

**“OPENING THE STATE HOUSE DOORS”: EXAMINING
TRENDS IN PUBLIC ACCESS TO LEGISLATIVE RECORDS**

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INTRODUCTION

Freedom of Information (“FOI”) statutes play a vital role in good governance and accountability by providing the public with a right to access government information. That access ensures that the media, citizen activists, and other interested persons obtain documents that reveal the functioning—or wrongdoing—of elected and bureaucratic officials. Both at the federal and state levels, FOI laws typically apply to the executive branch of government and the administrative state. Whether the records of the legislature, individual legislators, or other legislative branch entities are, or should be, subject to the same level of public access is a more contentious issue.

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Some state FOI statutes are explicit about whether the public can access legislative records. In a significant number of jurisdictions, however, the law is ambiguous and calls out for interpretation by the courts and executive branch officials. Prolonged legal disputes inevitably arise when requesters attempt to test the limits of access in cases of ambiguity. For example, there are cases currently pending on appeal in both Washington⁴ and Georgia⁵ that will determine the extent to which legislative records are subject to public disclosure in those states.

Based on a comprehensive survey of state FOI laws, only a small number of states—twelve, to be precise—disallow access to legislative records, whether by express statutory language or interpretation of the courts or other state officials. Most other states, by contrast, provide requesters with at least some basic level of access. This access may be provided in explicit terms. But in many jurisdictions, the ability to access legislative records depends on statutory construction and the interpretation of language that only impliedly authorizes requests for records of any “branch,” “department,” or “authority.” Other jurisdictions provide access to legislative records because their laws are organized with reference to certain types of documents rather than certain entities. Interpreting a FOI statute, in those cases, also may involve consideration of broader statutory context and the interplay of other statutory provisions, such as exemptions applicable only to legislative records. Taken together, the data suggest a clear trend of interpreting state FOI laws to resolve ambiguities in favor of public access.

* * *

Section I of this article details the jurisdictions where access to legislative records is either expressly provided for by statute or impliedly recognized by judicial or other legal interpretation. Section II details the minority of jurisdictions where access to legislative records is expressly

⁴ See *infra* note 50 and accompanying text.

⁵ See *infra* notes 95 & 100 and accompanying text.

excluded. Section III extends the paper’s analysis to the federal Freedom of Information Act (“FOIA”). Although the FOIA’s definition of an “agency” explicitly excludes Congress and has been interpreted to exclude congressional components and individual legislators, the application of the statute to legislative branch agencies is a more complicated matter. This paper describes the current case law regarding legislative branch agencies, suggests how Congress and the courts may further transparency by subjecting certain legislative agencies to the FOIA, and ends by analyzing the relevant test for “agency control” over legislative branch records that end up under the control of entities subject to the FOIA.

I. MOST FOI STATUTES PROVIDE SOME FORM OF ACCESS TO LEGISLATIVE RECORDS

Thirty-eight states have adopted FOI statutes that permit requesters to access legislative records.⁶ In some states, that access is unrestricted. That is, the type of records subject to the FOI statute varies and may include records maintained by individual legislators, as well as materials created by legislative committees or legislative branch agencies. In other instances, access is more limited. Yet no matter the exact scope of disclosure, there are recognizable trends that reveal how lawmakers deal with the legislative branch in a FOI statute—typically, with express language—and how executive officers, such as state attorneys general, and courts tend to resolve cases of ambiguous statutory language.

A. States with Express Access to Legislative Records

Almost half of all states—or twenty-four—have FOI laws that cover the legislature in explicit terms. There is some diversity in how those states reach that result.⁷ In two states, the

⁶ See App. Table 1. For ease of reading, the capitalization of language in statutory references has been changed throughout the article and the appendix. Internal quotation marks and citations also have been omitted.

⁷ Florida has enshrined the right of access to legislative records in its state constitution. See FLA. CONST. art. I, § 24(a) (“Every person has the right to inspect or copy any public record This specifically includes the legislative, executive, and judicial branches of government[.]”).

law focuses on the *nature of the record* subject to disclosure. Under the North Carolina FOI statute, for example, a “public record” is defined broadly to include almost anything “made or received” by an “agency . . . includ[ing] every public office, public officer or official (State or local, elected or appointed)[.]”⁸ The Colorado FOI statute similarly focuses on the definition of a “public record,” which “includes all writings made, maintained, or kept by the state,” plus the correspondence of elected officials.⁹

Other states focus on the kinds of government entities that must disclose their records upon request, rather than the nature of the records themselves. Nine states have FOI laws that define the term “agency” to include the entire legislative branch.¹⁰ In Connecticut, for example, an “agency means any executive, administrative or legislative office[.]”¹¹ The Ohio FOI statute includes a similar reference to the entire legislative branch,¹² as does the Montana law.¹³

Although New Jersey defines “agency” broadly to include the legislature, as well as legislative entities “within or created by the Legislative Branch,”¹⁴ certain legislative records are exempt from the regime. Specifically, the New Jersey FOI statute provides a broad exclusion for records, such as constituent correspondence, that belong to individual legislators.¹⁵ Access to records of individual legislators is similarly limited in Pennsylvania, notwithstanding a broad

⁸ N.C. GEN. STAT. ANN. § 132-1(a).

⁹ COLO. REV. STAT. ANN. § 24-72-202(6)(a)(I)–(II).

¹⁰ Those states include Connecticut, Idaho, Indiana, Kentucky, Montana, New Jersey, Ohio, Pennsylvania, and Rhode Island.

¹¹ CONN. GEN. STAT. ANN. § 1-200(1)(A).

¹² OHIO REV. CODE ANN. § 149.011(B) (“State agency includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including . . . the general assembly [and] any legislative agency[.]”).

¹³ MONT. CODE ANN. § 2-6-1002(10) (“Public agency means the executive, legislative, and judicial branches of Montana state government[.]”).

¹⁴ N.J. STAT. ANN. § 47:1A-1.1 (“Public agency or agency means . . . the Legislature . . . and any office, board, bureau, or commission within or created by the Legislative Branch[.]”).

¹⁵ *See id.* (“A government record shall not include [constituent correspondence and related records or] . . . any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member’s official duties[.]”). The New Jersey Senate Judiciary Committee is currently considering a proposal to broaden this exemption. *See* S.B. 187, 218th Leg., Reg. Sess. (N.J. 2018).

definition of “agency” that includes legislative bodies, including each deliberative house and attendant legislative agencies.¹⁶

Indiana is another state where, despite an expansive definition of “agency,” the application of the FOI statute is complicated by other statutory provisions and judicial precedent. Under the Indiana FOI law, a “[p]ublic agency . . . means . . . [a]ny [entity] exercising any part of the executive, administrative, judicial, or legislative power of the state.”¹⁷ Courts have recognized the breadth of this definition.¹⁸ At the same time, they have refused to adjudicate disputes over legislative determinations on the withholding of exempt work product.¹⁹ That refusal is premised on a theory of separation of powers, as well as the deference afforded to public agencies in making certain redactions.²⁰ Nevertheless, the Indiana courts also have refused to rely on constitutional grounds to invalidate the broad definition of a “public agency.” In the context of the executive branch, for example, the Indiana Court of Appeals only recently rejected then-Governor Mike Pence’s argument that a lawsuit challenging his refusal to disclose public records was a non-justiciable question; the court characterized the Governor’s position as “render[ing] [the FOI statute] meaningless.”²¹ Similar reasoning presumably should apply to the legislative branch.

