South Carolina Law Review

Volume 65
Issue 4 *SURVEY OF SOUTH CAROLINA LAW and FOURTH CIRCUIT SURVEY*

Article 8

Summer 2014

Let the Sun Shine: Reforming South Carolina's Freedom of Information Act to Promote Transparency and Open Government

Jennifer Jokerst

LET THE SUN SHINE: REFORMING SOUTH CAROLINA'S FREEDOM OF INFORMATION ACT TO PROMOTE TRANSPARENCY AND OPEN GOVERNMENT

I. INTRODUCTION

"Philosophically, I think the public's business ought to be done in public except in very rare instances . . . . If you have commitment and pride in the decisions you make, then let the public know what you are doing."[1]

In May 2011, a man was shot to death by the police chief of Eutawville in the police department's parking lot.[2] More than two years later, the department and the investigating agencies still had not filed an official report explaining the officer's actions.[3] In a separate incident, officials in Beaufort County held closed-door meetings, excluding the public, to select a new superintendent.[4] On yet another occasion, a state representative made an important appointment to the Charleston County Aviation Authority by conducting a poll over the

1. Glenn Smith, *S.C.'s Freedom of Information Act a Constant Battlefield of Confusion, Errors*, POST & COURIER (March 10, 2013 12:23 AM), http://www.postandcourier.com/article/20130310/PC16/130319937/1177/sc-x2019-s-freedom-of-information-act-a-constant-battlefield-of-confusion-errors (internal quotation marks omitted) (quoting Andy Savage, the 2013–2014 chairman of the Charleston County Aviation Authority).
2. *Id.*
3. *Id.*
4. *Id.*

telephone.[5] All of these examples highlight a growing issue throughout South Carolina, where public officials and public bodies blatantly and frequently violate the state's Freedom of Information Act (FOIA)[6] by ignoring disclosure requirements and contravening open meeting rules.

Although South Carolina's FOIA was intended to promote transparency and open government, weak enforcement mechanisms and poor compliance has rendered the law essentially ineffective for meeting this purpose.[7] Additionally, the judicial trend toward greater openness and disclosure has been undermined by the actions of the General Assembly, which has rebuffed previous legislative attempts to reform and strengthen the law due to internal politics.[8] To make the South Carolina FOIA more effective and consistent with its stated purposes, the General Assembly should (1) make the process for accessing records and adjudicating challenges of FOIA denials faster, (2) enact stronger enforcement mechanisms, (3) provide an independent review process, (4) establish centralized oversight of compliance, and (5) create a system to collect and disseminate data regarding FOIA requests to encourage greater accountability.

This Note focuses on the statutory requirements of the South Carolina FOIA, with the purpose of proposing various reforms aimed at strengthening the law. Specifically, Part II explains the elements of the Act, including both open records and open meetings requirements. Part III examines the history and purpose of the law, looking at how the law has been amended over time and discussing its federal counterpart—which expresses similar goals to the state law. Part IV analyzes relevant case law interpreting the statute, which illustrates a judicial trend toward greater openness in government. Part V considers various causes of noncompliance and how those causes have rendered the law in South Carolina essentially ineffective. Part VI proposes various reforms intended to strengthen the law's enforcement mechanisms, make the adjudication of FOIA claims faster, and ensure that public information is more accessible for individuals. Finally, Part VII offers a brief conclusion.

II. FREEDOM OF INFORMATION ACT REQUIREMENTS

The South Carolina FOIA contains two different classes of laws aimed at promoting open government: open records laws and open meeting laws.[9]

---

5. *Id.*

6. S.C. CODE ANN. §§ 30-4-10 through -165 (2007 & Supp. 2013).

7. *See infra* Part V.

8. *See infra* Part VI (discussing the recently proposed reform bill that was defeated in the General Assembly). This recent reform effort was thwarted when lawmakers added an amendment to remove the legislative exemption provision. *See* Gina Smith, *Overhaul of S.C. Ethics Under Way,* SUN NEWS, August 5, 2012, at 1A, *available at* http://www.myrtlebeachonline.com/2012/08/05/2980004/effort-under-way-to-overhaul-limited.html. According to Bill Rogers, the bill was ultimately defeated because it got caught up in internal politics over removing the legislative exemption. Telephone Interview with Bill Rogers, Exec. Dir., S.C. Press Ass'n (Jan. 7, 2014).

9. *See* discussion *infra* Parts II.A–B.

A. Open Records Laws

Under the South Carolina FOIA, "[a]ny person has a right to inspect or copy any public record of a public body."[10] The statute defines *person* to include not only individuals, but also corporations, organizations, and other associations.[11] Furthermore, for purposes of this statute, the definition of *public body* encompasses any state government agency, board, or commission, as well as "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds."[12] Finally, a *public record* is not limited to physical paper records and can include any "books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics."[13] A public body has the right to charge the requesting party for the cost of searching for the records and making copies, but such fees cannot exceed the actual costs incurred.[14]

In addition, the statute imposes a time limit for responding to a FOIA request.[15] Once a written FOIA request is received, a public body has fifteen business days to notify the requesting party of its determination.[16] The public body's decision is considered its final opinion regarding the public availability of the record.[17] If the request is granted, the public body must produce the requested record or make it available for inspection.[18] If, however, the request is denied, a requesting party may seek to challenge the public body's denial of the FOIA request and obtain injunctive relief in circuit court within one year of the alleged violation.[19] Should the petitioner prevail, the court may award reasonable attorneys' fees and litigation costs.[20] Additionally, it is a misdemeanor for a public body to "willfully" violate FOIA laws, punishable by up to $100 in fines or thirty days imprisonment for a first time offense.[21]

The FOIA statute also requires that certain categories of public records be made available for inspection or copying purposes during a public body's hours of operation, including (1) the public body's meeting minutes for the last six months, (2) reports disclosing various aspects of reported or alleged crimes, and

---

10. S.C. CODE ANN. § 30-4-30(a) (2007).
11. *Id.* § 30-4-20(b).
12. *Id.* § 30-4-20(a); *see also* Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 401–03, 401 S.E.2d 161, 163–64 (1991) (describing when an organization receiving public funds is considered a "public body").
13. S.C. CODE ANN. § 30-4-20(c).
14. *Id.* § 30-4-30(b).
15. *See id.* § 30-4-30(c).
16. *Id.*
17. *Id.*
18. *Id.*
19. *See id.* § 30-4-100(a). The penalty for a second offense is no more than $200 or sixty days imprisonment and, for a third offense, no more than $300 or ninety days imprisonment. *Id.* § 30-4-110.
20. *Id.* § 30-4-100(b).
21. *Id.* § 30-4-110.

(3) information identifying those incarcerated in any jail or detention center for the last three months.[22] Individuals seeking access to one of these categories of information do not have to make the request in writing if they appear in person.[23] Additionally, the Act specifically declares that certain categories of information are "public information," including the names of public body employees, the final opinions of the public body, and written planning policies.[24]

While the FOIA requires the disclosure of several categories of information upon request, it also designates nineteen categories of information as exempt from these disclosure requirements.[25] Some of these categories are protected for privacy reasons, including information relating to the identity of gift donors who wish to remain anonymous[26] and personal information—the disclosure of which would result in an "unreasonable invasion of personal privacy."[27] Other categories seek to protect sensitive business materials, including trade secrets[28] and documents related to proposed contractual arrangements or the sale of property.[29] However, although such exemptions exist, the statute still expresses an intention to disclose as much information as possible.[30] When a requested document contains exempt information that an agency wishes to withhold from disclosure, the Act provides for the separation of the exempt material from the nonexempt material and directs the disclosure of the nonexempt material in accordance with the Act's requirements.[31]

B. Open Meeting Laws

In addition to requiring disclosure of certain public records, the South Carolina FOIA requires that certain procedures be followed under its open meeting laws. *Meeting* is statutorily defined as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power."[32] Furthermore, *quorum* means a simple majority of the members of a public body.[33]

Under South Carolina law, "[e]very meeting of all public bodies shall be open to the public," unless its closure is authorized under the other provisions of

22. *Id.* § 30-4-30(d).
23. *Id.*
24. *Id.* § 30-4-50.
25. *Id.* § 30-4-40(a).
26. *Id.* § 30-4-40(a)(11).
27. *Id.* § 30-4-40(a)(2).
28. *Id.* § 30-4-40(a)(1).
29. *Id.* § 30-4-40(a)(5).
30. *See id.* § 30-4-40(b).
31. *Id.*
32. S.C. CODE ANN. § 30-4-20(d).
33. *Id.* § 30-4-20(e).

the statute.[34] The law allows a public body to close a meeting to the public if the public body is discussing one of the following: (1) employment matters, including appointment, demotion, and promotion; (2) proposed contractual arrangements; (3) "development of security personnel or devices"; (4) investigative proceedings of alleged criminal misconduct; or (5) "proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses" within the area that the public body serves.[35] Also, any meeting of the Retirement System Investment Commission, while in executive session, may be closed to the public.[36]

Furthermore, the law requires that the public body provide written notice of its meetings to the public, which should include no less than "posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held."[37] Every public body must give written notice of its regularly scheduled meetings at the start of each calendar year, including the dates, times, and places of the meetings.[38] If a meeting is rescheduled, or a special meeting is called, notice of such a meeting must be posted "as early as is practicable *but not later than twenty-four hours before the meeting*."[39] A public body must post an agenda for the meeting, if any, at least twenty-four hours before the meeting.[40] Importantly, the notice requirement is not applicable to emergency meetings called by a public body.[41]

Special notice provisions apply to legislative committees and subcommittees:

> Legislative committees must post their meeting times during weeks of the regular session of the General Assembly and must comply with the provisions for notice of special meetings during those weeks when the General Assembly is not in session. Subcommittees of standing legislative committees must give notice during weeks of the legislative session only if it is practicable to do so.[42]

Nonlegislative subcommittees of public bodies that are required to provide notice as described above "must make reasonable and timely efforts" to provide notice of their meetings.[43]

---

34. *Id.* § 30-4-60. This section shares the same definition of *public body* as previously discussed in the context of the public records laws. *See id.* § 30-4-20(a).
35. *Id.* § 30-4-70(a)(1)–(5).
36. *Id.* § 30-4-70(a)(6).
37. *Id.* § 30-4-80(a), (d).
38. *Id.* § 30-4-80(a).
39. *Id.* (emphasis added).
40. *Id.*
41. *Id.*
42. *See id.* § 30-4-80(b).
43. *Id.* § 30-4-80(c).

