based on provisions included in the federal law and in model legislation and suggestions from law review articles."³¹ A total of 34 state laws met the four additional criteria (86.5% compliance).³² Overall, across all fifteen categories, Iorio found that that one state, Tennessee, scored a perfect 15.³³ Another 8 states scored 14.³⁴ At the other end of the scale, Alabama scored the lowest at 5.³⁵

In a similar study comparing state laws, Harlan Cleveland measured the range of "openness" across all fifty states with respect to open meetings statutes and their impact on higher education in America.³⁶ Twenty-five criteria of "openness" were identified, although "not determined by any scientific method but by personal response to the laws,"³⁷ and no attempt

26. *Id.* at 745.

27. *Id.*

28. *Id.*

29. Iorio, *supra* note 24, at 746-47.

30. *Id.* at 742.

31. *Id.* at 743. In addition to Adams's eleven criteria, Iorio used the following categories:

(1) Definition—sets parameters for operation of the law by providing accurate explanation of terms such as public body, agency meeting.

(2) Minutes—establishes a permanent record open to public review.

(3) Prior notice of meetings—provides information concerning time and place of meetings.

(4) Rules for the conduct of executive session—sets safeguards against abuse of executive session privilege.

Id.

32. *Id.* at 745.

33. *Id.* at 749.

34. Iorio, *supra* note 24, at 748-49.

35. *Id.* at 749.

36. See Harlan Cleveland, *The Costs and Benefits of Openness: Sunshine Laws and Higher Education*, 12 J.C. & U.L. 127, 127-73 (1985).

37. See *id.* at 158-61. The criteria used were:

was made to weight the importance of the categories. Tennessee met the most criteria with a score of 22, followed by Florida with 21.³⁸ At the other end of the scale, the “least open” states were Mississippi, South Dakota, Wyoming, and Pennsylvania.³⁹

A fourth study analyzing FOI laws in each of the fifty states and the District of Columbia was conducted by the Chicago-based Better Government Association (BGA).⁴⁰ The organization looked at the text of each open record statute, and decided not to use case law or attorney general opinions “to keep the analysis as objective as possible.”⁴¹ Each state was rated against a “gold standard” of five criteria—three procedural criteria and two penalty criteria—that “were chosen as an effort to conduct

-
- (1) Policy Statement.
 - (2) No Bodies Explicitly Exempted.
 - (3) All Final Action in Open Meeting.
 - (4) Discussion in Open Meeting.
 - (5) Information Gathering in Open Meeting.
 - (6) Committee Meetings Open.
 - (7) Advisory Boards Open.
 - (8) Informal Meetings Open.
 - (9) Quasi-Judicial Meetings Open.
 - (10) Meetings of Local Entities Open.
 - (11) Meetings of Less Than Quorum Covered.
 - (12) Involved Parties May Request Openness.
 - (13) Substantial Minutes of Closed Meetings Required.
 - (14) Remedial Action-Voiding or Equitable Relief.
 - (15) Criminal Penalty May Be Levied.
 - (16) Exemptions Exclusive.
 - (17) Personal Character or Reputation.
 - (18) Employment.
 - (19) Property.
 - (20) Other Financial.
 - (21) Legal.
 - (22) Labor Strategy.
 - (23) Labor Negotiations.
 - (24) Security.
 - (25) Enforcement Agency.

Id.

38. *Id.* at 164-65.

39. *Id.* Mississippi, South Dakota, and Wyoming each scored an 8 and Pennsylvania scored a 5—the lowest on the scale.

40. See Better Government Association, *Freedom of Information in the USA: Part I*, IRE J. (2002), available at <http://www.ire.org/foi/bga/index.html>.

41. See Better Government Association, *FOI Laws in the USA: Part II, Detailed Methodology & Analysis*, IRE J. (2002), available at http://www.ire.org/foi/bga/foi_overview2.html [hereinafter *Detailed Methodology & Analysis*].

the most objective analysis of the law in each state.”⁴² Compliance with each of the five criteria was measured on a 5-point scale, with 0 being the lowest and 5 being the highest possible score.⁴³ The resulting score was then converted to a 4-point scale and given an “academic” grade point average (GPA).⁴⁴ The states were ranked according to their overall GPA.⁴⁵ The BGA survey reported that Nebraska had the highest score, with a B grade and a 3.3 GPA. New Jersey followed closely with a 3.1.⁴⁶ At the low end of the scale, Alabama and South Dakota failed to meet any of the five criteria, and were thus given an F grade and a 0.0 GPA.⁴⁷

A fifth study has been published by the Reporters Committee for Freedom of the Press in 2006.⁴⁸ The *Open Government Guide*, formerly known as *Tapping Officials’ Secrets*, is currently in its fourth edition and provides summaries of law regarding access to public records and official meetings for each of the fifty states and the District of Columbia.⁴⁹ The legal outlines are prepared by attorneys who are experts in “open” government issues.⁵⁰ Each outline describes the general structure of the

42. *Id.* The procedural criteria were:

- (1) [t]he amount of time a public agency or department has to respond to a citizen’s request for a public document;
- (2) the process a citizen must go through to appeal the decision of an agency to deny the request for the public record; and
- (3) whether an appeal is expedited when it reaches the court system.

The penalty criteria were:

- (1) whether the complaining party, upon receiving a favorable judgment in court, is awarded attorney fees and costs; and
- (2) whether the agency that has wrongfully withheld a record is subject to any civil or criminal punishment.

Id.

43. *Id.*

44. *Id.* This was accomplished by multiplying by .80.

45. *Id.*

46. See Better Government Association, *Results*, IRE J. (2002), available at <http://www.ire.org/foi/bga/foiatable.html>.

47. See *id.*

48. See The Reporters Committee for Freedom of the Press, *The Open Government Guide*, available at <http://www.rcfp.org/ogg/index.php> (last visited Sept. 4, 2007) [hereinafter *Open Government Guide*].

49. *Open Government Guide, Introductory Note*, available at <http://www.rcfp.org/ogg/item.php?pg=intro> (last visited Sept. 4, 2007).

50. *Id.*

state's law and then provides a detailed topical listing that explains access policies for specific types of meetings and records.⁵¹

The current study, called the Marion Brechner Citizen Access Project (MBCAP), rates state access statutes⁵² but—unlike previous studies—does not arbitrarily select categories to measure a state's overall rating. Instead, the project uses a qualitative research method called “grounded theory,” allowing the laws to speak for themselves.⁵³ In other words, rather than setting criteria in advance to measure the relative degree of state “openness,” researchers discover the criteria through a careful and systematic review of all state access laws.⁵⁴ During this review, researchers identify categories of information capable of being compared across the state statutes.⁵⁵ These categories, in turn, function as the criteria for relative comparison among the states.⁵⁶

In this respect, this study is fundamentally different than those conducted by Adams, Iorio, Cleveland, and the BGA, all of which started with assumptions about the most important characteristics of access law that led to the organization of the data and therefore, lead to results that did not reflect the law as a whole.⁵⁷ For example, although Adams requested an evaluation of the law by editors, this evaluation was not used in the creation of the original criteria of an “ideal” law.⁵⁸ By using grounded theory, the MBCAP emphasizes subtle differences among state laws and, ultimately, rates these laws in recognition of these subtleties. In the Adams study, state access laws were rated on the basis of eleven criteria;⁵⁹ in Iorio's study, fifteen criteria,⁶⁰ in Cleveland's study, twenty-five;⁶¹ and in

51. *Open Government Guide, User's Guide*, available at <http://www.rcfp.org/ogg/item.php?pg=users> (last visited Sept. 4, 2007). The Internet version of this publication is fully searchable for legal summaries by individual states and allows for searches of the laws of all states across one category.