¹⁶ Compare 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 with *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 239 (Pa. 2003) (“Any right of access under the common law was supplanted when the General Assembly defined the term ‘agency’; it did not include *members* of the General Assembly. To conclude such access exists would be tantamount to rewriting the definition of ‘agency’ in the Act.”). In other contexts, courts have more carefully considered whether records created by individual legislators may be still subject to disclosure. See, e.g., *Parsons v. Penn. Higher Educ. Assistance Agency*, 910 A.2d 177, 187–88 (Pa. Commw. Ct. 2006) (rejecting argument that “official records of the acts of legislator members of . . . an independent administrative agency” were “legislative records” exempt from disclosure).

¹⁷ IND. CODE ANN. § 5-14-3-2(q)(1).

¹⁸ See, e.g., *Citizens Action Coal. v. Koch*, 51 N.E.3d 236, 243 (Ind. 2016) (“The general question of whether [the state FOI statute] applies to the Indiana General Assembly and its members is justiciable, and we hold that [it] does apply.”); *id.* at 242 (“[T]he General Assembly and its members constitute a ‘public agency[.]’”).

¹⁹ See *id.* at 242 (“[O]nly the General Assembly can properly define what work product may be produced while engaging in its constitutionally provided duties. Thus, defining work product falls squarely within a ‘core legislative function.’ . . . Since the General Assembly and its members constitute a ‘public agency,’ the statute itself expressly reserves to the General Assembly the discretion to disclosure or not to disclose its work product.”).

²⁰ See, e.g., *State ex rel. Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993).

²¹ See *Groth v. Pence*, 67 N.E.3d 1104, 1115 (Ind. Ct. App. 2017) (“[T]he Governor does not assert a particular statutory exemption . . . but, rather, makes a categorical claim of executive privilege from disclosure of his public

Twelve state FOI laws include legislative records by referring to legislative “departments,” “bodies,” “committees,” or “entities” when defining the set of “public” or “governmental bodies” and “entities” whose records are subject to disclosure.²² Thus, in New Hampshire, a “public body means any . . . legislative body, governing body, . . . or authority[.]”²³ In Nevada, a “governmental entity” includes “an elected or appointed officer of th[e] State[.]”²⁴

Once again, even in cases of ostensibly clear statutory direction, there can be disagreement over the exact scope of the law. The Michigan FOI Act, for example, expressly covers any “agency, board, commission, or council in the legislative branch.”²⁵ But the state’s Attorney General has relied on legislative history to interpret this provision to exclude individual legislators.²⁶ The original version of the Michigan FOI, as introduced, included the term “legislator” in the same provision that referenced other legislative entities. The “intentional deletion” of that word, the Attorney General reasoned, “demonstrate[d] beyond peradventure the legislative intent . . . to exclude a state legislator from the definition of a ‘public body.’”²⁷ That interpretation has neither been widely litigated nor received much legislative attention. Still, there is a pending bill in the Michigan House of Representatives that could significantly alter the scope of the FOI statute by excluding “an[y] entity in the legislative branch” from the definition of a “public body.”²⁸

records The Governor’s argument would, in effect render [the FOI statute] as meaningless as applied to him and his staff. [The law] does not provide for any such absolute privilege, and the separation of powers doctrine does not require it.”)

²² Those states include Alabama, Delaware, Illinois, Michigan, Missouri, Nevada, New Hampshire, New Mexico, Texas, Utah, Virginia, and West Virginia.

²³ N.H. REV. STAT. ANN. § 91-A:1-a(VI)(d). References to the legislature were only added to the New Hampshire FOI statute in 2008. Previously, courts had held that the Right-to-Know law did not apply to the legislature. *See, e.g., Hughes v. Speaker of the N.H. House of Representatives*, 876 A.2d 736, 744–47 (N.H. 2005). The status of individual legislators’ records is still undecided. *See generally* N.H. Att’y Gen. Op. No. 11-01 (June 29, 2011).

²⁴ NEV. REV. STAT. ANN. § 239.005(5)(a).

²⁵ MICH. COMP. LAWS ANN. § 15.232(h)(ii).

²⁶ *See* Mich. Att’y Gen. Op. No. 6390 (Sept. 26, 1986).

²⁷ *Id.*

²⁸ H.B. 4008, 100th Leg., Reg. Sess. (Mich. 2019).

B. States with Implied Access to Legislative Records

Fourteen states have promulgated open records laws that only impliedly grant access to legislative records.²⁹ These states have FOI statutes that lack provisions expressly addressing the legislature, legislative agencies, or individual members; instead, they contain other terms or provisions that have been interpreted by the courts and responsible executive officials to provide access to legislative records. They can be grouped into three general categories.

1. *Implied Access Based on the Terms Defining the Governmental Entities Whose Records Are Subject to Disclosure*

In nine states, the relevant FOI statute covers the legislature, or certain legislative offices, based on an interpretation of the terms defining which governmental entities' records are subject to disclosure. Six of those nine states have open records laws that cover the legislature by use of the term "branch" (*i.e.*, the legislative branch of government). Although the term "branch" can be ambiguous on its own, in these states, any ambiguity has been resolved in favor of public access.

In Arizona, for example, "public records and other matters in the custody of any officer shall be open to inspection by any person[.]"³⁰ The term "officer," in turn, means "any person elected or appointed to hold any elective or appointive office of any public body[.]"³¹ And the term "public body" covers the "state, any county, city, [*etc.*] . . . [and] any branch, department, [*etc.*] . . . of the foregoing."³² The Arizona Attorney General has read these definitions in concert and concluded "that every legislator is an 'officer' and that the Legislature and the houses therefore constitute a branch or department of State Government, and, therefore, is a 'public body' under the public records statutes."³³

²⁹ See App. Tables 2–4.

³⁰ ARIZ. REV. STAT. ANN. § 39-121.

³¹ *Id.* § 39-121.01(A)(1).

³² *Id.* § 39-121.01(A)(2).

³³ Ariz. Att'y Gen. Op. 78-76 at 2 (Apr. 18, 1978).

Other states employing the term “branch” have reached a similar conclusion. In Vermont, a “public agency or agency means any agency, board, department, commission, committee, *branch*, instrumentality, or authority of the State[.]”³⁴ The Vermont Supreme Court has determined that this definition applies to the Governor with reasoning that is equally applicable to the legislature: In *Herald Ass’n, Inc. v. Dean*, the court wrote that it “is hardly disputable that the Office of the Governor of the State of Vermont is a ‘branch, instrumentality or authority of the State.’”³⁵ “Because the Governor is an ‘agency’ . . . any paper or document ‘produced or acquired’ during the course of the Governor’s business is a public record subject to disclosure[.]”³⁶

The interpretation of the term “branch” in the Nebraska Public Records Law to cover the legislature is supported by an explicit exemption for records belonging to individual legislators, namely, “correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever form.”³⁷ An indefinitely postponed bill from the previous session of the legislature, which would have exempted audio and video recordings of legislative proceedings, may add further support to this interpretation, at least to the extent it illustrates how some legislators interpret the law.³⁸ The three remaining states that cover the legislature by using the term “branch” include Iowa,³⁹ Louisiana,⁴⁰ and South Dakota.⁴¹

Another three states—North Dakota, Washington, and Wisconsin—cover their legislatures based on the interpretation of other statutory terms. In North Dakota, “all records of a public entity

³⁴ VT. STAT. ANN. tit. 1, § 317(a)(2) (emphasis added).

³⁵ 816 A.2d 469, 473 (Vt. 2002) (citing, *inter alia*, VT. CONST. ch. II, § 1).

³⁶ *Id.*

³⁷ NEB. REV. STAT. ANN. § 84-712-05(12).

³⁸ See L.B. 1018, 105th Leg., 2d Sess. (Neb. 2018).