Along with the openness and notice requirements, South Carolina's FOIA requires that public bodies keep written minutes for all public meetings.[44] The minutes must include information such as the date and time of the meeting, the members of the public body present or absent at the meeting, any matters proposed or discussed, any votes taken if requested, and "[a]ny other information that any member of the public body requests be included or reflected in the minutes."[45] The minutes taken at public meetings are considered public records and are subject to the disclosure requirements described above in Part II.A.[46] Finally, any individual may record all or part of any open meeting—by means of tape recorder or videotaping—so long as such recording does not interfere with the conduct of the meeting.[47]

Further, the same remedies and criminal penalties available for a violation of the open records provisions are also available for a violation of open meeting laws.[48]

III. HISTORY AND PURPOSE OF SOUTH CAROLINA'S FOIA

The federal Freedom of Information Act, first enacted on July 4, 1966, provides citizens a judicially enforceable right to access federal agency records.[49] President Obama recently stated the following:

> In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.[50]

The federal law "set the stage" for South Carolina to enact its own Freedom of Information Act in 1974 to "ensure that public business is performed in an open and public manner . . . [making] it possible for citizens, or their representatives, to learn and report fully the activities of their public officials."[51] The original law, however, contained only minimal provisions; for example, it had no provisions imposing criminal sanctions for willful violations of the law,

---

44. *Id.* § 30-4-90(a).
45. *Id.*
46. *See id.* § 30-4-90(b).
47. *Id.* § 30-4-90(c).
48. *See supra* notes 19–21 and accompanying text.
49. *What is FOIA?*, FOIA.GOV, http://www.foia.gov/about.html (last updated Jan. 2011).
50. Memorandum on the Freedom of Information Act, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009), *available at* http://www.justice.gov/oip/foia_guide09/presidential-foia.pdf.
51. Burnett R. Maybank, III & Alexandra P. Eikner, *South Carolina Freedom of Information Act*, S.C. LAW., Sept. 2006, at 19, 19 (quoting S.C. CODE ANN. § 30-4-15) (internal quotation marks omitted).

and it did not exempt any categories of information from disclosure.[52] Shortly after its enactment, the FOIA was amended in 1978, but the law still left much to be desired—containing only seven categories of exempt information[53] and only a sixty-day time period within which a person could bring a claim for an alleged violation.[54]

The FOIA was amended again in 1987, and included a number of significant changes.[55] First, the term *public body* was amended to specifically include "committees, subcommittees, advisory committees, and the like" with respect to any qualifying public body.[56] Second, the amendments added more categories of information for exemption from disclosure requirements, including a provision making the correspondence and working papers of legislators exempt from disclosure.[57] The amendments also extended the statute of limitations for bringing a claim alleging a violation of the law to one year and provided a provision allowing a petitioner to seek a declaratory judgment in addition to injunctive relief.[58]

Other minor amendments have been made over the years. Specifically, the General Assembly has amended the categories of information exempt from disclosure numerous times.[59] In 1992, the General Assembly amended the section relating to public information to clarify that information contained within police reports, as well as employee names and addresses deemed public information, cannot be used for commercial solicitation purposes.[60] In 2001, the provision relating to keeping minutes at an open meeting was amended to allow

---

52. *See* S.C. CODE ANN. §§ 1-20 to -20.4 (Supp. 1974) (current version at S.C. CODE ANN. §§ 30-4-10 to -165 (2007 & Supp. 2013)).

53. S.C. CODE ANN. § 30-4-40 (Supp. 1978) (current version at S.C. CODE ANN. § 30-4-40 (2007 & Supp. 2013)).

54. S.C. CODE ANN. § 30-4-100 (Supp. 1978) (current version at S.C. CODE ANN. § 30-4-100 (2007)).

55. *See* Freedom of Information Act, Act No. 118, 1987 S.C. Acts 301–10.

56. *Id.* at 302.

57. *Id.* at 305–07. The amendments notably clarified when compensation paid by public bodies may be exempt. *Id.* at 305–06. Under the previous 1978 version, all salaries were considered exempt, but not the salary schedules. Act No. 593, 1978 S.C. Acts 1738–39. The 1987 amended version made compensation exempt, *except* for employees making over $50,000, and required that the salary schedules be made available for employees making less than $30,000. Act No. 118, 1987 S.C. Acts 305.

58. Act No. 118, 1987 S.C. Acts 310.

59. *See, e.g.*, Act No. 125, 2005 S.C. Acts 1482 (exempting private investment and proprietary information provided to the Venture Capital Authority by designated investor groups); Act No. 34, 2003 S.C. Acts 134 (discussing when autopsy photographs and videos are considered exempt); Act No. 423, 1998 S.C. Acts 3120–22 (adding categories of information considered exempt and clarifying that, while a public body may withhold exempt information, it does not have to withhold it).

60. Act No. 269, 1992 S.C. Acts 1780, 1781.

videotaping.[61] Perhaps most importantly, the General Assembly has not amended the provisions concerning penalties and injunctive relief since 1987.[62]

The purpose of the FOIA is set forth in the statute as follows:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.[63]

State officials have reinforced this purpose.[64] For instance, in a letter included in the *Public Official's Guide to Compliance with South Carolina's Freedom of Information Act*, state Attorney General Alan Wilson provided the following recommended guidelines to public bodies within the state:

> When in doubt, disclose requested information[;]
> When in doubt, post the time, place, and purpose of the meeting[;]
> When in doubt, open the meeting to the public[; and]
> When in doubt, release the document[.][65]

Wilson also stated that public officials "have an obligation not only to adhere to the letter of this law, but also live up to its spirit through compliance with every reasonable FOIA request without delay or obstruction to the individual or entity seeking their right to public information."[66] These statements clearly urge public bodies in South Carolina to err on the side of disclosure and openness.[67]

---

61. Act No. 12, 2001 S.C. Acts 75.

62. *Compare* Act No. 118, 1987 S.C. Acts 301, 310, *with* S.C. CODE ANN. § 30-4-100(a)–(b) (2007).

63. S.C. CODE ANN. § 30-4-15 (2007).

64. *See, e.g.*, Alan Wilson, *Preface* to S.C. PRESS ASS'N, PUBLIC OFFICIAL'S GUIDE TO COMPLIANCE WITH SOUTH CAROLINA'S FREEDOM OF INFORMATION ACT 1 (2011), *available at* http://www.scpress.org/Documents/2011FOI.pdf (indicating that, when in doubt, the Attorney General's Office errs on the side of disclosure and openness and urging other public officials to do the same).

65. *Id.*

66. *Id.*

67. The federal FOIA provides a similar purpose, reinforced by a memorandum issued by President Obama shortly after he took office—in which he expressed a clear presumption toward openness in government. *See* Memorandum on the Freedom of Information Act, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 21, 2009), *available at* http://www.justice.gov/oip/foia_guide09/presidential-foia.pdf ("The Freedom of Information Act should be administered with a clear

IV. RELEVANT CASE LAW

Several cases involving the FOIA have revealed a judicial trend in favor of greater disclosure in South Carolina.[68] One significant South Carolina Supreme Court case, *Bellamy v. Brown*,[69] addressed the issue of "whether the FOIA establishes a statutory duty of confidentiality."[70] In *Bellamy*, the plaintiff was terminated from her position as Executive Director of the Horry County Council on Aging (HCCOA).[71] Following her removal, two members of the HCCOA Board made comments about the plaintiff to a local reporter who had contacted them regarding the matter.[72] The plaintiff then filed suit, claiming that the two board members violated the FOIA.[73]

The plaintiff argued, in part, that by exempting certain classes of information from the FOIA disclosure requirements, the statute created a duty of confidentiality.[74] The South Carolina Supreme Court disagreed, citing a U.S. Supreme Court case in which the Court held that "the federal FOIA is exclusively a disclosure statute and cannot be used to enforce the confidentiality of records."[75] Moreover, while the statute "demarcates" an agency's duty to disclose, it does not forbid disclosure when disclosure is not required.[76] The South Carolina Supreme Court concluded that the same reasoning was applicable to the *Bellamy* case because the central purpose of the federal FOIA—to promote open government—mirrors the purpose of the state's FOIA.[77] Further, the court stated the following:

---

presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.").

68. *See, e.g.*, Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) (citing S.C. Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994)) (holding that the private "advisory committee" meetings made exactly the kind of secret determinations that FOIA was designed to prevent); Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 344, 353, 594 S.E.2d 888, 891, 895 (Ct. App. 2004) (holding that information sought by a newspaper reporter and newspaper was not exempt form disclosure under the FOIA); Campbell v. Marion Cnty. Hosp. Dist., 354 S.C. 274, 289, 580 S.E.2d 163, 170–71 (Ct. App. 2003) (holding that "physician salaries, compensation and the prices paid for physician practices are *NOT 'trade secrets' exempt from the FOIA*").

69. 305 S.C. 291, 408 S.E.2d 219 (1991).

70. *Id.* at 293, 408 S.E.2d at 220.

71. *Id.* at 292, 408 S.E.2d at 219.