52. See generally Marion Brechner Citizen Access Project, available at www.citizenaccess.org [hereinafter *MBCAP Web Site*] (all citations to the MBCAP Web Site are current as of Nov. 7, 2007).

53. See ANSELM STRAUSS & JULIET M. CORBIN, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* 23-32 (1991), available at www.sagepub.com/booksProdDesc.nav?prodId=Book5726.

54. See STRAUSS & CORBIN, *supra* note 53.

55. *Id.*

56. *Id.*

57. See generally *supra* Part II.

58. See ADAMS, *supra* note 11, at 4, 18. See also *supra* text accompanying notes 19-23.

59. See ADAMS, *supra* note 11, at 5.

60. See Iorio, *supra* note 24, at 743.

61. See Cleveland, *supra* note 36, at 158-61.

the BGA, five criteria.⁶² The MBCAP, however, has already identified hundreds of categories.⁶³ By rating and disseminating the laws within these categories, the project is able to readily demonstrate differences among the laws.

In addition, the MBCAP compares and weights legal provisions in recognition of the hierarchy of law, as will be discussed later in this Essay. The project aims to effectively describe every single provision of all state access laws, and eventually the entire law, in a way that makes the comparative rating more meaningful. While the *Open Government Guide* is comprehensive in its description of state statutory law, it neither evaluates these laws in terms of their comparative degree of “openness” nor does it look at law other than statutes.⁶⁴ The MBCAP currently evaluates statutes, constitutional provisions, and limited case law for their relative degree of “openness.” More case law is being added.⁶⁵ In this way, the MBCAP will provide a more complete picture of the state access laws.

III. PROJECT DESIGN AND METHOD

The “openness” of government records and meetings can be a critical component of a democratic republic, allowing citizens to take a more active role in government.⁶⁶ However, few citizens or public officials doubt the need for protection of information that if disclosed would damage national security or subject a crime victim to additional harm.⁶⁷ In an effort to help scholars, public officials and citizens better understand the public policy choices of disclosure and non-disclosure, the MBCAP uses both qualitative and quantitative research tools in order to provide the

62. See *Detailed Methodology & Analysis*, *supra* note 41.

63. See generally *MBCAP Web Site*, *supra* note 52.

64. See *Open Government Guide*, *supra* note 49.

65. See Marion Brechner Citizen Access Project, Methodology File (on file with Bill Chamberlin) [hereinafter *Methodology File*].

66. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527 (1977).

67. See, e.g., *Press Advocates Keep Close Eye on Efforts to Limit Records Access*, ASSOCIATED PRESS, Jan. 25, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=15682>; *Ohio Anti-terrorism Law Blocks Access to Security Records*, ASSOCIATED PRESS, Aug. 27, 2002, available at <http://www.firstamendmentcenter.org/news.aspx?id=3503>; Susan J. Bottino, Policy Analyst, Public Hearing: *Open Public Records Act Proposed New Rules*: N.J.A.C. 13:1F (July 22, 2005), in N.J. POL'Y PERSPECTIVE, available at http://www.njpp.org/test_opra_sb.html; Mimi Moom, *States Also Limit Access in Wake of 9/11*, 26 NEW MEDIA & THE LAW 28 (2002), available at <http://www.rcfp.org/news/mag/26-1/foi-statesal.html>.

MBCAP web site users with a systematic “landscape” of state access law.⁶⁸

Mapping all state law, including constitutional provisions and court opinions, that affect access to government records is an immense project that will take several more years. Because the project staff, however, is analyzing one category at a time across all fifty states and the District of Columbia, the information on the individual categories can be used as the project develops. Obviously, the size and potentially unlimited duration of the project mean that many resource restrictions facing Adams, Iorio, and other researchers were not factors in preparing the research design. Permanent funding through the MBCAP endowment protects the viability of such a long-term project.⁶⁹

The MBCAP determines the content of state laws and to what degree they maximize or minimize access by carefully perusing and summarizing the laws and then asking experts on access law to rate them.⁷⁰ To locate and interpret the state access laws in each of the fifty-one jurisdictions, the project relies on a systematic qualitative data collection by legal researchers using keyword computer searches and secondary sources.⁷¹ Then the Sunshine Advisory Board (SAB)⁷² evaluates the state access laws

68. See *MBCAP Web Site*, *supra* note 52, About the Project; Research Methodology; Advisory Board. The MBCAP web site, in addition to the ratings and summaries of laws, provides direct links to all state access laws and FOI compliance audits of public officials. It also provides a substantial and frequently updated list of books, booklets, and articles written about the individual state access laws, as well as contact information for all of the organizations known to be actively involved in education or public interest advocacy related to access to government meetings and records.

69. Orlando-based media executive Marion Brechner established an endowment of \$600,000 in 1999. Later, the state of Florida provided \$420,000 in matching funds, and the John S. and James L. Knight Foundation awarded a supplemental grant of about \$275,000 to get the project started while the project director was waiting for the state funds. In 2006, Mrs. Brechner added another \$50,000 to help fund FOI911, a complement to the broader project but focused on providing in a timely manner background information that will help policymakers and activists fight anti-access legislation proposed in the state legislatures. See *MBCAP Web Site*, *supra* note 52; *supra* text accompanying note 68.

70. See *MBCAP Web Site*, *supra* note 52, Research Methodology; Advisory Board.

71. See *MBCAP Web Site*, *supra* note 52; see also *supra* text accompanying note 68.

72. Members of the board were primarily chosen for their national reputations and for their knowledge of access laws and the legal system, although the project director does not claim that the board necessarily represents the broad array of interests involved in access policy. The board members represent different regions of the country, different professional backgrounds, and different organizations. Currently, the board has seventeen active members: Loren Cochran, an attorney, former broadcast journalist and currently the director of the FOI Service Center at the Reporters Committee for the Freedom of the Press; Rebecca Daugherty, an attorney and the former director of the FOI Service Center; Dr. Sandra Davidson, an attorney, and associate professor of

for their comparative degree of “openness” via a quantitative methodology that allows web site users to understand at a glance the relationship between laws.⁷³

A. Identifying Categories

The MBCAP organizes the law under several categories that both aid the practitioner and researcher in finding relevant material on the project web site and allow for meaningful comparisons across states. In order to organize the research efforts, the project director assigns each researcher a broad research issue readily identifiable in most state laws and the secondary literature. The list of major starter categories includes (1) “Definition” of a public record, (2) “Fees” for copying records, (3) procedures for “Requesting Records,” (4) public and private “Entities Subject to Law” of a state, (5) “Subjects Open/Closed,” (6) laws providing for “Penalties, Appeals, Remedial Action,” and punishments in records cases.⁷⁴ These six major categories serve as an umbrella to ensure that all public records provisions are examined but are relied on only as the beginning of a research focus.