³⁹ IOWA CODE ANN. § 22.1(1).

⁴⁰ LA. STAT. ANN. § 44:1(A)(1), (3).

⁴¹ In South Dakota, the legislature has explicitly excluded the judicial branch from the state’s Sunshine Law. See S.D. CODIFIED LAWS § 1-27-1.12.

are public records” open to inspection.⁴² The code defines a “public entity” as any “public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order[.]”⁴³ As an entity created by the state constitution, the legislature qualifies as a “public entity.” That conclusion is supported, moreover, by an explicit exemption for certain legislative materials; records of the “legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly” may be withheld, if they are purely personal, legislative council work product, or if they reveal private communications of a member of the assembly.⁴⁴ This exemption would not make sense if the legislature, as a whole, were not covered by the FOI statute. Indeed, the North Dakota Attorney General’s Office has adopted exactly that understanding.⁴⁵ The North Dakota FOI law also details how a “record” subject to disclosure cannot “include records in the possession of a court,” a carve-out that does not extend to the legislature.⁴⁶

Under the Washington Public Records Act, each “state agency” must provide the public with access to records. The Act defines a “state agency [to] include[] every state office, department, division, bureau, board, commission, or other state agency.”⁴⁷ Although this language does not explicitly include or exclude the legislature, an examination of other statutory definitions, including some outside of the Public Records Act, reveals that at least *some* legislative offices must be covered. For example, a “state office,” which is part of the definition of a “state agency,”

⁴² N.D. CENT. CODE ANN. § 44-04-18(1).

⁴³ *Id.* § 44-04-17.1(13)(a).

⁴⁴ *Id.* § 44-04-18.6.

⁴⁵ See STATE & LOCAL GOV’T DIV., OFFICE OF ATT’Y GEN., N.D., OPEN RECORDS MANUAL at 37 (2017), available at <http://bit.ly/2zIV9e4> (affirming application of open records law to legislature and discussing exemptions).

⁴⁶ N.D. CENT. CODE ANN. § 44-04-17.1(16) (“Record . . . does not include records in the possession of a court of this state.”); *cf. supra* note 41 (discussing similar provision in South Dakota).

⁴⁷ WASH. REV. CODE ANN. § 42.56.010(1).

includes a “state legislative office.”⁴⁸ That office, in turn, includes the “office of a member” of the legislature.⁴⁹ At least one state court accepted that reading when it held that “the plain meaning of the Public Records Act defines the offices of all state senators and representatives to be ‘agencies’ subject to the customary disclosure requirements[.]”⁵⁰ The court also explained that the Public Records Act covered certain records from two non-member legislative offices—the Secretary of the Senate and the Office of the Chief Clerk for the House of Representatives—based on the Act’s definition of a “public record.”⁵¹

Finally, in Wisconsin, a “requester has a right to inspect any record,”⁵² which is defined as “any material . . . that has been created or is being kept by an authority.”⁵³ An “authority,” in turn, is defined as anyone “having custody of a record [including,] [an] elective official[.]”⁵⁴ The legislature is covered because it is made up of “elective officials,” as confirmed by the courts. While requiring a state senator to disclose emails, for example, the Wisconsin Court of Appeals “observe[d] that the legislature wrote the open records law to apply to ‘elected official[s]’ generally, without any special exception for individual state legislators or houses of the legislature[.]”⁵⁵

⁴⁸ *Id.* § 42.17A.005(49).

⁴⁹ *Id.* § 42.17A.005(33).

⁵⁰ *Associated Press v. Wash. State Legislature*, No. 17-2-04986-34, slip op. at 10 (Wash. Thurston Cty. Sup. Ct. Jan. 19, 2018). This case is on appeal to the state Supreme Court. *See Accepted Cases*, WASH. SUP. CT., <http://bit.ly/2oZfB5Q> (last visited Mar. 18, 2019). A search of the Court’s docket reflects that the parties have briefed the questions presented, and a hearing is scheduled for June 11, 2019. *See* Docket No. 95441-1, *Court Briefs*, WASH. SUP. CT., <http://bit.ly/2tX40Xj> (last visited Mar. 18, 2019). Efforts in the previous legislative session to revise the FOI law to restrict access to legislative records failed. *See* S.B. 6617, 65th Leg., Reg. Sess. (Wash. 2018); *see also* Joseph O’Sullivan, *Gov. Inslee vetoes Legislature’s controversial public-records bill*, SEATTLE TIMES (Mar. 1, 2018), <http://bit.ly/2QnpZAK> (“The veto marks a stunning turnaround since . . . legislators voted overwhelmingly to pass the bill that would have exempted the Legislature from the Public Records Act.”). Renewed legislative efforts are now underway to explicitly cover the legislature under the FOI law while adding a “permanent exemption” for records revealing its deliberative process. *See* S.B. 5784, 66th Leg., Reg. Sess. (Wash. 2019); Jessie Gomez, *Washington state to see second bill extending public records act to legislators*, MUCKROCK (Feb. 8, 2019), <http://bit.ly/2EQA7hU>.

⁵¹ *Associated Press*, slip op. at 11–12; *see also* WASH. REV. CODE ANN. § 45.26.010(3).

⁵² WIS. STAT. ANN. § 19.35(1).

⁵³ *Id.* § 19.32(2).

⁵⁴ *Id.* § 19.32(1).

⁵⁵ *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenback*, 848 N.W.2d 862, 866 (Wis. Ct. App. 2014).

2. *Implied Access Based on the Definition of a “Public Record”*

In two states, the relevant analysis turns on the type of record at issue, rather than the entities covered by the open records law. The Maryland Public Information Act, for example, provides access to “public record[s],” a term that includes “any documentary material that is made [or received] by a unit or instrumentality of the State . . . in connection with the transaction of public business[.]”⁵⁶ The Maryland Court of Appeals has held that the “Act applies to ‘public records,’ not ‘agency records.’”⁵⁷ Thus, “[t]he coverage of the Act is dependent upon the scope of the term ‘public records,’ and not upon whether the governmental entity holding the records is an ‘agency’ rather than some other type of governmental entity.”⁵⁸ The Maryland Attorney General also has determined that the Act “covers virtually all public agencies or officials in the State . . . includ[ing] all branches of State government – legislative, judicial, and executive . . . [although] [t]he Maryland courts have not definitively addressed the status of records of individual legislators, many of which are covered by constitutional privileges.”⁵⁹

The Tennessee Public Records Act similarly provides access to “all documents, papers, letters . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]”⁶⁰ Because the statute does not provide a definition of “governmental entity,” courts have focused on whether the information at issue was made or received while transacting “official business.”⁶¹ The Tennessee Office of the Attorney General, for its part, has advised that “[a]ny [state legislator’s] e-mail that meets this

⁵⁶ MD. CODE ANN., GEN. PROVIS. § 4-101(j)(1)(i).

⁵⁷ *Office of Governor v. Wash. Post Co.*, 759 A.2d 249, 257 (Md. 2000).

⁵⁸ *Id.*

⁵⁹ OFFICE OF THE ATT’Y GEN., MD., MARYLAND PUBLIC INFORMATION ACT MANUAL at 1-2, 1-4 (2015), *available at* <http://bit.ly/2ietGta>.

⁶⁰ TENN. CODE ANN. § 10-7-503(a)(1)(A)(i).