72. *Id.* at 292 & n.1, 408 S.E.2d at 219–20 & n.1.

73. *Id.* at 292, 408 S.E.2d at 219–20.

74. *Id.* at 293, 408 S.E.2d at 220 (citing S.C. CODE ANN. §§ 30-4-40(a)(1)–(2), -70(a)(1) (Supp. 1987); Jensen v. S.C. Dep't of Soc. Servs., 297 S.C. 323, 377 S.E.2d 102 (Ct. App. 1988)).

75. *Id.* at 295, 408 S.E.2d at 221 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979)).

76. *Id.* (citing *Chrysler Corp.*, 441 U.S. at 293).

77. *See id.*

> The FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for the *disclosure* of information. However, the exemptions from disclosure . . . do not create a duty not to disclose. These exemptions, at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentiality can be found in the language of the Act.[78]

The *Bellamy* case clarified that, even when requested information is technically exempt under one of the categories of information listed in section 30-4-40, it may nonetheless be disclosed at the discretion of the public body.[79] Thus, public bodies have no duty to withhold information as confidential.[80]

In the same year as *Bellamy*, the South Carolina Supreme Court addressed an issue regarding the definition of a *public body* in *Weston v. Carolina Research & Development Foundation*.[81] In *Weston*, two journalists made a FOIA request to the Carolina Research & Development Foundation (Foundation), a charitable foundation operating for the exclusive benefit of the University of South Carolina.[82] Because the Foundation did not respond to the request, the individuals sought an injunction to compel disclosure, arguing that the Foundation was a *public body* within the meaning of the statute.[83]

The individuals argued that several of the Foundation's transactions demonstrated that the Foundation was funded "in whole or in part by public funds" and, therefore, was a public body subject to the disclosure requirements of the FOIA.[84] First, the Foundation received a large portion of the profits from the sale of a former University of South Carolina residence hall.[85] Second, the Foundation accepted a federal grant for the construction of a new engineering building on campus and was responsible for administering the expenditure of the money.[86] Third, the Foundation accepted property and cash grants from the city and county for the development of the Koger Center.[87] Finally, the Foundation received a portion of total contract amounts from various agreements between the university and third parties for research.[88]

The supreme court determined that, while each transaction individually would be sufficient to bring the Foundation within the definition of a *public*

---

78. *Id.*
79. *See id.*
80. *See id.*
81. 303 S.C. 398, 400, 401 S.E.2d 161, 162 (1991).
82. *Id.* at 400 & n.2, 401 S.E.2d at 162 & n.2.
83. *Id.* at 400, 401 S.E.2d at 162–63.
84. *See id.*
85. *See id.* at 401, 401 S.E.2d at 163.
86. *Id.*
87. *Id.* at 402, 401 S.E.2d at 164.
88. *Id.*

body, collectively, "they lead to the unavoidable conclusion that the Foundation is a 'public body.'"[89] The court rejected the Foundation's contention that the FOIA definition applies only to government and quasi-government bodies because such a reading "would obliterate both the intent and the clear meaning of the statutory definition."[90]

The court clarified that not all private corporations who receive public funds will be deemed a *public body*.[91] Rather, the definition applies in the following situation:

> [W]hen a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds[,] the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.[92]

Nevertheless, by expanding the definition of *public body* to include some privately funded corporations and nonprofits, the court consequently expanded the reach of the FOIA and its disclosure requirements.

The court faced a constitutional question regarding the FOIA's requirements last year in *Disabato v. South Carolina Ass'n of School Administrators*.[93] In that case, the court examined "whether the FOIA as applied to the South Carolina Association of School Administrators (SCASA), a non-profit corporation engaged in political advocacy, unconstitutionally infringes upon SCASA's First Amendment speech and association rights."[94] The plaintiff requested information from SCASA pursuant to the FOIA, but SCASA refused to produce any documents, contending that the corporation is not a public body subject to the FOIA.[95] After the plaintiff filed suit seeking declaratory and injunctive relief, SCASA filed a motion to dismiss, arguing that "when the FOIA is applied to a public body that is a non-profit corporation engaged in political advocacy, the FOIA unconstitutionally violates the First Amendment rights of speech and association."[96]

In addressing the issue, the court adopted a two-step approach.[97] First, the court stated that it "must determine whether the FOIA impact[ed] SCASA's speech and association rights."[98] If so, the court would then need to determine

---

89. *Id.* at 403, 401 S.E.2d at 164.
90. *Id.*
91. *See id.* at 404, 401 S.E.2d at 165.
92. *Id.* at 404, 401 S.E.2d at 165.
93. *See* 404 S.C. 433, 439, 746 S.E.2d 329, 332 (2013).
94. *Id.*
95. *Id.* at 439–40, 746 S.E.2d at 332.
96. *Id.* at 440, 746 S.E.2d at 332.
97. *Id.* at 443, 746 S.E.2d at 334.
98. *Id.*

whether such infringement was unconstitutional.[99] Under the first prong, the court concluded that the FOIA requirements affected First Amendment rights because open meeting requirements prevented private communications between members of the corporation and removed privacy from deliberations.[100] Under the second prong of the test, however, such an effect did not violate the First Amendment because the impacts are subject to a lower level of scrutiny—intermediate scrutiny—"whereby a reasonable and nondiscriminatory restriction on association that furthers an important governmental interest is constitutionally permissible."[101] Under this level of scrutiny, the court held that the FOIA "is a content-neutral statute that serves important governmental interests and does not burden substantially more speech than necessary to serve those interests, and therefore, it does not violate SCASA's First Amendment speech and association rights."[102] Thus, by rejecting a constitutional challenge to the statute, the court again refused to except a public body from the requirements of disclosure under the FOIA.[103]

By refusing to impose a duty of confidentiality, expanding the applicability of the FOIA and its requirements, and rejecting a constitutional challenge, these supreme court cases collectively express a continued judicial preference for greater openness in government.[104] Moreover, this judicial trend is likely to continue, particularly given that Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, authored the 1978 amendments and sponsored the 1987 amendments when she served in the state House of Representatives.[105]

---

99. *Id.* at 443–44, 746 S.E.2d at 334.

100. *See id.* at 444, 446, 746 S.E.2d at 334–35.

101. *See id.* at 450, 456–57, 746 S.E.2d at 337, 338, 341.

102. *Id.* at 457, 746 S.E.2d at 341.

103. *See id.*; *see also* Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (imposing no confidentiality requirement); Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991) (concluding that the quasi-public body, the Carolina Research and Development Foundation, was subject to FOIA requirements).

104. For more cases expressing a judicial trend in favor of disclosure and openness, see Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864–65 (2001) ("FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." (citing S.C. Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978))); S.C. Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 847 (1994) (holding that the privacy exemption did not prevent disclosure of the information requested in that case); Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 350, 352–53, 594 S.E.2d 888, 893, 895 (Ct. App. 2004) (holding that the sheriff's department is a public body subject to FOIA requirements, and that requested crime reports and employment records did not fall under the privacy exemption); Campbell v. Marion Cnty. Hosp. Dist., 354 S.C. 274, 287, 580 S.E.2d 163, 169 (Ct. App. 2003) (holding that physician salaries and compensation are not trade secrets exempt from disclosure).

105. JAY BENDER, REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: OPEN RECORDS AND MEETINGS LAWS IN SOUTH CAROLINA 1 (Greg Leslie & Mark Caramanica eds., 6th ed. 2011).

V. CAUSES OF NONCOMPLIANCE

Despite the judicial trend toward ruling in favor of greater disclosure and openness, stories of noncompliance consistently appear in newspaper articles throughout South Carolina.[106] Mary Cheh, a law professor and councilmember in the District of Columbia, explored various causes of noncompliance in the context of the District of Columbia's freedom of information laws.[107] Professor Cheh highlights two main reasons for noncompliance, both of which are equally applicable to South Carolina.[108] First, the large volume of FOIA requests received often stretches a state's resources beyond that which it can handle.[109] Responding to the substantial number of requests requires the use of limited resources and employee time.[110] In the District of Columbia, for example, more than 43,000 staff hours were spent answering FOIA requests received in 2009—the equivalent of twenty-one full-time employee positions.[111]

Although information regarding the precise number of FOIA requests received annually is not readily available, many public bodies throughout South Carolina receive thousands of requests a year.[112] Unfortunately, the significant amount of resources that must be dedicated to responding to a high volume of requests discourages compliance by already cash-strapped and understaffed state agencies.[113]

---

106. *See* Smith, *supra* note 1.

107. *See* Mary M. Cheh, *Making Freedom of Information Laws Actually Work: The Case of the District of Columbia*, 13 UDC/DCSL L. REV. 335, 335 n.*, 347 (2010).

108. *See id.* at 347.

109. *See id.* at 347–48.

110. *See id.* at 348 (citing GOV'T OF THE DIST. OF COLUMBIA, ANNUAL FREEDOM OF INFORMATION ACT REPORT FOR FISCAL YEAR 2009, at 1, 2 (2010) [hereinafter D.C. FOIA REPORT], *available at* http://dc.gov/DC/OS/Publication%20Files/FOIA%20Report%20FY2009.pdf).

111. *Id.* at 348 (citing D.C. FOIA REPORT, *supra* note 110, at 2). The District of Columbia typically receives between 5,000 and 6,000 FOIA requests a year. *Id.* At this point, it is important to note the lack of resources available to find similar figures for South Carolina FOIA requests. The District of Columbia provides annual reports that indicate the number of requests received by each agency, as well as the average response time, in addition to other statistics. *See, e.g.*, D.C. FOIA REPORT, *supra* note 110, at 5–6 (providing charts outlining the number of FOIA requests each agency received and the average number of days requests were pending for the 2009 fiscal year). Such accessibility for those seeking to do research, as well as ordinary citizens, is lacking in South Carolina. No centralized information on the number of requests received within the state of South Carolina seems to be available. Nor is such information easily accessible on any particular agency's website.