media law in the School of Journalism at the University of Missouri; Joe Davis, an editor of publications for the Society of Environmental Journalists; Pat Gleason, the cabinet affairs director, special counsel—open government, the office of Governor Charlie Crist; Kevin Goldberg, Special Counsel to Fletcher, Heald & Hildreth, P.L.C., specializing in First Amendment and media law issues; Harry Hammitt, an attorney and current editor and publisher of *Access Reports*, a biweekly newsletter on the Freedom of Information Act and other open government laws and policies; Forrest (Frosty) Landon, a former president of the National Freedom of Information Coalition and executive director of the Virginia Coalition for Open Government; Linda Lightfoot, a retired executive editor of the Baton Rouge *Advocate*; Ian Marquand, a broadcast journalist for KPAX-TV of Missoula, Montana and a former co-chair of the FOI Committee for the Society of Professional Journalists; Dr. Shannon Martin, a professor and the department chair, Department of Communication and Journalism, University of Maine at Orono; Patrice McDermott, the director of openthegovernment.org; Tara Olivero, the assistant director, Office of Government Relations, American Library Association; Dr. Suzanne Piotrowski, an assistant professor, Graduate Department of Public Administration, Rutgers University-Newark; Dr. Susan Dente Ross, an assistant dean, Washington State University; Charles Tobin, a litigation and media law attorney with Holland & Knight in Washington, D.C. and a former journalist; and Eric Turner, an attorney, and managing editor and associate general counsel for the Connecticut FOI Commission.

73. See *MBCAP Web Site*, *supra* note 52.

74. *Id.*, Research Methodology. Currently, the project director also uses such categories as “Computer Records” and “Constitutional Provisions” for access to records, but those categories will eventually be subsumed into the six major categories for the purpose of one overall rating. The six categories have been subject to adjustment as the research progresses and are only the first effort to identify the content of state public records laws. For public meetings, major categories established so far are “Constitutional Provisions” and the “Definition of Public Meeting.”

Within one general category, a researcher immediately begins to see what legal issues emerge in the state laws themselves. Further efforts to categorize the provisions of state laws do not start with a priori assumptions of what is in the laws or pre-established search criteria as in previous research studies.⁷⁵ Instead, the categories for MBCAP evolve from a careful examination of the text of all statutory and constitutional provisions related to access law as well as court opinions and perhaps eventually administrative law. The MBCAP team, relying on grounded theory, frames the research by what types of information is found in the laws as they are reviewed, rather than forcing the law's language into preconceived categories.⁷⁶ From this detailed analysis, categories emerge.

Once researchers are assigned a specific category to research from the starter list, such as provisions regulating which government bodies are subject to the law, the researchers conduct keyword searches using comprehensive legal databases. They are looking for any aspect of each state's law that mentions government agencies and public records. Significantly, researchers do not limit their searches to public records laws; related laws can be found under the statutes describing school board obligations or the duties of county clerks, for example. The primary searches create initial categories, which often lead to further and more focused searches. Researchers also rely on the citations and references they find to discover other pertinent statutes, court opinions, and constitutional provisions. So far, for each public records category, researchers have examined primarily state constitutions and state statutes. For some categories, some state appellate court decisions also have been put online. The project director eventually plans to rate all state and federal appellate court opinions, state administrative opinions with legal authority, and state attorney general opinions.

The researchers also examine pertinent literature, including law reviews and periodicals. They look for items related to the project in online news databases and clip files. The project office maintains a library of books about state media law and newsletters distributed by state access groups. In this way, the project tries to protect itself against any missing information and is able to keep up-to-date with changes in existing law. Researchers also use this secondary data, when available, to check the comprehensiveness of their work.

75. See generally ADAMS, *supra* note 11; Iorio, *supra* note 24; Cleveland, *supra* note 36; Better Government Association, *supra* note 40.

76. See STRAUSS & CORBIN, *supra* note 53. On occasions where only a few states mention one issue, the project director has to decide when a category can stand on its own or whether the data would be better represented by merging that category with others.

As researchers progress, subcategories of the major categories—and of the subcategories themselves—are discovered. At times, a particular data set, such as “Security-Related Investigations,” may easily fit within two or more parent categories, such as “Security and Safety” records as well as “Law Enforcement” records, both of which are subsets of the starter category entitled “Subjects Open/Closed” involved in records laws. The project director tries to organize the data in such a way as to minimize the number of times one particular aspect of a law is rated, although some issues, as in the example above, clearly should be a part of two different categories.

The process of fitting the law into categories usually involves significant revision of the categories. A researcher may start research on a broad research category, such as “Security and Safety” related records, and find a plethora of information. Through a dialogue between the student researcher and the project director, broad subcategories are then broken down into more manageable and comparable data sets. For the sake of both the review board members and web site users, and to ensure comparable and clear ratings, all subcategories must reflect only a single issue. For example, “Security and Safety” related records eventually resulted in eight separate comparable data sets, including (1) “National Security,” (2) “Security-Related Federal Law,” (3) “Security and Safety Plans and Procedures,” (4) “Security, Facilities,” (5) “Security-Related Investigations,” (6) “Security-Related Medical and Drugs,” (7) “Security-Related Personal Information,” and (8) “Security Assessment.”⁷⁷

While comparison by the SAB across all these categories under the general heading of “Security and Safety” would have been cumbersome and difficult, comparison across the states in each of the eight categories was much more manageable. Eventually, an overall state rating for the broader category “Security and Safety” may then be achieved by an average of the relevant scores in each of the subcategories. No effort is made to weight the importance of the individual subcategories given the arbitrary complexities that would add to the quantitative measures.

B. *Creating Summaries of Law*

Because the MBCAP staff wants to provide information about access laws to any individual, whether familiar with legal terms or not, the project staff creates summaries of law, or “capsules,” without the legal jargon and complex sentences often found in statutes and court opinions. For example, a “capsule” in the category “National Security” states: “The

77. See MBCAP Web Site, *supra* note 52, Security and Safety.

Alaska public records law exempts all records made confidential under federal law or regulation.”⁷⁸ States that have identical or similar laws will have identical or similar “capsules.”⁷⁹ In this way, the “capsules” offer quick comparison of statutory material unencumbered by confusing and long original statutory language. For those who wish to view the statutory language, formal citation to the relevant statutory section is included at the end of each “capsule.”⁸⁰

The “capsules,” however, must be an accurate representation of the law. As such, precautions are taken to prevent researchers from reading into the language of the laws. The researchers, for example, must keep legal provisions in their appropriate context so that both users and members of the review board can have an accurate picture of what the law says. They also eliminate most words that take legal training to understand. When it is impossible to eliminate legal wording without losing meaning—such as when a law incorporates a legal term of art—an explanation of the term is provided. For example, care is taken to explain the meaning of “actual costs,” a term which often arises with respect to fees for record copying. Finally, researchers are to report when they cannot find relevant law. A “null statement” is then created to show unequivocally that there is no law in the state with respect to the particular research category. The project director reviews all legal summaries, called “capsules,” in their final form.