⁶¹ *See, e.g., Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991) (holding that a state representative’s handwritten notes were public records because they “were received by the Knoxville Police Department in connection with the transaction of official business.”).

definition, therefore, would be a public record subject to public inspection under the statute, unless otherwise provided by state law.”⁶² The Tennessee FOI statute also provides specific exemptions for certain legislative records, thereby strengthening the conclusion that the legislature, as a whole, is covered by the open records law.⁶³

3. *Implied Access Based on Statutory Exemptions Unique to the Legislature*

In states where an open records law does not explicitly cover the legislature, references to other provisions in the FOI statute can provide helpful guidance in interpreting the law. In at least six states, the presence of exemptions for certain—but not all—legislative records counsels in favor of determining that the legislature is covered by the open records law.

In South Carolina, “a person has a right to inspect, copy, or receive . . . any public record of a public body[.]”⁶⁴ A “public body” includes “any department of the State, . . . any state board, commission, agency, and authority, any public or governmental body, . . . or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds[.]”⁶⁵ Although this language by itself does not explicitly include or exclude the legislature, the available exemptions set forth in the FOI law counsel that the legislature is covered.⁶⁶ These exemptions, applying to only a specific set of documents, would be superfluous if the legislature—or, at least, the offices of individual legislators—were not considered a “public body.” Pending legislation that would expand the scope of the legislative exemption to include more deliberative work product further reinforces the point.⁶⁷ Relatedly, the South Carolina Attorney General’s Office has “concluded that Legislative Delegations are ‘public bodies’ for purposes of the FOIA

⁶² Tenn. Att’y Gen. Op. No. 05-099 (June 20, 2005).

⁶³ See TENN. CODE ANN. § 3-10-108 (providing exemptions for legislative computer systems).

⁶⁴ S.C. CODE ANN. § 30-4-30(A)(1).

⁶⁵ *Id.* § 30-4-20(a).

⁶⁶ *Id.* § 30-4-40(a)(8) (exempting “memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs[.]”).

⁶⁷ See H.B. 3259, 123d Leg., Reg. Sess. (S.C. 2019).

and, thus, the provisions of the Act apply to such entities.”⁶⁸ The Attorney General “also [has] concluded that the possession of public records by a Legislative Delegation triggers the applicability of the FOIA and causes . . . records to be disclosed insofar as is possible.”⁶⁹

In Wyoming, the public enjoys access to “any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business[.]”⁷⁰ The legislature falls within that definition because the public is disallowed access “to audits or investigations of state agencies performed by or on behalf of the legislature or legislative committees.”⁷¹

The definition of a “public record” under the Maine Freedom of Access Act provides two types of “exemptions” that, by negative inference, demonstrate why the legislature must be covered. First, the Act provides a special condition for the release of “legislative papers and reports,” which are to be “signed and publicly distributed in accordance with legislative rules.”⁷² Second, it exempts “records, working papers, drafts and interoffice and intraoffice memoranda used or maintained . . . to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees” during the current legislation session, the session in which the records are “prepared or considered,” or the session into which they are “carried over.”⁷³

⁶⁸ Letter from Paul Koch, Assistant Att’y Gen., Office of the Att’y Gen., S.C., to Hon. Ronald P. Townsend, Chairman, Anderson Cty. Legislative Delegation, at 2 (Oct. 7, 1998) (citing S.C. Att’y Gen. Op. (Sept. 6, 1984)), *available at* <http://bit.ly/2mnPWFm>.

⁶⁹ *Id.* (citing S.C. Att’y Gen. Op. (Oct. 6, 1993)).

⁷⁰ WYO. STAT. ANN. § 16-4-201(a)(v). Interestingly, pending legislation would simply this provision and redefine “public records” as “any information . . . created, accepted, or obtained by a *governmental entity* in furtherance of its official function and transaction of public business[.]” S.B. 57, 56th Leg., Gen. Sess. (Wyo. 2019).

⁷¹ WYO. STAT. ANN. § 28-8-113(a).

⁷² ME. REV. STAT. ANN. tit. 1, § 402(3)(C).

⁷³ *Id.*

Three other states, which already have been addressed—*viz.*, Nebraska,⁷⁴ North Dakota,⁷⁵ and Tennessee⁷⁶—also have statutory exemptions that meaningfully inform whether the legislature is covered under their respective open records laws.

II. A MINORITY OF STATES EXCLUDE ACCESS TO LEGISLATIVE RECORDS

Only twelve states exclude their legislature from their FOI statute.⁷⁷ Eight of those states do so in explicit terms.⁷⁸ In Hawaii, for example, an “agency” includes “each state or county board, commission, department, or office . . . *except* those in the legislative or judicial branches.”⁷⁹ Oklahoma likewise excludes the “Legislature” and “legislators” from its definition of a “public body” whose records are subject to disclosure.⁸⁰

New York presents something of an odd case. The state FOI statute defines an “agency” to “mean[] any state or municipal . . . governmental entity,” but there is an exclusion for “the judiciary [and] the state legislature.”⁸¹ Special provisions impose a more limited disclosure regime on the legislature, insofar as legislative leadership is required to “promulgate rules and regulations . . . *in conformity with the provisions of* [the FOI Law], pertaining to the availability, location and nature” of certain enumerated types of records.⁸² More generally, New York law directs the legislature to make various records reflecting formal business (*e.g.*, records of votes, committee reports, and other sorts of legislative history) available for public inspection and copying.⁸³ There

⁷⁴ See *supra* notes 37–38 and accompanying text.

⁷⁵ See *supra* notes 44–45 and accompanying text.

⁷⁶ See *supra* note 63 and accompanying text.

⁷⁷ See App. Table 5.

⁷⁸ These states include Arkansas, California, Hawaii, Kansas, Mississippi, New York, Oklahoma, and Oregon.

⁷⁹ HAW. REV. STAT. ANN. § 91-1 (emphasis added).

⁸⁰ OKLA. STAT. ANN. tit. 51, § 24a.3(2).

⁸¹ N.Y. PUB. OFF. LAW § 86(3).

⁸² *Id.* § 88(1) (emphasis added); see also *Polokoff-Zakarin v. Boggess*, 62 A.D.3d 1141, 1142 (N.Y. App. Div. 2009) (“While FOIL, as it applies to agencies, is based on a presumption of access such that all records are available to the public unless they fall within a specific statutory exception . . . , the Legislature is only obligated to disclose records that fall within a specifically enumerated category.”).

⁸³ N.Y. PUB. OFF. LAW § 88(2)–(3).

have been attempts in recent years to repeal this limited proactive disclosure regime for legislative records and expand the definition of an “agency” under the New York FOI law to include the state legislature in explicit terms, and thereby subject it to the regular FOI law.⁸⁴

Four additional states—Alaska, Georgia, Massachusetts, and Minnesota—exclude the legislature by implication or judicial decision. Under the Alaska Public Records Act, for example, an “agency . . . means . . . [any entity] created under the executive branch of the state government[.]”⁸⁵ As the legislature is not a creature of the “executive branch” it cannot be subject to the FOI statute.

In Minnesota, the only legislative-related records subject to disclosure appear to be “long-distance telephone bills paid for by the state or a political subdivision, including those of representatives, senators, . . . and employees thereof[.]”⁸⁶ Current and previous efforts to expand the reach of Minnesota’s open records law to include the legislature may provide helpful, if non-authoritative, clarification about the proper reading of the law, too.⁸⁷

Massachusetts is one of two states that has relied on judicial interpretation of the term “agency” to categorically exclude the legislature. The Massachusetts Public Records Act mandates access to a “public record [if it] is within the possession, custody or control of [an] agency or municipality[.]”⁸⁸ In *Westinghouse Broadcasting Co. v. Sergeant-At-Arms of the General Court of Massachusetts*, the Supreme Judicial Court addressed the scope of term “agency” and held that the “Legislature is not one of the instrumentalities enumerated” because “[i]t is not

⁸⁴ See, e.g., S.B. 7510, 202d Leg., Reg. Sess. (N.Y. 2018); see also A.B. 9510, 202d Leg., Reg. Sess. (N.Y. 2018); S.B. 4584, 202d Leg., Reg. Sess. (N.Y. 2018); S.B. 2010, 202d Leg., Reg. Sess. (N.Y. 2017); A.B. 3010, 202d Leg., Reg. Sess. (N.Y. 2017).