112. *See* Jaime Self, *SC Citizens, Agencies Differ on Public Records Access Plan*, THE STATE, Feb. 1, 2013, at B1, *available at* http://www.thestate.com/2013/01/31/2612792/house-public-records-proposal.html (reporting comments from a Charleston attorney about the several thousand public record requests Charleston city offices receive each year).

113. *See, e.g.*, Cheh, *supra* note 107, at 347–48 (citing D.C. FOIA REPORT, *supra* note 110, at 1, 2) (explaining how the District of Columbia lacks adequate resources and "most of FOIA officers in the District also serve as the General Counsel within their respective agencies and have a wide range of other, pressing responsibilities"). In some cases, limited resources—coupled with the large

Consequently, even with a high volume of FOIA requests, most requests are often directed at only a few agencies, with many agencies receiving a negligible number of FOIA requests each year.[114] In the District of Columbia, for example, over 40% of the FOIA requests made in a given year are directed at just two agencies: the D.C. police department and the D.C. fire and emergency services agency.[115] The vast majority—thirty-five out of forty-seven reporting agencies—receive less than 100 FOIA requests per year, with ten of those agencies receiving less than ten requests.[116] This disparity in the number of requests received by a given agency often produces conflicting results throughout the various agencies because "[t]he low volume of FOIA requests can lead to improper, or at least inconsistent, application of the FOIA laws, and a lack of sophistication with respect to handling requests."[117]

An agency's noncompliance may also result from a lack of meaningful enforcement mechanisms.[118] Unfortunately, timely response to a FOIA request, when weighed against the general duties of an agency, often takes a low priority.[119] Furthermore, agencies have little incentive to comply with FOIA requirements.[120] In the District of Columbia, a requesting party who has been denied a FOIA request, or has not been given a response within the statutory time frame, can file an administrative appeal or litigate the claim.[121] Thus, the only potential legal incentive for agency compliance is the District's punishment scheme in the event a court concludes that an agency's FOIA officer acted in an arbitrary or capricious manner in responding to a request.[122] The risk of punishment is low, however, as the District of Columbia's courts have yet to determine that any officer has met this standard.[123]

In South Carolina, requesting parties have even less options for challenging a FOIA denial. A petitioner seeking to challenge a public body's denial of, or failure to reply to, a FOIA request must seek injunctive relief in circuit court

---

volume of requests—can cause requests to go unanswered beyond the statutory period, resulting in a backlog. *See What is FOIA?*, FOIA.GOV, http://www.foia.gov.html (last visited Mar. 25, 2014). For example, the federal government received more than 650,000 FOIA requests in FY 2012 and has a backlog of more than 71,000 requests still awaiting a response. *See id.* The South Carolina statute, however, does not contain a mechanism by which agencies can receive an extension for responding to a FOIA request; thus, under the state law, there should theoretically be no backlog. *See* S.C. CODE ANN. §§ 30-4-10 through -165 (2007 & Supp. 2013).

114. *See, e.g.*, Cheh, *supra* note 107, at 348 (citing D.C. FOIA REPORT, *supra* note 110, at 5–6) (noting that "[p]aradoxically, another difficulty . . . is that many public agencies have too few FOIA requests" of the total share a municipality, county, or state receives).

115. *See id.* (citing D.C. FOIA Report, *supra* note 110, at 5–6).

116. *Id.* (citing D.C. FOIA Report, *supra* note 110, at 5–6).

117. *See id.*

118. *See id.*

119. *Id.*

120. *Id.*

121. *See id.* at 349.

122. *See id.*

123. *Id.*

within one year of the alleged violation.[124] However, "Litigation is relatively rare because delay and costs associated with pursuing relief in the [state] courts typically make litigating a FOIA claim unrealistic."[125] Under South Carolina law, a petitioner may be entitled to an award of reasonable attorney's fees and litigation costs if the petitioner prevails.[126] However, the provisions controlling a challenge to a FOIA denial shift the initial cost burden of challenging an agency's refusal to the requester—a burden that many citizens are unable or unwilling to undertake.[127] One problem many individuals face in seeking access to public information is that "[i]t is simply too expensive and takes too long for anyone to meaningfully pursue [their] legal right[s] to [such] information."[128] Moreover, the lack of meaningful enforcement mechanisms provides very little incentive for state agencies and other public bodies to comply with FOIA laws.[129]

Noncompliance with FOIA requirements is also likely attributable to the fractured nature of the FOIA process in South Carolina. Under the current system, each agency handles its own FOIA requests without any centralized oversight by the state.[130] Consider the following example of how different agencies in South Carolina handle FOIA requests. The South Carolina Department of Health and Environmental Control (DHEC) created a Freedom of Information (FOI) Center to consolidate processing FOIA requests made through the agency because it receives a "substantial" number of requests each year.[131] The Department of Agriculture, on the other hand, refers all FOIA requests to its Office of General Counsel.[132] Like DHEC, the Department of Agriculture states that it handles a "substantial number of FOI requests" each year.[133] This fractured process leaves South Carolina's already overburdened state agencies

---

124. *See* S.C. CODE ANN. § 30-4-100(a) (2007). The state relies heavily on private and civil enforcement of the laws. *See* OPEN GOVERNMENT GUIDE, *supra* note 105, at 2 (citing S.C. CODE ANN. § 30-4-100).

125. Cheh, *supra* note 107, at 349.

126. *See* S.C. CODE ANN. § 30-4-100(b). Additionally, similar to the D.C. law, the South Carolina FOIA law has punishments available if a public body willfully violates the law—but also like the D.C. law, this standard has never been met in South Carolina and, thus, the punishment scheme does not provide any disincentive for violations. *See infra* Part VI.B.

127. *See* Cheh, *supra* note 107, at 349; *see also* S.C. CODE ANN. § 30-4-100(b) (noting that plaintiffs may recover costs *after* the adjudication of the lawsuit).

128. Cheh, *supra* note 107, at 349.

129. *See id.* at 348–49 (citations omitted).

130. *See* OPEN GOVERNMENT GUIDE, *supra* note 105, at 7 (noting that the current version of FOIA does not specify to whom FOIA requests should be sent, indicating only that they should be received by the agency that holds the information sought).

131. *See Freedom of Information*, S.C. DEP'T OF HEALTH & ENVTL. CONTROL, http://www.scdhec.gov/administration/foi/foirules.htm (last visited Mar. 27, 2014) ("The DHEC FOI Center is being established to ensure that all requests are handled in a consistent manner and in conformity with the FOIA.").

132. *Freedom of Information*, S.C. DEP'T OF AGRIC., http://agriculture.sc.gov/userfiles/file/Policies%20and%20Procedures/FOIPolicy.pdf (last visited Mar. 27, 2014).

133. *Id.*

with the sole responsibility of handling all requests directed to those agencies. Without any oversight, the state has no meaningful way to hold its agencies accountable for their responses to FOIA requests. Additionally, the lack of consistency created by such varied procedures makes the whole process of seeking public information more difficult and confusing for individuals, which directly contradicts the stated purposes of the FOIA laws.

VI. PROPOSED REFORMS

"Until they put some sanctions in there for noncompliance, in terms of fines or penalties for agencies that don't comply promptly, . . . the FOIA law [will be] very limited, very weak."[134]

The South Carolina Freedom of Information Act would undoubtedly benefit from various reforms. During the 2012 legislative session, a bill proposing several reforms to the law met stiff resistance after the Governor's office added an amendment that would effectively remove the legislative exemption from the state's FOIA laws.[135] The proposed bill—discussed in more detail below—was ultimately defeated, meaning that proponents of a stronger FOIA will have to wait until the next legislative session to try again.[136]

A number of reforms could strengthen the law itself and increase compliance by public bodies. First, the law should impose a time limit for the production of documents to make the process of accessing public records faster. Second, the General Assembly should enact stronger enforcement mechanisms as an incentive for agencies to comply with open government laws. Third, the General Assembly should create an independent review process by which individuals can challenge denials of FOIA requests without initially incurring the expense of litigation. Fourth, the state should establish a central office to oversee FOIA compliance. Finally, South Carolina should be more transparent regarding the number of requests received and create a better system of keeping records for such requests.

A. Making the Process Faster

One major issue with the current law concerns how long the process for accessing public records can take after a request has been made.[137] Under the current system, two steps in the process can unnecessarily delay a resolution. The first delay typically occurs after a request has been made.[138] The law gives

134. Smith, *supra* note 8, at 1A (emphasis added) (internal quotation marks omitted).

135. *See id.*

136. *See id.*

137. *See* Interview with Bill Rogers, *supra* note 8 (identifying the fact that South Carolina has no time limit for turning over documents when asked about the FOIA law's weaknesses).

138. *See id.*

public bodies fifteen days to respond to a FOIA request.[139] According to Bill Rogers, Executive Director of the South Carolina Press Association, "fifteen days is ridiculous."[140] Mr. Rogers notes that Georgia agencies have a three-day response time and "they function very well."[141] Even though the FOIA imposes a time limit for responding to a request, the law fails to impose any time limit as to when public bodies must produce such documents. Theoretically, after responding to a request, public bodies in South Carolina can take as long as they want to actually turn over the documents.[142] Lawmakers need to add a time limit for the production of documents to prevent public bodies from "dragging their feet" after responding to a request.

Additionally, the process for adjudicating claims challenging FOIA request denials needs to be quicker. The only option available under the current law for an individual seeking to challenge a denial is to file a civil suit.[143] Litigation is not only costly, but it also takes a long time to resolve. Accordingly, FOIA laws need to provide an alternative procedure by which individuals can resolve these disputes more quickly and at a lesser expense. Establishing an independent review process to solve this issue is discussed in greater detail in Part VI.C.