After subcategories and “capsules” are created, revised, and finalized, copies of these “capsules” are redrafted as “neutral statements.” In these “neutral statements,” citations, state names, counties, and even names of specific state agencies are removed. The purpose of creating these “neutral statements” is to prevent SAB members from recognizing the state from which the law arose and from recognizing the legal source of the law. This technique protects against bias when rating legal statements. Otherwise,

78. *Id.*, National Security; see ALASKA STAT. § 40.25.120(a)(4) (2007).

79. See also, e.g., CAL. GOV'T CODE § 6254(k) (West 2007) (exempting those records made confidential under federal law); IDAHO CODE ANN. § 9-340A (2007) (exempting those records made confidential by federal law or regulation); 5 ILL. COMP. STAT. 140/7(1)(a) (2007) (exempting those records made confidential by federal law or regulations); IND. CODE § 5-14-3-4(a)(3) (2007) (exempting those records made confidential under federal law); MD. CODE ANN., STATE GOV'T § 10-615(2)(ii) (LexisNexis 2007) (exempting records made confidential by federal law or regulation); OR. REV. STAT. § 192.502(8) (2005) (exempting records made confidential by federal law or regulation); R.I. GEN. LAWS § 38-2-2(4)(S) (2007) (exempting all records made confidential by federal law or regulation); VT. STAT. ANN. tit. 1, § 312(e) (2007) (exempting records made confidential by federal law); WYO. STAT. ANN. § 16-4-203(a)(ii) (2007) (exempting records made confidential by federal statute or regulation).

80. See *MBCAP Web Site*, *supra* note 52.

SAB members may unintentionally assume that a particular state has more “open” legal statements than other states or indeed unconsciously favor or disfavor their own state laws. SAB members may be more impressed with a constitutional provision than a statutory provision. By giving SAB members “neutral statements” to rate, the ratings more accurately reflect the substance of the law. The “neutral statements” are scrambled in a way that makes it difficult to determine the state of origin for a given statement. “Neutral statements” are numbered in such a way that project staff is able to link rated statements with original “capsules.” Once rated, the “capsules” are posted to the project’s web site.⁸¹

All legal statements for one category or subcategory are sent to the SAB at the same time and a deadline is imposed for their return. This ensures that an overall state rating may be generated and posted to the web site immediately and that reviewers are not dealing with several different subjects at one time. The review board members usually receive 75 to 150 summaries every three to four weeks. When updates to particular laws are necessary, the updated “neutral statements” are sent with a broad range of previously rated “neutral statements” to allow the review board to make meaningful comparisons.

Because the MBCAP staff believes it is important for the review board to see the legal provisions reviewed in their proper context, the legal statements sent to the board often contain issues extraneous to the subject at hand. Therefore, the project director carefully defines for the SAB the category being rated. In other words, when the review board is rating the degree to which state records are “open” with respect to “Security-Related Investigations,” the review board may receive a full sentence exempting from the public any “references to law enforcement investigations, including investigations related to terrorism, connected to threats to security and safety of the general public.”⁸² The project director may instruct the SAB members to rate the statement only with respect to terrorism if terrorism-related information is all that is being rated at that time, and not rate the statement in the context of general law enforcement investigations or with respect to terrorism-related information generally. In this way, the project preserves advantages of context while limiting review board members to a review of a single subject matter at a time.⁸³

81. *See id.*

82. *See id.*; Security and Safety; Security-Related Investigations; Definition.

83. In one batch of legal summaries for one category, SAB members may be reviewing two or more legal summaries from one state. Every constitutional provision, statute, and appellate court opinion for each category is rated and posted separately, and the project rates all legal statements for each category at the same time if possible.

In addition, SAB members are to rate every set of legal summaries only to the degree that the law facilitates or limits access to government information. Ratings are “not intended to reflect the quality of the language of a law, nor the value or morality of a law,” but only the “degree to [which] government records are *open* or *closed* to the public” per the law at the time of rating.⁸⁴ Although some subjectivity is controlled through the creation of subcategories themselves, as well as through the non-legal and controlled phrasing of the “capsules” and “neutral statements,” this reminder focuses the review board on the relevant issue to be addressed. This reminder controls for any residual bias that may be present, despite precautions taken via the research methodology. Once a batch of “neutral statements” are returned, the project calculates the relative “weight” of the law on a scale that will be discussed in greater detail below.

C. Rating Procedure

The project director set a goal of at least an 80% response rate from the SAB members surveyed at one time and so established a guideline that at least nine out of the eleven SAB members sent a survey must send in their ratings for one category before it can be tabulated and entered into the database.⁸⁵ Advisory board members have two to three weeks from the day they receive the legal statements to rate them. Nearly everyone sends in the ratings. In fact, the MBCAP staff has never had to go beyond a third contact to acquire all of the returned surveys it needs. In special circumstances, when one review board member knows in advance that it will be difficult or impossible to meet the ratings deadline, the project director asks one of the associate board members to complete the task. Before beginning to rate legal statements, the SAB members agreed to do so on a 7-point semantic differential scale, with 7 indicating that the law allows for maximum “openness” to government records and meetings, and 1 meaning the law facilitates the most “closure.”⁸⁶ The MBCAP legal research team determined that a 7-point scale best allows the rating of subtle language differences in the laws. The scholars advising the project were concerned that the extreme ends of “completely open” and “completely closed” would seldom be used, and therefore wanted a 5-point range rather than only a 3-point scale for the remaining evaluations. They

84. Interview with Bill F. Chamberlin, Project Director (Apr. 2002).

85. Occasionally, only ten SAB members might be available for a single survey. The project director then insists on only eight rated surveys.

86. See *MBCAP Web Site*, *supra* note 52, Research Methodology.

wanted, in other words, at least two measures of “openness,” one neutral rating, and two measures of “closures” in addition to the two extreme ratings.

The MBCAP only wants the review board to compare the relative “openness” of the states within each category of information. An overall score, developed from all subcategories, may represent the relative degree of “openness” of the state with respect to a broad and diverse subset of data, such as “Security and Safety” related records, but this score is achieved through a process that circumvents subjective influences.

Within each category, the project evaluates whether laws maximize or minimize transparency in government but does not evaluate whether laws are “good” or “bad.” The MBCAP does not want the review board to make subjective determinations regarding the social importance of access to a particular type of information when rating state “openness.” A “good” law depends as much on an individual’s perspective as it does on the characteristics of the law itself. For example, a state law involving privacy, which is rated “very open” by the MBCAP may be “good” for journalists, but less adequate for people who are afraid their personal information will become public. A “good” law may also depend on the relative historical context in which the law operates. For example, a state law involving access to security-related plans rated “very open” may be publicly supported during peace but not during war. Varying perspectives may cause individuals or even society to value access in varying degrees.