⁸⁵ ALASKA STAT. ANN. § 40.21.150.

⁸⁶ MINN. STAT. ANN. § 10.46.

⁸⁷ See S.B. 1142, 91st Sess. (Minn. 2019); H.B. 1065, 90th Sess. (Minn. 2018); H.B. 2954, 90th Sess. (Minn. 2018); S.B. 1393, 90th Sess. (Minn. 2017).

⁸⁸ MASS. GEN. LAWS ANN. ch. 66, § 10(a)(ii) (emphasis added).

an ‘agency, executive office, department, [etc.] . . . ’ within the meaning of [the statute].”⁸⁹ The court wrote that, although the legislature could be conceived of as a “department” of the state government, the use of that term, in context, “has a much more restricted meaning.”⁹⁰

Notwithstanding that ostensibly straightforward reasoning, a closer examination of *Westinghouse* suggests that the holding did not turn on whether the Massachusetts General Court—that is, the state legislature—was an “agency” or a “department.” The court paid close attention to the fact that the Public Records Act “specifically exempt[ed] the *records* of the” legislature *in toto*.⁹¹ In other words, to borrow the language of the Massachusetts FOI statute, the Act simply did “not apply to the records of the general court[.]”⁹² Thus, the exclusion of the legislature may have depended less on a context-bound construction of the term “agency” than it did the consideration of statutory exemptions.

Georgia is the only other state to have excluded the legislature based on a judicial interpretation of its open records law. Under the Georgia FOI statute, “public records” are defined as anything prepared, maintained, or received by an “agency.”⁹³ An “agency,” in relevant part, includes “every state department, agency, board, bureau, office, commission, public corporation, and authority.”⁹⁴ Despite this broad language, a state trial court recently ruled, in *Institute for Justice v. Kemp*, that the Georgia Open Records Act did not apply to the legislative branch, “including the General Assembly and its subordinate committees and offices,” because the legislature did not qualify as a “department.”⁹⁵ In reaching that conclusion, the *Kemp* court looked

⁸⁹ 375 N.E.2d 1205, 1208 (Mass. 1978).

⁹⁰ *Id.*

⁹¹ *Id.* (emphasis added).

⁹² MASS. GEN. LAWS ANN. ch. 66, § 18.

⁹³ GA. CODE ANN. §§ 50-18-71(a), 50-18-70(b)(2).

⁹⁴ *Id.* § 50-14-1-(a)(1).

⁹⁵ *Institute for Justice v. Kemp*, No. 2016-281578, slip op. at 7 (Ga. Fulton Cty. Sup. Ct. Sept. 21, 2017).

to the settled meaning of “department” in the definition of an “agency” under the Georgia Open Meetings Act.⁹⁶

There is one aspect of the Georgia FOI law, and the *Kemp* decision, worth examining further. At the time the *Kemp* court issued its decision, the Georgia Open Records Act included two “exceptions” for various legislative records. The first of these provisions, which has since been removed by the General Assembly, exempted records from a series of legislative offices, including the Legislative and Congressional Reapportionment Office, the Senate Research Office, and the House Budget and Research Office.⁹⁷ The second provision, which is still in force, exempts certain records from the Office of Legislative Counsel.⁹⁸ All of the foregoing offices were—and still are—contained within the legislative branch. But the *Kemp* court decided against drawing any meaningful inference from the existence of these exemptions. It did so on rather conclusory, and questionably coherent, grounds:

[The exemptions] do not demonstrate that the legislative branch is subject to the Open Records Act. Instead, these exemptions affirm that because the legislature has explicitly enacted rules about which documents/records are subject to disclosure and when, the Open Records Act does not apply to the General Assembly.⁹⁹

As addressed above, no other state has interpreted its FOI statute to exclude legislative records as a whole when the open records law provides exemptions limited to specific legislative offices or types of legislative records. Instead, the presence of such exemptions has been understood to imply that legislative records, as a general matter, are subject to public disclosure. In other words, if legislative records were categorically excluded, individual exemptions that applied only to *some* legislative records would make no sense in the broader statutory scheme.

⁹⁶ *Id.* (citing *Coggin v. Davey*, 211 S.E.2d 708, (Ga. 1975)).

⁹⁷ See GA. CODE ANN. § 50-18-72(a)(12) (2017).

⁹⁸ *Id.* § 28-4-3.1; cf. GA. CODE ANN. § 50-18-75 (2016).

⁹⁹ *Kemp*, slip op. at 10. The court also mentioned internal legislative procedures for records management. *Id.*

The exclusion of the legislature from the scope of the Georgia FOI statute is not yet settled precedent. The *Kemp* decision is currently on appeal, and it is likely to reach the Georgia Supreme Court.¹⁰⁰ In the view of the authors, the *Kemp* court likely misread the law.¹⁰¹ Interpreting the broad definition of “agency” and “department” to include the legislature is consistent with the overarching purpose of Georgia’s FOI statute, which is to foster “open government” and to limit the withholding of records on strict, enumerated terms.¹⁰² Further, the Open Records Act itself demands that its terms “be broadly construed to allow the inspection of governmental records.”¹⁰³

Finally, from an analytical perspective and regardless of the merits of *Kemp*, interpretation of the Georgia FOI statute to exclude all legislative records deviates from the clear trend in the interpretation of other state FOI laws. At least nine states have adopted open records statutes that employ expansive terms when defining an “agency”—including “department” and “authority”—and in each instance the legislature has been understood to be impliedly covered. Massachusetts is an exception, but even then, the relevant precedent seems to rely on the presence of a categorical statutory exclusion for legislative records. The more limited exemptions found in the Georgia Open Records Act, on the other hand, are akin to those found in the six states where the presence of such exemptions have counseled in favor of interpreting the FOI law to cover the legislature.

III. LEGISLATIVE RECORDS UNDER THE FEDERAL FREEDOM OF INFORMATION ACT

The federal FOIA provides access to records of an “agency,” a defined term in the statute, thereby limiting the scope of its application. That definition begins by cross-referencing the

¹⁰⁰ See *Institute for Justice v. Reilly*, No. A19A0076 (docketed Ga. Ct. App. July 30, 2018).

¹⁰¹ The authors filed an *amicus* brief with the court considering the appeal from *Kemp* presenting the findings of the survey presented herein. See Br. of *Amicus Curiae* Cause of Action Inst., *Inst. for Justice v. Reilly*, No. A19A0076 (Ga. Ct. App. filed Oct. 23, 2018), available at <https://coainst.org/2Hfo0Nz>.

¹⁰² GA. CODE ANN. §§ 50-18-70, 50-18-71(a).

¹⁰³ *Id.* § 50-18-70(a).

Administrative Procedure Act (“APA”) and provides a seemingly exhaustive list of FOIA-subject entities, including:

any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]¹⁰⁴

Although the legislative branch is not mentioned, the cross-referenced section of the APA fills out the gap by further defining an “agency” to “mean[] each authority of the Government.”¹⁰⁵ “Congress” is the first exclusion from that definition.¹⁰⁶ Federal courts have confirmed that Congress,¹⁰⁷ its components (*e.g.*, congressional committees),¹⁰⁸ and individual legislators¹⁰⁹ are all outside the FOIA’s definition of an “agency.” But this seemingly total exclusion does not resolve all questions about using the FOIA to access records of the legislative branch.