B. Enacting Stronger Enforcement Mechanisms

As previously discussed, the South Carolina FOIA—as it currently exists—has weak enforcement mechanisms that need strengthening. The General Assembly can strengthen the enforcement provisions through a number of reforms. First, the new law should provide for an award of attorney's fees not only when the petitioner is successful, but also when the petitioner "substantially prevails" on a claim. As the law currently stands, a public body can deny a request and wait until the petitioner files suit before complying, without being responsible for attorney's fees, so long as it discloses the materials before a judgment on the merits is issued (i.e., by providing the documents as a sort of settlement with the requesting party).[144] To avoid this scenario, a court could

---

139. *See* S.C. CODE ANN. § 30-4-30(c) (2007).

140. Interview with Bill Rogers, *supra* note 8.

141. *Id.* The Georgia law imposes a three-day time limit not only for responding to a record request, but also for producing the documents requested. *See* GA. CODE ANN. § 50-18-71(b)(1)(A) (2013) (imposing a three business day time limit for the production of records after a request has been made).

142. *See* S.C. CODE ANN. § 30-4-30(c) (requiring that public bodies respond to written requests within fifteen days, but failing to provide any time limits for the actual production of the documents requested); Interview with Bill Rogers, *supra* note 8.

143. *See* S.C. CODE ANN. § 30-4-100(a).

144. *See id.* § 30-4-100(b) (stating that a person or entity must "prevail" before attorney fees and costs of litigation may be awarded). Again, while the law provides for criminal penalties for any willful violation of FOIA laws, the broad exemptions covering certain categories of information—such as for privacy reasons—likely provides an initial "out" for an agency seeking to withhold such information. *See id.* § 30-4-40(a)(2). Furthermore, the severity of the $100 fine is often far outweighed by the expense of producing the documents or the media coverage that would

award attorney's fees if, after a lawsuit is initiated, the public body decides to disclose the information requested. In such a case, the petitioner has *substantially prevailed* and should be entitled to reasonable attorney's fees from the public body.[145] Moreover, awarding attorney's fees in this context would discourage agencies from refusing to disclose information until ordered to do so by a court.

The current language of the statute provides no assurances that a petitioner would be compensated for attorney's fees if an agency eventually discloses information prior to the entry of a judgment, and an agency certainly has no incentive to initially grant the request if it faces no repercussions for waiting for a petitioner to file suit.[146] Therefore, the General Assembly should amend the language to make it clear that an award of attorney's fees may be available, even if the court has not yet rendered judgment because a settlement was reached.

A provision allowing courts to award attorney's fees to a petitioner who substantially prevails currently exists under federal law.[147] Congress amended the federal FOIA law to include this provision after the Supreme Court ruled that a plaintiff could not recover attorney's fees as a *prevailing party* if the plaintiff "failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a

---

ensue if the information were released. If an agency can reasonably argue that withheld information falls within a category of disclosure, then punishment for a willful violation would be inapplicable and any limited incentive for compliance existing before would disappear.

145. *See* Cheh, *supra* note 107, at 356 (quoting 5 U.S.C. § 552(a)(4)(E) (2012); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 600 (2001)).

146. *See* S.C. CODE ANN. § 30-4-100(b). The South Carolina Supreme Court has indicated, however, that attorney's fees would be available to a party who receives the records requested after initiating a lawsuit. *See* Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011). In *Sloan*, the court stated that "[w]hen a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed." *Id.* at 157, 711 S.E.2d at 897. Nevertheless, the court still limited the award to attorney's fees incurred up to the time the defendant produced the requested documents because it had previously determined that the issue was moot after that point. *Id.* at 158, 711 S.E.2d at 898 (citing Sloan v. Friends of the Hunley, 369 S.C. 20, 26, 630 S.E.2d 474, 477–78 (2006)). Thus, the petitioner was still required to pay attorney's fees for the litigation that continued after that point, including fees associated with the argument that he was, in fact, a *prevailing party* under the meaning of the statute. *See id.* at 159, 711 S.E.2d at 898. In addition, the petitioner had already received exactly the relief he sought: the production of the documents. *See id.* at 158, 711 S.E.2d at 898. What remains unclear, however, is whether a case in which the relief granted is substantially—though not exactly—what the petitioner sought would yield the same result. For example, a case in which the petitioner receives some of the documents requested, but the settlement reached still allowed the agency to withhold other requested documents under one of the prescribed exemptions, presents a different scenario. In that case, would the petitioner still be considered a *prevailing party*? Given the uncertainty in this situation, the General Assembly should amend the language of the statute to resolve any ambiguity.

147. 5 U.S.C. § 552(a)(4)(E)(i) (2012).

voluntary change in the defendant's conduct."[148] The current law, as amended, provides as follows:

> (E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
>
> (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—
>
> (I) a judicial order, or an enforceable written agreement or consent decree; or
>
> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.[149]

The amended federal law protects both the government and the petitioner.[150] The petitioner can prevail if the agency changes its position and decides to disclose the requested material, which incentivizes petitioners who have a valid claim but may be afraid of incurring the substantial costs of litigation.[151] But the law also prohibits "insubstantial" claims, thus providing some protection to the government from the costs of litigating unmeritorious claims.[152] Accordingly, these protections provide the perfect balance between increasing accountability and encouraging compliance. Adopting language similar to the federal law, particularly as it relates to a petitioner who substantially prevails on a claim, would likewise strengthen the South Carolina FOIA law.

The General Assembly could also reform the FOIA by removing criminal sanctions altogether and giving courts the power to impose civil fines for FOIA violations. The criminal sanctions under the current law are essentially an empty threat to FOIA violators.[153] To charge someone criminally for willfully violating the FOIA requirements, the case must generally be brought by the solicitor's

---

148. Cheh, *supra* note 107, at 356 (quoting 5 U.S.C. § 552(a)(4)(E); *Buckhannon Bd. & Care Home*, 532 U.S. at 600).

149. 5 U.S.C. § 552(a)(4)(E).

150. *See id.*

151. *See id.* § 552(a)(4)(E)(ii)(II).

152. *See id.*

153. Section 30-4-110 of the South Carolina Code states that violators "shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense." S.C. CODE ANN. § 30-4-110 (2007). The maximum monetary fine and length of imprisonment increase to two hundred and three hundred dollars, and sixty and ninety days, for the second and third offenses, respectively. *Id.*

office, which is in charge of criminal prosecutions in South Carolina.[154] However, this almost never happens.[155] In fact, criminal prosecution for a willful violation of FOIA has only occurred once in South Carolina.[156] The problem lies with the perception that FOIA violations are only a minor issue, as opposed to "real crimes" to which solicitors should devote their attention.[157]

Instead, the state should remove the criminal penalty provision completely and adopt a scheme that imposes civil fines for the more egregious violations of the law, similar to current Occupational Safety and Health Administration (OSHA) laws. Under OSHA laws, an employer may be fined for a willful or repeated violation of OSHA requirements.[158] Adopting a similar scheme for willful and repeated FOIA violations by an individual or a public body would certainly provide a greater incentive for compliance.

Although imposing civil fines for willful violations would be a great start, establishing that a violation is *willful* would remain very difficult. Thus, the reform should go further and punish any *negligent* violation as a civil violation as well, giving a court the discretion to lower the fine based upon culpability.

The characteristic that distinguishes *willful* conduct from *negligent* conduct is that the latter implicitly lacks an element of intent;[159] in fact, "The aggravating factor which distinguishes willful misconduct from ordinary negligence is the actor's state of mind."[160] Generally, *willful* conduct involves an individual acting with actual or implied intent or purpose.[161] On the other hand, South Carolina courts have defined *negligence* as "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person, under the existing circumstances, would not have done."[162] Clearly, *willfulness* implies some conduct beyond ordinary negligence,[163] and the added element of intent makes this standard much more

---

154. *See Solicitor's Office*, FIFTH JUD. CIRCUIT SOLICITOR'S OFF., http://scsolicitor5.org/SolicitorsOffice.aspx (last visited Mar. 27, 2014) ("The Solicitor is responsible for prosecuting criminal offenses.").

155. *See* Jamie Self, *SC Activist's Push for Criminal Trial Dismissed in Open-Records Case*, THE STATE (Dec. 17, 2013), http://www.thestate.com/2013/12/17/3164750/sc-activists-push-for-criminal.html.

156. *See id.* The case involved a secret meeting held by a Spartanburg-area volunteer fire department. *Id.* A jury found those charged not guilty. *Id.*

157. *See* Telephone Interview with Bill Rogers, *supra* note 8.

158. 29 U.S.C. § 666(a) (2012).

159. *See* 65 C.J.S. *Negligence* § 94 (2010) (citations omitted).

160. *Id.* (citing Scott v. ABF Freight Sys., Inc., 306 F. Supp. 2d 1169, 1176 (M.D. Ala. 2004); Presley v. B.I.C. Constr., Inc., 2009 WL 2840815 (Ala. Civ. App. 2009); Bryant v. Hornbuckle, 728 P.2d 1132 (Wyo. 1986)).

161. *Id.* (citing Am. Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949); Thompson v. White, 149 So. 2d 797, 804 (Ala. 1963); Lutteman v. Martin, 135 A.2d 600 (Conn. C.P. 1957); State v. Dodge, 166 A.2d 467 (N.H. 1960); Boward v. Leftwich, 89 S.E.2d 32 (Va. 1955)).

162. 18 S.C. JUR. *Negligence* § 4 (1993) (quoting Jones v. Am. Fid. & Cas. Co., 210 S.C. 470, 478, 43 S.E.2d 355, 359 (1947)).