Without consulting outside sources, the SAB members rate the legal statements by way of the 7-point scale. Each survey represents the opinion of only one board member. Once the MBCAP staff receives the SAB ratings, they average them to obtain the mean raw rating for each legal statement, a raw score between 1 and 7. This raw score, however, must be altered to reflect the importance of different legal sources.

1. Weighting the Law

To be an accurate representation of the state’s relative degree of “openness,” ratings must reflect the fundamental principle of law that not all legal sources carry equal weight. State constitutions, for example, override statutory law; that is, any statutory provision deemed inconsistent with the state constitution is invalid. Similarly, the highest state court opinions override inconsistent state appellate court opinions; appellate court opinions override trial court opinions, administrative opinions, and state attorney general opinions.

In simple language, the legal statements made by institutions at the top of the hierarchy have more precedential value than those lower in the

hierarchy. This means that courts will be more persuaded by the legal and policy arguments crafted by higher authorities and will be less persuaded by lower court interpretations. It also means that legal authorities at the top of the hierarchy are wider in scope and greater in influence.

Recognizing the different persuasive values of different legal authorities is integral to the project's mission of achieving a non-biased rating of the degree to which states value and promote "open" governments through law. Admittedly, converting the hierarchical structure of the states legal systems has some limitations, particularly because in a common law legal system, prior court decisions interpreting the meaning and scope of various legal sources often have persuasive but not controlling value. In this respect, there is some play in the law that allows for significant changes in policy and interpretation. Despite these limitations, however, a research design can recognize the established and relative weight of a legal source if not its absolute authority. For the project, multipliers needed to be identified that would recognize these differences in legal authority.

The SAB members voted to create a scale giving a particular weight to each legal source. Review board members had the requisite expertise and experience to help isolate the appropriate multipliers. All members could claim a practical knowledge of how the legal hierarchy operates in the context of public records. In addition, these members had considerable academic and legal training with respect to public records laws. Particularly, six of the eleven board members at the time the research methodology was established had formal legal training, and the remaining five members had extensive exposure to the legal system.

The board adopted a 10-point weighting scale that allowed for a fairly large range of values while controlling for the possibility of ties created by averaging weights. The mean weights for the legal sources were: state constitution, 9.6; state supreme court, 8.84; state statute, 7.62; federal appellate court, 7.28; state appellate court, 6.5; federal trial court, 5.38; state administrative body with legal authority, 5.28; and state attorney general opinions, 4.08. A reliability analysis of the weight ratings was conducted using SPSS (Statistical Package for the Social Sciences) for Windows, a statistical software product. The resulting Cronbach's alpha was .9675, and the standardized alpha coefficient was .9692, indicating a near perfect agreement among review board members at the time.⁸⁷

87. See *Methodology File*, *supra* note 65. Cronbach's alpha "measures the internal consistency of a set of items, and ranges between 0 and 1, with higher numbers indicating higher consistency." Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577 n.116 (2006).

2. Data Manipulation

The MBCAP research team faced yet another potential methodological problem. As discussed above, access laws originate from legal authorities with different weights. Multipliers were developed that would reflect the relative weight of the legal authority. But, as a result of these multipliers, a state law of lower persuasive value rated by the SAB review board as “somewhat open” might in the final calculation be rated lower (i.e., “more closed”) than a state with a more neutral law, or possibly even a restrictive law, Supreme Court decision or constitutional provision. While multipliers solved the problems associated with the relative weight of authority, these multipliers could have the unintended effect of skewing the data by creating inaccuracies in the relative degree of “openness” of state laws with unequal persuasive authority.

To overcome the potential mathematical problems associated with the use of multipliers, and to account for the positive and negative valence of the ratings (i.e., “open” versus “closed” laws), the research team decided to convert the average ratings achieved through the 7-point differential scale, to average ratings along a bipolar scale. As such, before any hierarchical weight is given to the legal source, the average scores of 1 to 7 become average scores ranging from -3 to +3.

Multiplying a source of law by a “closed” review board rating would result in a negative number, a number that both represents the hierarchal value of the law as well as its intended effect on access to records or meetings. The project members decided to convert these scores after the SAB rating rather than change the differential scale to a bipolar scale on the SAB surveys because studies show that a differential scale eases comprehension and improves accuracy.⁸⁸

This method had been used by Icek Ajzen in 1999 to explicate his theory of planned behavior.⁸⁹ According to Ajzen, the transformation makes intuitive sense because evaluations, such as “open-closed,” form a bipolar continuum, negative at one end of the scale and positive at the other end.⁹⁰ Arithmetically, the conversion represents a linear transformation in which a constant—4 in this case—is subtracted from the original scale values, a process that does not alter its properties.⁹¹

88. See *Methodology File*, *supra* note 65.

89. Icek Ajzen, *The Theory of Planned Behavior*, 50 *ORG. BEHAV. & HUM. DECISION PROCESSES* 179 (1991).

90. *Id.* at 193.

91. *Id.* at 192-93. In order to assess which of the two types of scales yielded better results, Ajzen correlated two independent variables from his planned behavior model, first using a unipolar

Therefore, once the original ratings—the 1 to 7 scale—are received from the SAB members, the MBCAP research assistants convert them to the bipolar scale by subtracting 4. Then the mean raw score is calculated, and the weight corresponding to the respective legal authority is applied. Finally, the result is converted back into a 1 to 7 scale, by adding the constant 4 subtracted previously.⁹² State ratings are posted on the project's web site as raw numbers and corresponding "openness" icons. The value 7 corresponds to a "sunny" icon (or "completely open"), 6 is "mostly sunny," 5 is "sunny with clouds," 4 means "partly cloudy" (neither "more open" nor "more closed"), 3 represents "cloudy," 2 means "almost dark," and 1 is "dark" (or "completely closed").⁹³ Thus, web site users benefit from the more intuitive differential scale while accessing an accurate representation of the relative state of "openness."⁹⁴

D. Identifying the Most Current Law

Just as law operates on a hierarchical basis, it also operates on a chronological basis. As mentioned previously, the common law system used in almost every state in the United States operates on the assumption that the law must and can evolve from prior decisions, in response to policy changes, and as a result of inconsistencies and disparities between lower courts. The speed of this evolution is affected by the relative authority of legal sources, which in turn, helps justify the use of a multiplier. The project, however, is designed to aid not only legal researchers but also practitioners who may be less interested in the various state court opinions, statutory laws, court decisions, and constitutional amendments than in understanding, in a comprehensive and accurate way, the current state of the law with respect to a particular record issue.

The project director developed a "most recent statement of law" subpart for each subcategory to enable web site users to determine how the overall laws of the state—the combination of statutes, constitutional provisions, and court decisions—rate. In addition to providing individual summaries from various legal sources for a particular category, the project also attempts to indicate the current state of the law and rate it on a state-by-state basis.

scale (1 to 7) and then a bipolar one (-3 to 3). He found that the bipolar scale led to substantially stronger correlations than the unipolar scale did. *Id.*

92. See *Methodology File*, *supra* note 65.

93. *MBCAP Web Site*, *supra* note 52, Definition.