A. The Problem of Legislative Branch Agencies

The scope of the FOIA becomes somewhat more complicated when the question turns from whether Congress is subject to the statute to the proper treatment of *legislative branch agencies*. Sources vary in the precise number of such agencies; one government source indicates that there are approximately twenty.¹¹⁰ Legislative branch agencies are tasked with aiding Congress in its legislative capacity, but without “execut[ing] law” or exercising “authority.”¹¹¹ Examples include

¹⁰⁴ 5 U.S.C. § 552(f)(1).

¹⁰⁵ *Id.* § 551(1).

¹⁰⁶ *Id.* § 551(1)(A).

¹⁰⁷ See *Dunnington v. Dep’t of Def.*, No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) (“Neither branch of Congress is an executive agency subject to FOIA.”).

¹⁰⁸ See *Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990) (rejecting argument that U.S. House of Representatives Ethics Committee qualified as an “agency” under the FOIA for Exemption 5 purposes).

¹⁰⁹ See *Owens v. Warner*, No. 93-5415, 1994 WL 541335, at *1 (D.C. Cir. 1994) (*per curiam*) (“[The FOIA’s] requirements do not apply to records maintained by members of Congress.”).

¹¹⁰ See *Legislative Branch Agencies*, USA.GOV, <http://bit.ly/2CidMrU> (last visited Mar. 18, 2019).

¹¹¹ *Cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

the Congressional Budget Office, the Government Accountability Office, and the Library of Congress.

Courts that have addressed the status of legislative branch agencies routinely determine that they are *not* subject to the FOIA. For example, in *Mayo v. U.S. Government Printing Office*, the U.S. Court of Appeals for the Ninth Circuit held that the Government Printing Office (“GPO”) was excluded from the definition of an “agency” under the FOIA because it was “a unit of Congress.”¹¹² The circuit rejected the suggestion that “Congress,” as used in the APA, could have referred “merely” to “the two houses of Congress.”¹¹³ Instead, “[j]ust as the [FOIA] exclude[s] . . . not only the courts themselves but the entire judicial branch, so the entire legislative branch has been exempted[.]”¹¹⁴

In *Kissinger v. Reporters Committee for Freedom of the Press*, the Supreme Court noted in passing that the Library of Congress was not an “agency” for purposes of the FOIA.¹¹⁵ Interestingly, the district court below explained that the Library could, in some instances, be treated as an “executive agency” for purposes of requiring the government to provide back pay because of unjustified personnel actions.¹¹⁶ But, in the context of the FOIA, the statutory definition of an “agency,” with its cross-reference to the APA, was controlling.

The Library of Congress, however, is an interesting and complicated case. Although courts tend to take a categorical view towards legislative branch agencies, including the Library of

¹¹² 9 F.3d 1450, 1451 (9th Cir. 1993).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 445 U.S. 136, 145 (1980); see *Ethnic Emps. of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985).

¹¹⁶ *Reporters Comm. for Freedom of the Press v. Vance*, 442 F. Supp. 383, 385 n.5 (D.D.C. 1977) (citing 5 U.S.C. § 5596).

Congress,¹¹⁷ that categorical approach can sometimes break down. For example, as set forth in its regulations, the Library of Congress has devised its own disclosure regime, which “follows the spirit” of the FOIA.¹¹⁸ That policy does not provide any legal right of action, and therefore bypasses judicial review, but it does create an administrative appeals process.¹¹⁹ (Other legislative branch agencies have done the same.¹²⁰) Yet the Copyright Office—a “service” component of the Library of Congress¹²¹—*does* qualify as an “agency” under the FOIA,¹²² despite some courts having intimated otherwise.¹²³

The case law is hardly illuminating when it comes to determining why courts have not developed a more nuanced approach to legislative branch agencies. In one lawsuit, which concerned the status of the GPO, a district court denied the government’s motion to dismiss for lack of subject matter jurisdiction and explained that it lacked the facts to make an “informed decision” about the GPO’s “organizational arrangements.”¹²⁴ “Sorting out the ‘organizational arrangements’ of the GPO,” the court reasoned, would “be vital to determining its status within the federal government and thus its coverage under FOIA.”¹²⁵ The court, in other words, was unwilling to accept the mere fact that the GPO was situated within the “legislative branch” as

¹¹⁷ See *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (“[W]e have interpreted the APA exemption for ‘the Congress’ to mean the entire *legislative* branch. . . . Thus, we have held that the Library of Congress (part of the legislative branch but a separate entity from ‘the Congress,’ narrowly defined) is exempt[.]”).

¹¹⁸ 36 C.F.R. § 703.1; see generally *id.* subpt. A (“Availability of Library of Congress Records”).

¹¹⁹ *Id.* § 703.6(g)–(h).

¹²⁰ See, e.g., 4 C.F.R. pt. 81 (similar disclosure procedures for records of the Government Accountability Office).

¹²¹ 36 C.F.R. § 703.1(b).

¹²² See 37 C.F.R. pt. 203; see also *Freedom of Information Act (FOIA) Records*, U.S. COPYRIGHT OFFICE, <http://bit.ly/2UvXh2v> (last visited Mar. 18, 2019).

¹²³ See, e.g., *Mayo*, 839 F. Supp. at 700 (explaining that “‘quasi-congressional bodies and institutes,’ such as . . . the Copyright Office . . . are exempt from the FOIA” (citation omitted)).

¹²⁴ *Cong. Info. Serv., Inc. v. U.S. Gov’t Printing Office*, No. 86-3408, 1987 WL 9509, at *1 (D.D.C. Apr. 7, 1987) (“As a leading commentator on FOIA has noted, ‘[c]ourts trying to define coverage of the *agency* term are confronted constantly with the “myriad organizational arrangements for getting the business of the government done.”’” (citation omitted)).

¹²⁵ *Id.*

sufficient to exclude it from the definition of an “agency”; an examination of the functions and responsibilities of the GPO was necessary.

This sort of “functional” approach to construing the term “agency” is similar to the tests that the U.S. Court of Appeals for the District of Columbia Circuit has developed for determining whether offices within the Executive Office of the President (“EOP”) are subject to the FOIA. Those tests pose various inter-related questions: Is the EOP entity composed of the “President’s immediate personal staff” or is its “sole function . . . to advise and assist the President”?¹²⁶ Does it “exercise[] substantial independent authority”?¹²⁷ Does it have a “self-contained structure,” or is it “operationally close” to the President?¹²⁸ What is the nature of the entity’s authority—is it delegated by the President or granted by Congress?¹²⁹ Does it issue “guidelines to federal agencies” or “regulations . . . implementing” a statute?¹³⁰ As the D.C. Circuit once explained, “[h]owever the test has been stated, common to every case in which [it] h[as] held that an EOP unit is subject to FOIA has been a finding that the entity in question ‘wielded substantial authority independently of the President.’”¹³¹

It is unclear whether a more rigorous application of a “functional” test in the rare cases dealing with legislative branch entities would have resulted in different outcomes. And such a test may not create a meaningful change in FOIA law moving forward. But it is possible to imagine that, at least in some instances, legislative branch agencies *do* conduct their business without the direct oversight of Congress and in a way that impacts the functioning of the rest of the

¹²⁶ *Kissinger*, 445 U.S. at 156.

¹²⁷ *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996); see *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1042 (D.C. Cir. 1985).

¹²⁸ *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993).