163. *See* 57A AM. JUR. 2d *Negligence* § 241 (2004) ("In general, the words 'willful,' 'wanton,' and 'reckless' are employed, either singly or in combination, to characterize

difficult to prove. Changing the statutory language to encompass negligent violations of FOIA laws would force public officials to act reasonably when responding to FOIA requests and provide a greater incentive for public agencies to comply with the laws.

To encourage individual responsibility, the reforms could go a step further to impose fines for willful violations on the individuals themselves instead of on the public agency. This would hold individuals directly accountable for their actions and would prevent public bodies from having to use public funds to pay for the FOIA violations of their employees.

The General Assembly could also strengthen enforcement mechanisms by enacting a provision allowing for the award of punitive damages. Generally, under tort law in South Carolina, "punitive damages may be recovered when a tortfeasor acts willfully, wantonly, or in reckless disregard of the rights of another."[164] Punitive damages serve the "purposes of retribution or punishment and deterrence."[165] They are intended "to punish the defendant, not [to] compensate the plaintiff, who has already been compensated."[166] Courts have also imposed punitive damages "to vindicate a private right which has been violated by the tortfeasor's conduct" or "as a means to compensate a plaintiff whose legal harm is immeasurable in dollar amount."[167]

At least one state, Michigan, allows for a punitive damages award for a violation of freedom of information laws:

> If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated [the FOIA] by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record.[168]

South Carolina could adopt a similar provision allowing punitive damages awards in cases in which a violation is willful, as opposed to merely negligent.[169]

---

conduct . . . as more heinous or culpable than ordinary negligence." (citing Picariello v. Fenton, 491 F. Supp. 1026, 1043 (M.D. Pa. 1980))).

164. 11 S.C. JUR. *Damages* § 39 (1992) (quoting City of Greenville v. W. R. Grace & Co., 827 F.2d 975, 983 (4th Cir. 1987)).

165. 63B AM. JUR. 2d *Products Liability* § 1827 (2010) (citations omitted).

166. *Id.* (footnotes omitted) (citing Philip Morris Inc. v. Angeletti, 752 A.2d 200, 247 (Md. 2000); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 837 (Minn. 1988); Celotex Corp. v. Tate, 797 S.W.2d 197, 209 (Tex. App. 1990)).

167. *Id.* (quoting Spearman v. J & S Farms, Inc., 755 F. Supp. 137, 142 (D.S.C. 1990); Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 281 (D.N.J. 1989)).

168. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.240(7) (West 2004) (allowing for punitive damages if a public agency violates the freedom of information laws).

169. To award punitive damages for FOIA violations, the General Assembly would also likely need to provide an exception to the South Carolina Tort Claims Act, which prohibits the awarding

Without any compensatory damages at stake beyond reasonable attorney's fees and fairly minimal fines available for punishment, punitive damages would serve as additional punishment when a public body's conduct was particularly egregious. Not only would public bodies have a greater incentive to comply with FOIA requirements, but the added damages would also serve to deter others from willfully violating the laws.

C. Independent Review Procedure

Opponents of South Carolina's FOIA criticize that, among other things, the system lacks a meaningful appeals process.[170] Currently, South Carolina law provides no independent review of a FOIA violation claim beyond the initiation of a civil lawsuit.[171] As the South Carolina Press Association described, if an individual believes a public body has wrongfully denied that person's FOIA request—or if the public body has not responded at all—the individual has few avenues for challenging the decision: "For starters, ask to speak to a supervisor or the agency head. Show them the law. If an amicable solution cannot be reached, a lawsuit is an option. Anyone can file a suit in circuit court asking it to determine whether a[] FOIA violation has occurred."[172] However, the expense and hassles of litigation dissuade most individuals who would otherwise want to challenge a FOIA denial.[173]

Two options could cure this problem. First, the General Assembly could establish a review process within the South Carolina Administrative Law Court (ALC). The self-described mission of the state ALC is "to provide a neutral forum for fair, prompt and objective hearings for any person affected by an action or proposed action of certain agencies of the State of South Carolina."[174] The court "is an autonomous quasi-judicial agency within the executive branch of state government" that was established "to provide an independent forum for hearing the contested cases of state agencies."[175] The court came about because of the inherent difficulties in challenging an agency decision, particularly given that, under the previous procedures, the only form of relief came from the agency itself: "Previously, citizens desiring an evidentiary hearing to challenge the

---

of punitive damages in a tort action against any governmental entity of the state. *See* S.C. CODE ANN. §§ 15-78-40, -120(b) (2005).

170. *See* Smith, *supra* note 8 ("[Government advocates] cite several problems with the law. State agencies can deny access to records; there is no appeals process if access is denied; and state agencies can charge excessive fees for gathering information, making it too expensive for the public to get information.").

171. *See A Citizen's Guide to South Carolina's Freedom of Information Act*, S.C. PRESS ASS'N, http://www.scpress.org/Documents/citizen.pdf (last visited Mar. 30, 2014).

172. *See id.*

173. *See* Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 211 (1984).

174. *See* S.C. ADMIN. L. CT., http://www.scalc.net (last visited Mar. 30, 2014).

175. *Id.*

action of a State agency were heard by hearing officers employed by that particular agency."[176]

Under the law prescribing the jurisdiction of the ALC, the court can only exercise jurisdiction when the statute explicitly authorizes it.[177] The bill to amend FOIA proposed during the last legislative session would have added the following language to the statute:

> Section 1-23-665. (A) There is created within the Administrative Law Court the Office of Freedom of Information Act Review. The chief judge of the Administrative Law Court shall serve as the director of the Office of Freedom of Information Act Review . . . .
>
> . . . .
>
> (E) A hearing officer must issue an order containing findings of fact and conclusions of law. If a hearing officer determines that information is subject to disclosure, the order must set forth in writing what information must be disclosed and when that disclosure must occur. If the decision of the hearing officer is not timely appealed to the ALC, a prevailing party may apply to the ALC to enforce the determination. If the decision is appealed to the ALC, and the administrative law judge upholds a decision ordering disclosure of information, the administrative law judge may enforce the hearing officer's determination as the court considers appropriate. If the administrative law judge rules that the determination must be enforced, the court may hold a person, the responsible officer, or the public official of a public body in civil contempt for failing to comply with the provisions of Section 30-4-30 or an order of the court relating to Section 30-4-30. The administrative law judge may also award attorney's fees pursuant to Section 30-4-100(c).[178]

The procedure prescribed in the proposed reform bill offers a valid alternative to costly litigation.[179] Under this proposal, the ALC would have the same power that a circuit court has over a lawsuit filed in that the ALC could, for example, award attorney's fees to a prevailing party.[180]

---

176. *Id.*

177. *See id.* Currently, the General Assembly has given the ALC jurisdiction to hear four types of matters: contested cases, appeals pursuant to the Administrative Procedures Act, regulation hearings, and requests for injunctive relief. *Jurisdiction of the Administrative Law Court*, S.C. ADMIN. L. CT., http://www.scalc.net/jurisdiction.aspx (last visited Mar. 30, 2014).

178. H.B. 3163, 120th Gen. Assemb., Reg. Sess. (S.C. 2013).

179. Generally, petitioners represent themselves in ALC proceedings and, thus, would not incur substantial legal expenses in challenging a FOIA denial, as they would in litigation. *See* Vaughn, *supra* note 173, at 194–95, 211, 213 (citation omitted).

180. *See* S.C. H.B. 3163 (allowing the ALC to award attorney's fees pursuant to section 30-4-100(b) of the South Carolina Code).

This approach, however, could give rise to potential issues. For example, an individual may have to wait a significant amount of time for a resolution from the ALC if the court's jurisdiction is increased to hear FOIA claims. Currently, the ALC disposes of less than 50% of cases within the court's objective timeframe.[181] The court's accountability report highlights different factors that may affect the percentage of cases meeting the time objectives for disposition.[182] For one, the court's available resources, including whether it is staffed at full capacity, could be a factor affecting the court's timeframe for deciding cases.[183] Perhaps even more significantly, the ALC notes that "[a]nother issue with [the] timeframe for disposition of cases is an increase in jurisdiction and caseload. The motion practice and complex discovery issues have continued to grow, which has contributed to the age of disposed cases remaining at its current percentage rate . . . ."[184] If the General Assembly extended the court's jurisdiction to hear FOIA appeals, the average time that it takes to dispose of the cases could increase further and, thus, may not be the most attractive independent review procedure available for implementation.

Despite the potential increase in case resolution times, providing independent review through the ALC would likely be substantially quicker than litigating claims in the circuit courts.[185] Enacting the procedure would still afford petitioners relief from the long wait times and considerable expenses associated with litigation.

A system of independent review could also be accomplished by creating a separate Freedom of Information Commission. At least one state has utilized such procedure.[186] Connecticut statutorily created its Freedom of Information Commission in 1975 to enforce the state's open government laws.[187] The Connecticut law provides as follows:

> The [Freedom of Information] commission shall, subject to the provisions of the Freedom of Information Act promptly review the alleged violation of said Freedom of Information Act and issue an order

---

181. *See* S.C. ADMIN. LAW CT., 2012–2013 ACCOUNTABILITY REPORT 16 (2013), *available at* http://www.scalc.net/pub/FY2012-2013%20ALC%20Accountability%20Report.pdf (excluding disposition of inmate cases). The report divides cases "into four categories based upon complexity and normal length of time between the filing of a case to final disposition." *Id.* at 14. The objective time frames for disposal of cases range from 90 to 180 days. *Id.* Three to six months is a significant amount of time for an individual to have to wait for a judgment on a FOIA appeal, especially compared to the fifteen-day period the agency has to respond to an initial request. S.C. CODE ANN. § 30-4-30(c) (2007).

182. *See* S.C. ADMIN. LAW CT., *supra* note 181, at 16.