94. See generally *id.*

However, the weighting of legal authorities made achieving this current state-of-the-law rating difficult. Each category potentially had three different scores, even if they received the same rating, because each kind of document was weighted differently based on its legal precedential authority. After the project research team determined that a sum or multiple of the three scores would be meaningless, it attempted to establish a mathematical process that would best represent each state's overall rating. With reliability concerns in mind, the project director compiled nine possible solutions and sent a ballot out to the review board members.⁹⁵

The SAB selected the most recent statement of law, meaning that the most recent court opinion, statute, or constitutional provision would represent the state's law for that category. Once the project began using this designation, however, the project director discovered that the most recent statement often was a law that spoke to only part of a category and not the complete category. For example, with respect to "Security-Related Federal Law," New Jersey's most recent statement of law as of 2002 was a decision by the Superior Court of New Jersey holding that state citizens could not rely on state public records law to access information about the identity of INS detainees in state prisons.⁹⁶ New Jersey statutory law is much broader in providing that the states will not "abrogate" any federal exemption of a public or governmental record from disclosure requirements.⁹⁷ The statutory law more accurately summarizes the current state of the law with respect to security-related federal records. Because of this kind of problem, the project director and the review board members are currently working to find a way to create and rate a comprehensive and accurate summary of state law using the pre-existing methodology created by the project thus far.

IV. RESULTS

The enormity of the project means that the project's interactive web site provides many more results than could be summarized or presented in an article or even a book. The interactive nature of the web site allows for different and multiple comparisons to be made by the web site user, creating his or her own approach to the data. It allows the public records enthusiast, the journalist, the reporter, or the layperson the ability to

95. See *Methodology File*, *supra* note 65.

96. *Am. C.L. Union of N.J., Inc. v. Hudson*, 799 A. 2d 629, 654 (2002).

97. See N.J. STAT. ANN. § 47:1A-9(a) (West 2007).

control, compare, and manipulate information in a way that details the relative authority of the law, the current state of the law, the relative degree of “openness” of the state with respect to a particular category of information, or the relative “openness” of the state or states across categories of information. In this way, unlike previous research, the project enables the possibility of more meaningful and direct access to state public record information in a way that is controlled by a researcher’s own values of what a “good” law should be. Subjective decisions such as the social importance of accessing a type of information or the wisdom of allowing particular information to be disclosed are made by a web site user, and not by the MBCAP staff or the review board.

The enormity of the project, however, also means that the MBCAP staff still has a lot of work to do in terms of compiling, categorizing, and updating information as new statutory laws are passed and new cases decided. Only two of the major starter categories, the “Definition” of records and the procedures for “Requesting Records” categories, have been completed for statutes.⁹⁸ For “Definition,” the SAB gave the state of Louisiana the highest rating overall, a 5 or “somewhat open.”⁹⁹ A more favorable overall rating would have been difficult given that nine subcategories were examined; no state was likely to have a perfectly “open” law on all nine criteria.¹⁰⁰ Other states with a high “Definition”

98. Cases are not complete in any categories.

99. See *MBCAP Web Site*, *supra* note 52, Definition. Louisiana’s definition, certainly one of the most comprehensive, as summarized by a MBCAP staff member, was:

The Louisiana public records law provides that all books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are “public records,” except as otherwise provided by the public records act or the Constitution of Louisiana.

LA. REV. STAT. ANN. § 44:1(A)(2)(a) (2007).

100. See *MBCAP Web Site*, *supra* note 52. The MBCAP team measured states’ definitions of public records by whether a state required the record to be in a particular physical format, including a separate category for “Computer Records as ‘Public Records’”; required that a record be kept,

rating were New Mexico, Connecticut, and Minnesota. The advisory board gave those states a rating of 4, “partly cloudy”—neither “more open” nor “more closed.”¹⁰¹ The only state with no apparent explicit or implicit definition of a record was North Dakota, which received a rating of 2, or “nearly dark,” by the advisory board.¹⁰² Three other states were also rated at 2.¹⁰³

These ratings, in turn, help demonstrate how particular aspects of these definitions, as viewed by the SAB, either facilitate or frustrate access. The state with the highest ratings had lengthy definitions of public records that tended to encompass several different types of documents, “regardless of physical form,” held, created, developed, or maintained by any state agency.¹⁰⁴ Those states rated as 2 had narrow definitions of what constituted a public record. For example, the law in South Dakota stated, “[i]f the keeping of a record . . . is required of an officer or public servant under any statute of this state, the officer or public servant shall keep the record, document, or other instrument available and open to inspection by any person during normal business hours.”¹⁰⁵

The MBCAP review board of experts also determined that a definition of a public record that includes terms such as “used for public business,” although it sounds attractive, limits public access to more records than a definition that emphasizes any record which a public agency creates, receives, holds, and maintains.¹⁰⁶ The former means that information held by the government, but not directly used in governing, such as census data or labor statistics, might not by law be available. The “used for public business” limitation also can be used to restrict public access to records

possessed, or maintained by the agency; required that a record have a relationship to state funds; required that a record be authorized by law; “owns” a document; defines a record in terms of the role a record plays in the states’ governing system; and includes a miscellaneous category of criteria not reflected in most state laws.

101. *See id.*, Definition.

102. *See id.*

103. *See id.*

104. *See, e.g.*, LA. REV. STAT. ANN. § 44:1(A)(2)(a) (2007).

105. S.D. CODIFIED LAWS § 1-27-1 (2007).

106. *See MBCAP Web Site, supra* note 52, Definition. Compare W. VA. CODE § 29B-1-2(4), (5) (2007) (exempting records used for business purposes), and GA. CODE ANN. § 50-18-70(a) (West 2007) (exempting records of any public agency). Similar phrases used in statutory language include “relating to the conduct of the public’s business,” CONN. GEN. STAT. § 1-200 (5) (2007); “in the transaction of public business,” VA. CODE ANN. § 2.2-3701 (2007); and “relating to the conduct of government or the performance of any governmental or proprietary function,” WASH. REV. CODE § 42.17.020(41) (2007) (effective Jan. 1, 2008).

that may reveal inappropriate personal activity of public officials on the job.¹⁰⁷

Greater specificity of language also seems to correspond to a greater rating of “openness” even when state laws operate to close information once available. This is certainly true with respect to one of the more timely categories, “Security and Safety” related records,¹⁰⁸ which represents “[i]nformation related to security of government, government officials, government facilities or government meetings,”¹⁰⁹ and encompasses many laws passed in reaction to the 9/11 terrorist attacks.