¹²⁹ See *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978); *Soucie v. David*, 448 F.2d 1067, 1073–75 (D.C. Cir. 1971).

¹³⁰ *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980).

¹³¹ *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) (citation omitted).

government. In those situations, the FOIA should apply to guarantee public access to the entity's records. The typical concerns about revealing the legislature's internal deliberative processes are hardly implicated, and neither are the constitutional concerns present when considering records created by individual legislators and their office staffs. Given the current state of the jurisprudence, however, this result will likely need to be achieved through congressional amendment of the FOIA.

B. Congressional Records and the Agency Control Test

In most cases, FOIA requesters will not deal with the foundational question of whether a government entity, such as a legislative branch agency, is subject to the FOIA. Instead, the fight between the government and requester will be over the status of records maintained by a FOIA-subject "agency," but which were either obtained from the legislative branch or created or compiled in response to a congressional inquiry or records request. A careful reading of the relevant case law in this area shows that courts take seriously their obligation to construe the FOIA narrowly and to presume that government records are disclosable when maintained or controlled by an agency. In that respect, there is a strong parallel with the trends at the state level identified in Section I above.

The mere fact that a record relates to the legislative branch, was created by the legislative branch, or was transmitted by an agency to the legislative branch does not, by itself, render it a congressional record outside the scope of the FOIA. Instead, its status as an "agency record," and its availability under the FOIA, is dependent upon two factors. *First*, the agency that maintains the record must have "either create[d] or obtain[ed]" it.¹³² *Second*, the agency must have "control" of the record "at the time [a] FOIA request is made."¹³³ "Control" is typically analyzed with the four-factor *Burka* test, which examines:

¹³² *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989) (citation omitted).

¹³³ *Id.* at 145.

(1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record systems of files.¹³⁴

With purported congressional records, however, the first two *Burka* factors are dispositive because they speak to “whether Congress manifested a clear intent to control the document.”¹³⁵ This is known as the “modified control test.”¹³⁶

Under the modified control test, records are considered “congressional” in nature, and thus outside the scope of the FOIA, when there has been some “affirmatively expressed intent” on the part of the legislative branch to control the documents.¹³⁷ That can be accomplished through “*contemporaneous and specific* instructions” limiting an agency’s use or disclosure of records,¹³⁸ or the legislative branch can provide instructions particular to records prior to their creation.¹³⁹ Taken together, these requirements address the first two *Burka* factors: (1) Congress’s intent to retain or relinquish control, and (2) an agency’s ability to use or dispose of records as it sees fit.

The D.C. Circuit—the court primarily responsible for the development of the modified control test—has held that, “[i]n the absence of any manifest indications that Congress intended to exert control over documents in an agency’s possession,” one should conclude that the documents

¹³⁴ *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (citation omitted).

¹³⁵ *United We Stand Am., Inc. v. Internal Revenue Serv.*, 359 F.3d 595, 597 (D.C. Cir. 2004) [hereinafter *United We Stand*]; see also *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983) (“[E]xplicit focus on Congress’ intent to control (and on the agency’s) reflects those special policy considerations which counsel in favor of according due deference to Congress’ affirmatively expressed intent to control its own documents.”), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984).

¹³⁶ See generally *Cause of Action v. Nat’l Archives & Records Admin.*, 753 F.3d 210, 214–15 (D.C. Cir. 2014) (declining to apply *Burka* factors when congressional entities transfer records to the National Archives and Records Administration, a FOIA-subject agency, for storage and preservation).

¹³⁷ *Paisley*, 712 F.2d at 693, 693 n.30.

¹³⁸ *Id.* at 694; see also *Holy Spirit Ass’n for the Unification of World Christianity v. Cent. Intelligence Agency*, 636 F.2d 838, 843 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982).

¹³⁹ See *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 823 F.3d 655, 666–67 (D.C. Cir. 2016) [hereinafter *ACLU*], *cert. denied*, 137 S. Ct. 1837 (2017).

are “agency records.”¹⁴⁰ If sufficient indicia suggest that the legislative branch intended to retain only *some* control, records can still be disclosed after being redacted to protect the substance of any confidential congressional matters.¹⁴¹

The decisions leading up to the D.C. Circuit’s most recent treatment of the “congressional record” issue illustrate a developing appreciation for the foregoing principles and a recognition that congressional intent must be indicated in a specific, non-generalized manner. For example, in the earliest case of *Goland v. Central Intelligence Agency*, the court concluded that a congressionally-created transcript was not subject to the FOIA because of “the circumstances attending [its] generation and the conditions attached to its possession” by an agency,¹⁴² thus highlighting the importance of a specific and pre-established manifestation of congressional intent to retain control of records later possessed by executive branch agencies.

Later, in *Holy Spirit Ass’n v. Central Intelligence Agency*, the court held that the exemption from disclosure could “be lost” if Congress did not appropriately “designate[] the documents as falling within [its] control.”¹⁴³ Records could not be exempt based simply on some “general characterization” that they were “confidential,” and non-specific testimony concerning the conditions under which they were transferred to an agency would be insufficient to demonstrate otherwise.¹⁴⁴ As for documents created or compiled by an agency and sent to Congress in response to an official inquiry, the court determined that those records could “los[e] their exemption . . . [if] Congress failed to retain control” upon returning them without further instruction.¹⁴⁵

¹⁴⁰ *Paisley*, 712 F.2d at 692–93.

¹⁴¹ *United We Stand*, 359 F.3d 595, 601 (D.C. Cir. 2004) (citation omitted); *see also Holy Spirit*, 636 F.2d at 841 n.3.

¹⁴² 607 F.2d 339, 347 (D.C. Cir. 1978).

¹⁴³ 636 F.2d at 841.

¹⁴⁴ *Id.* at 841–42. The court also rejected a letter from the Clerk of the House of Representatives, “which objected to the release of any portion of the . . . documents,” but which was written “as a result of the FOIA request and th[e] litigation[.]” *Id.* at 842 (citations omitted).

¹⁴⁵ *Id.* at 843.

In *Paisley v. Central Intelligence Agency*, the D.C. Circuit required that Congress intend to control or restrict an agency's use of records contemporaneous with their transfer.¹⁴⁶ In doing so, the court discussed the importance of “external indicia of control or confidentiality,”¹⁴⁷ and it rejected an attempt to rely, among other things, on a “pre-existing agreement” of blanket confidentiality.¹⁴⁸ As for agency-created records, the *Paisley* court was careful to examine whether the connection between those records and Congress was “too insubstantial and commonplace to establish congressional control,” especially given the danger of designing a test that would exempt “a broad array of materials otherwise clearly categorizable as agency records, thereby undermining the spirit of broad disclosure that animates the [FOIA].”¹⁴⁹

United We Stand America, Inc. v. Internal Revenue Service involved a directive appended to the end of a Joint Committee on Taxation (“JCT”) oversight request, which indicated that “[t]his document is a Congressional record and is entrusted to the [agency] for [its] use only. This document may not be disclosed without the prior approval[.]”¹⁵⁰ The court held that the “limited scope of the confidentiality directive” was insufficient to cover the agency’s prepared responses to the JCT inquiry.¹⁵¹ Moreover, the *United We Stand* court refused to accept the agency’s internal policy on the confidentiality of congressional communications as dispositive, and it could not accept the “far too general,” albeit “consistent course of dealing,” that the agency claimed as a sort of “pre-existing agreement” for legislative-branch control of records.¹⁵²

¹⁴⁶ 712 F.2d at 694 (“The Government points to no *contemporaneous* and *specific* instructions from the SSCI to the agencies limiting either the use or disclosure of the documents.”).

¹⁴⁷ *Id.* at 694.