183. *Id.*

184. *Id.* The report, however, goes on to state that "judges have increased their efforts to promptly determine the cases" to counteract these factors. *See id.*

185. Even the highest objective time frame of the ALC, 180 days, is much quicker than the time it would take to fully litigate a civil, nonjury case in circuit court.

186. *See* Vaughn, *supra* note 173, at 193.

187. *Id.*

> pertaining to the same. Said commission shall have the power to investigate all alleged violations of said Freedom of Information Act and may for the purpose of investigating any violation hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, have the power to subpoena witnesses under procedural rules adopted by the commission to compel attendance and to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question. In case of a refusal to comply with any such subpoena or to testify with respect to any matter upon which that person may be lawfully interrogated, the superior court for the judicial district of Hartford, on application of the commission, may issue an order requiring such person to comply with such subpoena and to testify; failure to obey any such order of the court may be punished by the court as a contempt thereof.[188]

Furthermore, Connecticut's Freedom of Information Commission possesses both adjudicatory and enforcement powers[189]:

> These powers include broad investigatory powers and substantial adjudicatory and enforcement authority, including the power to impose civil penalties upon agency officials who have withheld information without a reasonable basis in law. It conducts training of agency personnel and public education and comments upon agency regulations implementing the state freedom of information law. The Commission's jurisdiction extends not only to state agencies but also to local government. The Connecticut Administrative Procedure Act empowers the Commission to issue advisory opinions and to establish its own rules and procedures, and requires it to publish its decisions and make them available to the public. The adjudication of appeals from agency decisions denying access to documents and records, however, remains the Commission's principal function.[190]

Additionally, the procedure for appointing members to the commission attempts to ensure limited political influence in the process.[191] The commission is made up of nine individuals, five of whom are appointed by the Governor; the other four are appointed as follows: "One by the president pro tempore of the Senate, one by the minority leader of the Senate, one by the speaker of the House

---

188. CONN. GEN. STAT. ANN. § 1-205(d) (West Supp. 2013).

189. Vaughn, *supra* note 173, at 193 (citing CONN. GEN. STAT. ANN. § 1-21i(b) (West Supp. 1988)).

190. *Id.* at 193–94 (footnotes omitted) (citing CONN. GEN. STAT. ANN. §§ 1-21i(b), -21j(d), -21j(e), -21j(h) (West Supp. 1988)).

191. *See* Cheh, *supra* note 107, at 351 (citing Vaughn, *supra* note 173, at 198–99).

of Representatives and one by the minority leader of the House of Representatives."[192] Commission members serve terms varying between two and six years, and "[n]o more than five members of the commission shall be members of the same political party."[193] The Connecticut commission has consistently "stood out for its political independence and commitment to accessibility of public records."[194]

Likewise, South Carolina could create a Freedom of Information Commission as an alternative to the expensive costs of litigating in circuit court.[195] The commission procedure would provide a number of benefits. First, the system would give the commission the independence to make potentially unfavorable political decisions that are, nonetheless, mandated by the laws.[196] For example, the Connecticut Freedom of Information Commission recently issued a decision mandating disclosure of the 911 calls from the Sandy Hook massacre.[197] The commission determined that the tapes should be released pursuant to a request by the Associated Press.[198] The state attorney challenged the decision in court, arguing that "a stay of the FOI ruling would protect both the families of the victims and the surviving witnesses."[199] Attorneys for the

---

192. CONN. GEN. STAT. ANN. § 1-205(a) (West Supp. 2013).

193. *Id.*

194. Cheh, *supra* note 107, at 351 (citing Vaughn, *supra* note 173, at 198–99). The Freedom of Information Commission in Connecticut was consolidated, along with nine other watchdog agencies, into the Office of Governmental Accountability in 2011. FREEDOM OF INFO. COMM'N, *Final Report: Public Access and Accountability Legislation Connecticut General Assembly 2013 Regular Session*, CT.GOV, http://www.ct.gov/foi/cwp/view.asp?a=4314&Q=527340 (last updated June 26, 2013). According to a report,"[A]lthough consolidated, the agencies were able to retain their independent decision-making authority and budgetary independence." *Id.* In 2013, two proposals that would have reduced or eliminated the independence of the Government Accountability Commission ultimately failed. *See id.*

195. Similar to the Connecticut commission, the commission's decisions would still be subject to judicial review. *See* Vaughn, *supra* note 173, at 196 ("Decisions of the Commission are subject to review in superior court. The court, however, reviews the decisions of the Commission under a limited standard of review that gives great weight to the Commission's determinations. The limited standard of review insures that the Commission remains the entity principally responsible for adjudication of claims under the freedom of information law." (footnotes omitted) (citations omitted)). The decisions of the ALC are also subject to judicial review. *See Jurisdiction of the Administrative Law Court, supra* note 135 ("All decisions of an administrative law judge, except regulation hearing reports and interlocutory orders, are subject to appellate review."). Appeals arising from the ALC are heard by the court of appeals. *Id.* The implementation of a commission, however, would provide a cheaper alternative to individuals before they resort to litigation and also has the potential to keep FOIA challenges from adding to the already overloaded court dockets.

196. *See, e.g.*, Corky Sieimaszko, *Newtown Massacre Scene Demolished As Prosecutor Tries to Block Release of 911 Calls*, NY DAILY NEWS (Nov. 9, 2013), http://www.nydailynews.com/news/national/prosecutor-block-release-sandy-hook-911-calls-article-1.1510852#ixzz2kAhaoxYp (discussing how Connecticut's Freedom of Information Commission ruled that tapes of 911 calls from the Sandy Hook school shooting should be released after the Associated Press requested them).

197. *Id.*

198. *Id.*

199. *Id.*

commission, however, responded that "911 tapes routinely are disclosed to the public and the [state] cannot meet the standard for staying enforcement of the Commission's decision."[200] Even in such a politically charged situation, the commission arrived at an independent decision without the influence of political and public pressures.[201]

Additionally, whereas administrative law judges may have limited experience with FOIA and its requirements, an independent agency charged with reviewing FOIA decisions would ensure consistent application of the laws by having staff deal solely with FOIA regulations and appeals. The process would also likely result in quicker decisions than those rendered in the ALC. At one point in Connecticut, the average time the commission took to reach a decision—from the filing of an appeal to the rendering of the decision—was about two-and-a-half months,[202] which is shorter than the lowest objective time frame of the South Carolina ALC.[203]

Creating a commission does, however, have some disadvantages—namely, the cost of establishing such a commission. The budget appropriations for the ALC for fiscal year 2013–2014 amounted to nearly $3.5 million.[204] Adding review of FOIA claims to the ALC would not likely require much in terms of additional appropriations because the additional overhead costs for court operations would be minimal.[205] Establishing a commission, on the other hand,

---

200. *Id.*

201. The decision of the commission was recently upheld and a state trial judge ordered the release of the tapes. *See* Gary Stoller & Gary Strauss, *Sandy Hook's Chilling 911 Tapes*, USA TODAY, Dec. 5, 2013, at A3, *available at* http://www.usatoday.com/story/news/nation/2013/12/04/sandy-hook-school-shooting-911-recordings-to-be-released-today/3868249/.

202. Vaughn, *supra* note 173, at 199 (citation omitted). As Professor Vaughn noted, the statute does include directory time frames for disposition of a case before the commission, but these times are not mandatory. *Id.* (citing CONN. GEN. STAT. ANN. § 1-21i(b) (West Supp. 1988); Giordano v. Freedom of Info. Comm'n, 413 A.2d 493, 495 (Conn. Super. Ct. 1979)). Additionally, judicial review can sometimes delay a decision, even though commission appeals are supposed to be given priority on judicial dockets. *Id.* (citation omitted) (citing CONN. GEN. STAT. ANN. § 1-21i(d)). Professor Vaughn further noted the following:

> Although delay occurs under the Connecticut approach, the vast majority of cases are decided rapidly even when an agency has not been cooperative. The availability of an effective administrative alternative to agency delay in responding to requests encourages requesters to seek redress for delay and encourages agencies to comply with the time limits.

Id. at 199–200 (citation omitted).

203. *See* S.C. ADMIN. LAW CT., *supra* note 181, at 14.

204. *See id.* at 8.

205. *See* STATE BUDGET DIV., S.C. BUDGET & CONTROL BD., FISCAL IMPACT STATEMENT ON BILL NO. H.3163, HOUSE AMENDMENT (2013), *available at* http://www.budget.sc.gov/webfiles/OSB/Fiscal%20Impact%20House/H3163HA.pdf. The Fiscal Impact Statement regarding the proposed FOIA bill—discussed throughout this Note—estimated that the cost of establishing review of FOIA decisions in the ALC would be $111,370.00. *Id.* Almost all of the expected fiscal impact would be a recurring cost for the two positions that the ALC would need to create—a hearing officer and an administrative assistant. *Id.*

would likely cost several million dollars.[206] Nevertheless, the potential cost savings from decreased litigation and increased compliance as a result of commission oversight could potentially offset some of the costs to the state.[207]

Additionally, public bodies can help reduce some of the costs associated with either system of independent review by taking advantage of increased access to technology and routinely making information that the public bodies know are subject to disclosure—such as police reports—available online. The federal government encourages a similar approach. In an internal memorandum to the executive agency heads, Attorney General Eric Holder wrote the following:

> Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs.[208]

By taking a proactive approach, agencies can take advantage of increased technology and access to reduce the number of potential FOIA requests.