As mentioned previously, state laws referencing security and safety were subdivided into eight categories: (1) “National Security,” (2) “Security-Related Federal Law,” (3) “Security and Safety Plans and Procedures,” (4) “Security, Facilities,” (5) “Security-Related Investigations,” (6) “Security-Related Medical and Drugs,” (7) “Security-Related Personal Information,” and (8) “Security Assessment.”¹¹⁰ When the overall category of access to “Security and Safety” records was rated by statutes across all fifty states and the District of Columbia, the states scored between 3 and 5, from “somewhat closed” to “somewhat open.”¹¹¹ The SAB rated no state at the extremes, “dark” (1) or “sunny” (7).¹¹²

Tennessee rated the lowest, at 3, “somewhat cloudy” or “somewhat closed.”¹¹³ The Tennessee Open Records Act exempts all records created “to respond to,” or prepare for, “any violent incident,” such as a “terrorist

107. See, e.g., *Denver Publ’g Co. v. Bd. of County Comm’rs of Arapahoe County*, 121 P.3d 190, 202 (Colo. 2005). The court held:

CORA’s [Colorado Open Records Act] definition of “public records” limits the type of records covered by CORA and specifically distinguishes between e-mail messages that address the performance of public functions or the receipt or expenditure of public funds and those that do not. Furthermore, the inclusion of an elected official’s correspondence, namely the official’s e-mail messages, does not eliminate the privacy protection inherent in the “public records” definition and does not extend the scope of CORA beyond Records of public business.

Id.

108. Although the researcher started looking for laws with the word “terrorism” in them, she soon found few mentions of the word. However, the researcher found that states were largely adopting laws to protect against terrorism by using such words as “security” and “safety.” Most of the laws have been passed since 9/11.

109. See *MBCAP Web Site*, *supra* note 52, Security and Safety; Definition.

110. *Id.*

111. See *id.*

112. See *id.*

113. See *id.*

incident.”¹¹⁴ The Tennessee law also exempts “contingency plans of a government entity” created in response to, or to prepare for “any violent incident, bomb threat, ongoing act of violence at a school or business, ongoing act of violence at a place of public gathering, threat involving a weapon of mass destruction, or terrorism incident.”¹¹⁵

In contrast, Nebraska received a relatively high rating for “openness,” with a score of 5.¹¹⁶ Nebraska’s statute allows a custodian to withhold information developed or received by any “public bodies charged with duties of investigation or examination,” that is “a part of the examination, investigation, intelligence information, citizen complaint or inquiries, informant identification, or strategic or tactical information used in law enforcement training.”¹¹⁷ If, however, this information has been previously and publicly disclosed in an open court, administrative proceeding, or meeting “by a public entity pursuant to its duties,” the information is subject to the state’s public records law.¹¹⁸ Tennessee’s law uses vague terms that can be read expansively while Nebraska’s law is directed toward more specific activity. Additionally, Nebraska has a provision designed to minimize unnecessary “closure”; Tennessee does not.

Also at 5, or “somewhat open,” Minnesota had no law that restricted access to terrorism information. The absence of any restrictions on access to official documents appears to have led the advisory board to rate this state higher than any state that explicitly denied access to similar records.¹¹⁹ In other words, the review board rated the lack of law to mean there was some presumption of records access, which may or may not be true as a matter of practice. However, the board was only asked to rate whether the lack of a statute would be most likely to maximize or minimize access. The rating of “somewhat open” suggests the review board was aware of some of the difficulties associated with the lack of a law.

The MBCAP’s rating process and summary of laws makes identification of characteristics such as specificity more visible. Such rating process makes transparent, by comparison, the inherent vagueness of the Tennessee security and safety law, and the fact that the Tennessee law has no provision that allows access absent evidence of potential public or individual harm. Identifying and isolating these characteristics can aid

114. TENN. CODE ANN. § 10-7-503(2)(e) (West 2007).

115. TENN. CODE ANN. § 10-7-504(a)(21)(A)(ii) (West 2007).

116. *MBCAP Web Site*, *supra* note 52, Security and Safety.

117. NEB. REV. STAT. ANN. § 84-712.05(5) (LexisNexis 2007).

118. *Id.* § 84-712.05.

119. *MCAP Web Site*, *supra* note 52, Security and Safety.

in identifying strengths and weaknesses in state laws as well as provisions that might be useful in other jurisdictions.

Furthermore, benefits of the project come from the construction of categories. The categorization of access laws provides a map otherwise unavailable. Because researchers are exploring laws with no preconceived notion of what they will find, this opens the door to discovering aspects of laws little known or understood to this point. The inclusion of categories of laws mentioned in only a few states helps observers identify the many issues raised by access to government. Ultimately, by showing which and how many states deal with access to different kinds of documents and agencies, the project will create a broader and more accurate picture of state public records laws and their differences. By providing very complex data in a manner that is easy to access, the project will allow citizens, scholars, and policymakers to study the laws more easily, more often, and with more insight. Those interested will have less trouble finding which states have access laws regarding specific issues. As such, future scholars can better concentrate on issues such as specific wording of laws, the values represented by the laws, and issues of implementation.

V. CONCLUSION AND LIMITATIONS

Deciding which state supposedly has the “best” public records or open meetings laws has only limited value. First, one must consider their own values, what they believe about the importance of access, secrecy, and privacy, for example, before deciding what law is “best.” More importantly for this project, once a decision has been made to rate the laws on one dimension, on a scale of “openness,” for example, a scholar or researcher soon realizes that what a comprehensive project reveals about individual legal provisions may be much more important than a final overall assessment. Access laws have too many dimensions for any state to be “best,” or the “most open,” on all issues.

However, an important contribution to the understanding of access laws occurs when a study shows which individual statutory provisions maximize “openness,” and in what way, and then show how such provisions, in total, may either facilitate or limit access. Prior research has not done this, and, therefore has not inspired a strong public dialogue on specific issues associated with access.¹²⁰ Prior research also does not

120. See generally *supra* Part II. MBCAP Director Chamberlin and an SAB member, Rebecca Daugherty, have often said that deciding which state supposedly had the “best” public records or open meetings laws would not necessarily be very useful information. The laws have too many

provide, in a comprehensive and immediate way, the tools that individuals may rely upon to develop strategic methods of accessing information or developing new access policies. Finally, prior research does not provide a sufficiently comprehensive picture of state access law with enough detail to identify the subtle differences in language and issue priority.

The MBCAP, however, provides anyone with access to the Internet a summary of more than 100 legal categories for each of the 50 states and the District of Columbia. The project posts additional summaries and ratings every month. Users of the project web site can for the first time obtain an easy-to-understand overview of all state laws on one category, organized by which most maximize and minimize access to government information. The project presents raw data for public policymakers, public access advocates, academic researchers, and journalists.

As mentioned previously, the project, in addition to providing raw data, also gives the public access to timely information. The project regularly updates its database on state laws governing access to information about issues related to terrorism, for example. Within days of the U.S. Supreme Court's consideration of state laws providing information about sex offenders to the public, the MBCAP's summary and ratings of those laws appeared in more than two dozen newspapers.¹²¹

The project offers some interesting insights into records laws as well. For example, it is easy to ascertain from the site that the state of Florida has by far the most comprehensive constitutional provision protecting access to government information and is rated highly.¹²² Almost all other

dimensions for any state to be "best" overall. Chamberlin and Daugherty also said that anyone would make an important contribution to the understanding of access laws if they could help us understand which individual statutory provisions maximized "openness" and in what way. In addition, Chamberlin noted that we needed a better public dialogue on specific issues associated with access. *See* Interview with Project Director, *supra* note 84.

121. *See, e.g.,* David Hench, *Sex Offender Registry Waits for Key Ruling; Maine Does Not Yet Post Information about Sex Offenders on the Internet, but a U.S. Supreme Court Decision May Change That*, PORTLAND PRESS HERALD (Me.), Nov. 23, 2002; Nancy Cook Lauer, *Wisconsin Provides Most Data On Sex Offenders, Survey; [sic] Says*, NAT'L J. TECH. DAILY, Nov. 13, 2002; *Crime: University of Florida Study Ranks States' Access to Sex Offender Information*, ASCRIBE NEWSWIRE, Nov. 12, 2002.

122. *See MBCAP Web Site, supra* note 52 (Hyperlink "Home"; hyperlink "State Law Summaries"; select "Examine summaries, known as capsules, of individual provisions of access laws for each state"; choose "Florida"; select category "Constitutional Access Provisions"); FLA. CONST. art. I, § 24 (granting "[e]very person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state.").

states, in contrast, offer very limited constitutional protection for access.¹²³ Additionally, in only one category so far, statutes controlling inspection of public records, did all states receive a higher rating than 3, which reads “cloudy” and “somewhat closed.”¹²⁴

These insights might serve as practical tools for those seeking access to records in multiple states. At a glance, the researcher may determine which state’s law is most likely to grant a records request among the categories evaluated by the MBCAP thus far. Editors and producers of news may achieve more accurate information from multiple sources with less effort. Additionally, scholars will more easily determine the value of an exploration of any one category of open meetings or public records laws.

Furthermore, information gathered from this study may give a better answer to which state has the “best” access laws, depending on the values of the person asking the question. For example, states that FOI activists would say have the “most open” access laws—Florida, North Carolina, and Virginia—so far rate high in many categories, including access to “Computer Records.”¹²⁵ Furthermore, one state which has a national reputation for providing poor public access to records, Pennsylvania, has rated toward the bottom of many categories.¹²⁶ Others frequently near the low end of the scale of “openness” as of fall 2007 include Alabama, Montana, North Dakota, and Wyoming.¹²⁷

Finally, insights provided by this project directly aid FOI advocates and policymakers. For example, many more states allow their officials to collect attorneys’ fees from individuals who have sued to obtain “closed” documents than many observers would have predicted.¹²⁸ Many FOI advocates encourage the payment of attorneys’ fees as a way to encourage

123. See *MBCAP Web Site*, *supra* note 52 (Hyperlink “Home”; hyperlink “One Law Across All 50 States”; select from drop down menu “Constitutional Access Provisions”; click “Go”; in the “Note,” select “Constitution”).

124. See *id.*, Inspection of Public Records.

125. See *id.* (Hyperlink “Home”; hyperlink “State Law Summaries”; choose a state “North Carolina,” “Virginia,” or “Florida”; select category “Computer Documents as ‘Public Records’”).

126. *Id.* (Hyperlink “Home”; hyperlink “One State’s Access Ratings”; select “Examine summaries, known as capsules, of individual provisions of access laws for each state”; choose state “Pennsylvania”).

127. See *id.* (Hyperlink “Home”; hyperlink “State Law Summaries”; select “Examine summaries, known as capsules, of individual provisions of access laws for each state”; choose a state: “North Dakota,” “South Dakota,” “Wyoming” or “Nevada”; select category “Computer Documents as ‘Public Records’”).

128. See *MBCAP Web Site*, *supra* note 52 (Hyperlink “Home”; hyperlink “One Law Across All 50 States”; select from drop down menu “Attorneys’ Fees, Government (Public Records)”; click “Go”).

citizens to risk paying the money it costs to go to court to retrieve records from officials.¹²⁹ Publication and free access to the project's data may encourage those states without an attorney's fee provision to adopt one.

Of course many limitations make the project an imperfect ranking of access laws. Foremost is the research time involved, meaning that, even though trends can be detected with an incomplete data base, an overall rating of all access provisions will not be available for some time. A second limitation of the project is that the measurement tool for the project is the analysis of the laws by approximately a dozen individuals who, while they are experts in the field, can never provide the perfect analysis. Among the many pitfalls of rating access laws is the difficulty faced by review board members attempting to rate fifty state laws and the laws in the District of Columbia relative to each other. Depending on the complexities of the laws, it can be very difficult to ensure the same rating is given to substantially similar laws.

A third limitation of the study is that no project can perfectly measure the similarities and differences in state laws as long as there is no effective vehicle to rate the importance of one category compared to another. In this project, subcategories of major categories are given the same weight although some are clearly more important than others. For example, overall, the issue of redaction of confidential records from non-confidential records probably is more important to many people than laws in states providing for certified copies of records. Yet attempting to weigh subcategories adds to the complexity of the project perhaps without telling us much more. Any weighing would also be largely based on a subjective determination of worth.

A fourth limitation is that even an accurate rating of the laws and court decisions cannot determine whether the laws are enforced or even whether requestors usually gain access to the records sought. Testing the effectiveness of laws by studying whether public officials actually provide public records when asked provides a better understanding of behavior than any study of the access laws. Accordingly, links to citizen efforts to document compliance and noncompliance with their state laws are listed on the MBCAP web site. The web site also provides a background from which such studies can be created.

Even with the project's limitations, however, the project adds to the body of knowledge about public records in a way that should help

129. See, e.g., Press Release, The Senate Republican Majority, Legislature and Newspaper Publishers Announce Agreement on FOIL [sic] Legislation (May 22, 2006), available at <http://www.senate.state.ny.us/pressreleases.nsf/a9c64cb05dda7e7e85256aff006d42c0/a08ccdd8b4a4d95f8525717700557bdd?OpenDocument>.

policymakers, educators, and journalists better examine and understand the statutes and court decisions regarding access laws. By increasing access to information about public records and open meetings laws, the project also potentially highlights the importance of government information to the democratic process. The project intends to provoke public conversation about access to government information similar to environmental projects dedicated to the issues of water and air pollution, which were neglected by the public and press until the 1960s and 1970s.¹³⁰

The project showcases the states that comparatively make public access a priority, and provides an impetus to low-scoring states to improve. It may also help clarify the regional and political differences between the states as framed by access-related issues. On a more detailed basis, the project helps identify “problem” states and “problem” areas of the law.

Generally, a better discussion and understanding of access laws can lead to a more thorough and less polemic consideration when issues such as the need for access to information maintained by the government and the necessity of protecting individual privacy collide. At a broader level, the project helps both legal and social science scholars to better understand how research methodologies can be blended together to create an improved understanding of other areas of law, particularly cross-state examinations of media law. Most importantly, additional information about state access laws is more readily available and understandable than ever before. This combination of legal research and social science methodology can lead to greater understanding and use of the law.¹³¹

130. See, e.g., Jack Lewis, *The Birth of EPA*, ENVTL. PROT. AGENCY, Nov. 1985, available at <http://www.epa.gov/history/topics/epa/15c.htm>.

131. MBCAP’s data has been visible in a number of places. For example, the project’s work has been the focus of numerous newspaper and magazine articles. Additionally, project data is reported to FOI activists trying to improve access to the public.