Introducing measures for routinely disclosing information has shown positive results in Charleston County, which previously caught unwanted attention for failing to disclose supplementary reports containing crime data to the public.[209] The county now routinely provides this information, which can be easily found on its website.[210] Further, the Charleston Police Department has established an online portal for connecting with the community that allows citizens to search for and even retrieve accident reports.[211] The Myrtle Beach Police Department operates a similar online portal that provides the community with information regarding arrests and missing persons, as well as other public

---

206. *See, e.g.*, OFFICE OF GOV'T ACCOUNTABILITY, STATE OF CONN., REPORT SUBMITTED FROM THE OFFICE OF GOVERNMENT ACCOUNTABILITY TO THE GENERAL ASSEMBLY IN COMPLIANCE WITH PUBLIC ACT 11-48, at 47 app. C (2012), *available at* http://www.ct.gov/oga/lib/oga/pdfs/oga_compilationreport2012.pdf (stating that the Connecticut commission expected to operate on a budget of just under 2 million dollars a year in FY 2013).

207. *See infra* Part VI.D.

208. *See* Memorandum from Eric Holder, U.S. Attorney Gen., to the Heads of Executive Departments and Agencies on the Freedom of Information Act (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf (quoting President Barack Obama).

209. *See* Smith, *supra* note 1.

210. *Id.* The police department's annual report is available on the City of Charleston's website. *See* CHARLESTON POLICE DEP'T, ANNUAL REPORT 2012 (2012), *available at* http://www.charleston-sc.gov/DocumentCenter/View/2674.

211. *See Police to Citizen*, CHARLESTON POLICE DEP'T, http://p2c.charleston-sc.gov/p2c/main.aspx (follow "Get a Crash Report" hyperlink) (last visited Mar. 31, 2014).

information.[212] This system "has proven very popular with citizens, has generated no complaints and has freed [the] office from chasing down reports for the media and others."[213] Providing this routine information not only decreases the number of FOIA requests that consume valuable agency time and resources, but also reinforces the idea that the government and public agencies, as part of a democracy, ultimately work for the benefit of the public.

Another potential issue with adopting a commission similar to that in Connecticut is—despite the presence of certain statutory safeguards—the potential for political influence to compromise the independence of the process. Because individuals would be appointed to the commission by elected officials, the potential for politics to affect decisions is always present. However, this appointment process is not entirely different from the way administrative law judges are appointed.[214] In South Carolina, the six administrative law judges that make up the ALC are elected by the state's General Assembly and serve a term of five years.[215] Thus, commission appointments would be susceptible to the same inherent political pressures as those present in judicial elections. Yet, both processes attempt to reduce any political influence in different ways. Under the Connecticut commission's process, members must be appointed from both political parties and no more than five of the nine members can be from the same political party.[216] Thus, even if one party controls both the executive and legislative branches of state government in Connecticut, other parties must still be represented on the commission. The South Carolina ALC procedure creates judicial positions that, even though elected by a political body, are theoretically insulated from political pressures.[217] The court consistently hears cases involving state agencies and is charged with coming to an independent, neutral decision.[218] Adding jurisdiction to hear FOIA appeals would be no different than the state agency cases the court already hears, and any political influence would not likely compromise the court's ability to reach an independent decision.

Expanding the ALC's jurisdiction or creating a Freedom of Information Commission are both reasonable options for establishing an independent review

---

212. *See* Smith, *supra* note 1; *see also Police to Citizen (P2C) Portal*, MYRTLE BEACH POLICE, http://p2c.cityofmyrtlebeach.com/p2c/main.aspx (follow either "Arrests" or "Missing Persons" hyperlink) (last visited Mar. 31, 2014).

213. Smith, *supra* note 1 (quoting Capt. David Knipes, Public Information Officer for the Myrtle Beach Police Department). The success these police departments have experienced is particularly encouraging because police agencies often receive a substantial share of FOIA requests. *See, e.g.*, *supra* notes 115–16 and accompanying text (describing the high percentage of FOIA requests received by District of Columbia police and fire departments).

214. *See, e.g.*, *Administrative Law Judges,* S.C. ADMIN. L. CT., http://www.scalc.net/judges.aspx (last visited Mar. 31, 2014) (explaining that South Carolina's administrative law judges are elected by the state's General Assembly).

215. *Id.*

216. CONN. GEN. STAT. ANN. § 1-205(a)(3) (West Supp. 2013).

217. *See* S.C. ADMIN. L. CT., *supra* note 174.

218. *See id.*

process for FOIA appeals, and either one would strengthen the current law by making the appeals process more accessible for individuals seeking to challenge FOIA denials. However, the ALC process seems more favorable for immediate implementation because of its relatively low cost impact on the state.

Yet, establishing a Freedom of Information Commission—as opposed to providing independent review through the ALC—has other benefits discussed in the following section that may make it the more appealing option for South Carolina.

D. Centralized FOIA Oversight

The same Freedom of Information Commission described above could be charged with ensuring agency compliance throughout the state. If modeled after the Connecticut procedures, the commission would retain investigatory power, including the ability to subpoena any records it deems necessary in its examination.[219] These investigatory powers provide the commission with potential influence:

> Aside from its adjudicatory power, the power to investigate is the source of the Commission's greatest potential influence. The investigatory powers of the Commission are broad and extend beyond those powers needed to support the adjudicatory process. For example, the Commission could focus on individual agencies and conduct an extensive review of the agency's stewardship of the law. The Commission could likewise target specific local jurisdictions, moving the geographical focus of the Commission's work if necessary.[220]

Having the power to initiate its own review of agency compliance is crucial to the commission's oversight role. Public bodies will have greater incentive to comply with the open government laws knowing that a centralized agency is charged with holding them accountable.

In addition to having investigatory authority, the commission could also serve in an advisory role. Similar to a tax court, the commission could act as a centralized body that assists and advises public agencies responding to public requests and complying with open meeting requirements.[221] The commission could act as an *expert*, which is necessary when an agency responding to a

---

219. *See* CONN. GEN. STAT. ANN. § 1-205(d) (West Supp. 2013).

220. Vaughn, *supra* note 173, at 196–97 (footnotes omitted).

221. *See id.* at 193–94 (citing CONN. GEN. STAT. ANN. § 1-21j(b), -21j(d), -21j(e), -21j(h) (West Supp. 1988)). Connecticut's laws give the state's Freedom of Information Commission the authority to issue advisory opinions. *Id.* at 194 & n.51 (citing CONN. GEN. STAT ANN. § 4-176 (West Supp. 1988)).

request has little experience with the law and its requirements.[222] This available expertise will save agency time and resources dedicated to responding to FOIA requests, and will provide guidance to other agencies facing similar issues. The commission could play an even greater role if tasked with training agencies on FOIA compliance.[223] Training would strengthen the overall effectiveness of the laws by making public bodies more efficient in responding to the public's FOIA requests. Central oversight of FOIA compliance would help ensure greater consistency in the application of the laws throughout the state.

E. A System to Keep Better Records of FOIA Requests

Currently, it is difficult and cumbersome to obtain information regarding the number of requests an agency receives, and because each agency keeps its own information, the process is often fragmented.[224] In stark contrast to South Carolina's information system, the federal government has an entire website devoted to FOIA that reveals how many FOIA requests are received each year, including the number of requests received by each agency, the number of times an exemption is claimed, and the current backlog of requests.[225] No such centralized information system exists in South Carolina. In fact, statistics and information regarding an individual agency's FOIA requests and responses are not routinely available. With the amount of agency resources devoted to responding to FOIA requests each year, the public has the right to see how these resources are being used to comply with the laws. Therefore, South Carolina should adopt a method similar to the federal government's for reporting this information to encourage greater accountability and transparency. The Freedom of Information Commission, if established, could be responsible for collecting and disseminating state statistics on FOIA requests through electronic media.

---

222. *See supra* notes 114–17 and accompanying text (describing the inconsistent application of the law that results when many agencies receive very few FOIA requests annually).

223. *See, e.g.*, CONN. GEN. STAT. ANN. § 1-205(e) (West Supp. 2013) ("The Freedom of Information Commission . . . shall conduct training sessions, at least annually, for members of public agencies for the purpose of educating such members as to the requirements of [FOIA].").

224. See *supra* notes 130–33 and accompanying text (describing the fractured nature of the FOIA process in South Carolina).

225. *See What is FOIA?*, *supra* note 113. This website is user-friendly and easy to navigate, and it provides information on FOIA requests in a clear and comprehensible manner. As described on the website, "FOIA.gov is a government-wide portal for the Freedom of Information Act that was developed as part of the *Department of Justice's Open Government plan*. At FOIA.gov, you have access to all the FOIA data collected by the Department of Justice on behalf of the federal government." *Frequently Asked Questions*, FOIA.GOV, http://www.foia.gov/faq.html (last updated Feb. 2011).

VII. CONCLUSION

"Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[226]

Although open government laws have been a cornerstone of democracy in South Carolina for more than three decades, South Carolina's FOIA clearly fails to promote its stated purposes of transparency and accountability. Lawmakers contradict the judicial trend toward greater openness by making themselves exempt from FOIA's requirements.[227] Public officials, fearing only minimal potential consequences, have little incentive to comply with the laws. Endless news stories describing flagrant violations by public officials continue to highlight these threats to open government.[228]

An overly complicated, fractured system with weak enforcement mechanisms discourages citizens from seeking access to the public information to which they are entitled. Potential solutions exist, however, as evidenced by the recent success police departments have found in routinely making certain public information readily available online.[229] Proponents of reform are not optimistic about the General Assembly enacting any changes in the near future.[230] Yet, if politics can be set aside, making the process faster and more certain, enacting stronger enforcement mechanisms, establishing an independent review process, and creating a system of public recordkeeping for greater accountability would provide a great start toward making South Carolina's FOIA more effective and consistent with its stated goals.

Jennifer Jokerst

---

226. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

227. *See* S.C. CODE ANN. § 30-4-40(8) (2007).

228. *See supra* notes 2–5 and accompanying text.

229. *See supra* notes 209–13 and accompanying text.

230. *See* Telephone Interview with Bill Rogers, *supra* note 8. Rogers stated that the highly partisan nature of the state General Assembly makes it extremely difficult to get anything passed. *Id.*