¹⁴⁸ *Id.* at 694–95 (citation omitted). The court also rejected reliance on a letter from the SSCI that was “too general and sweeping to provide sufficient proof, when standing alone, of a specific intent to transfer” the particular records at issue “for a ‘limited purpose and on condition of secrecy.’” *Id.* at 695 (citing *Goland*, 607 F.2d at 348 n. 48).

¹⁴⁹ *Id.* at 696.

¹⁵⁰ *Id.* (“If the [JCT] intended to keep confidential not just ‘this document’ but also the IRS response, it could have done so by referring to ‘this document and all IRS documents created in response to it.’” (citation omitted)).

¹⁵¹ *Id.* at 600–01.

¹⁵² *Id.* at 601–02.

In its most recent congressional records decision, *American Civil Liberties Union v. Central Intelligence Agency*, the D.C. Circuit determined that a congressional report was a legislative record, despite its transmission to the executive branch, because the SSCI had explicitly and “unambiguously” indicated that records generated during its investigation would be “property of the Committee” and indefinitely “remain congressional records in their entirety[.]”¹⁵³ Even in the absence of a “secret” marking or legend on the records themselves, the existence of a detailed letter created at the outset of the investigation, and prior to the creation and dissemination of the report, was sufficiently clear to indicate congressional intent to retain control.¹⁵⁴ Nevertheless, the court explained that such intent could be “overcome” if there were evidence that “Congress subsequently acted to vitiate [its] intent to maintain exclusive control over the documents[.]”¹⁵⁵

* * *

To summarize, the case law described above establishes the requisite indicia of congressional intent to retain control of records acquired by agencies within the “legitimate conduct of [their] official duties.”¹⁵⁶ In all cases, the legislative branch must manifest its intent clearly and with specific language particular to the records at issue.¹⁵⁷ Neither Congress (or its components or agencies) nor agencies can rely on general, far-reaching, and pre-existing arrangements.¹⁵⁸ Post-hoc attempts to establish intent for control after the filing of a FOIA request or after the beginning of litigation also are inadequate.¹⁵⁹ The legislative branch must instead establish its intent to maintain control over records before they are created,¹⁶⁰ or contemporaneous

¹⁵³ 823 F.3d at 655; *id.* at 658 (citation omitted).

¹⁵⁴ *Id.* at 665.

¹⁵⁵ *Id.* at 664.

¹⁵⁶ *Tax Analysts*, 492 U.S. at 145.

¹⁵⁷ *Paisley*, 712 F.2d at 692–93.

¹⁵⁸ *United We Stand*, 359 F.3d at 601–602; *Holy Spirit*, 636 F.2d at 841.

¹⁵⁹ *United We Stand*, 359 F.3d at 601–02; *Holy Spirit*, 636 F.2d at 842.

¹⁶⁰ *ACLU*, 823 F.3d at 665.

with their transfer to an agency,¹⁶¹ and not act in some subsequent way so as to vitiate that original intent.¹⁶² These principles reflect a developing awareness by the D.C. Circuit of the danger of broadly extending congressional control over legislative branch records that find their way into the hands of agencies. Notwithstanding the limited judicial application of the FOIA to legislative branch agencies, the courts have at least taken seriously the importance of transparency when faced with records reflecting the Congress's dealings with the administrative state and *vice versa*.

CONCLUSION

In an ideal world, FOI statutes would grant access the broadest range of records detailing the operations of government. Regardless of which branch of government created or controls those records, disclosure would have the same disinfecting effect. Increased transparency, as a rule, should lead to greater accountability and better government. But the political and legal reality is hardly straightforward. Many states have adopted FOI laws that permit some basic level of access to legislative records. At times this access is expressly provided, but in other instances it relies on the interpretation of language that only impliedly authorizes requests for records of any “branch” or “authority.” In the cases where states have chosen to exclude the legislative branch, that exclusion is often done with explicit statutory language. The clear trend is to provide access to legislative branch records and, in cases of textual ambiguity, to favor public access.

Under the federal FOIA, Congress, its components, and individual legislators are either explicitly excluded from the definition of an “agency,” or long-standing interpretations of administrative law preclude a pro-disclosure interpretation. The status of legislative branch agencies is more complicated: Some courts have demonstrated interest in rejecting a categorical

¹⁶¹ *Paisley*, 712 F.2d at 694.

¹⁶² *ACLU*, 823 F.3d at 664; *cf. Cause of Action v. Nat'l Archives & Records Admin.*, 926 F. Supp. 2d 182 (D.D.C. 2013), *affirmed on appeal*, 753 F.3d 210 (D.C. Cir. 2014).

approach and adopting a functional test that considers an agency's role and responsibility within the broader scheme of government. In any case, Congress should consider subjecting certain legislative branch agencies to the FOIA. Finally, with respect to the "agency control" test, courts have been careful to avoid an overbroad approach that would threaten to sweep records out of the reach of requesters' hands merely because they reflect an agency's interaction with Congress.

APPENDIX

Table 1: States that expressly cover the legislature

Alabama
“Governmental bod[ies] [include] all boards, bodies, and commissions of the . . . legislative departments . . . ; multimember . . . instrumentalities of the . . . legislative departments . . . ; all quasi-judicial bodies of the . . . legislative departments . . . ; and all standing, special, or advisory committees or subcommittees of, or appointed by, the body[.]” ALA. CODE § 36-25A-2.
Colorado
“Public records means and includes all writings made, maintained, or kept by the state . . . includ[ing] the correspondence of elected officials,” subject to four exemptions. COLO. REV. STAT. ANN. § 24-72-202(6)(a)(II).
Connecticut
“Public agency or agency means: Any executive, administrative or legislative office of the state[.]” CONN. GEN. STAT. ANN. § 1-200(1)(A).
Delaware
“Public body means . . . any regulatory, administrative, advisory, executive, appointive or legislative body of the State[,] . . . [but] shall not include any caucus of the House of Representatives or Senate of the State.” DEL. CODE ANN. tit. 29, § 10002(h).
Florida
“Every person has the right to inspect or copy any public record This . . . specifically includes the legislative . . . branch[] of government[.]” FLA. CONST. art. I, § 24(a).
Idaho
“State agency means every state [entity] . . . including those in the legislative . . . branch[.]” IDAHO CODE ANN. § 74-101(15).
Illinois
“Public body means all legislative, executive, administrative, or advisory bodies of the State[.]” 5 ILL. COMP. STAT. ANN. 140/2 § 2(a).
Indiana
“Public agency . . . means . . . [a]ny [entity] exercising any part of the executive, administrative, judicial, or legislative power of the state.” IND. CODE ANN. § 5-14-3-2(q)(1).
Kentucky
“Public agency means . . . [e]very state or local legislative board, commission, committee, and officer[.]” KY. REV. STAT. ANN. § 61.870(1)(c).
Michigan
“Public body means . . . an agency, board, commission, or council in the legislative branch[.]” MICH. COMP. LAWS ANN. § 15.232(h)(ii).

Missouri
“Public governmental body [includes] any legislative, administrative or governmental entity created by the Constitution or statutes of this state[.]” MO. ANN. STAT. § 610.010(4).
Montana
“Public agency means the executive, legislative, and judicial branches of Montana state government[.]” MONT. CODE ANN. § 2-6-1002(10).
Nevada
“Governmental entity means an elected or appointed officer of this State[.]” NEV. REV. STAT. ANN. § 239.005(5)(a).
New Hampshire
“Public body means any . . . legislative body, governing body, commission, committee, agency, or authority[.]” N.H. REV. STAT. ANN. § 91-A:1-a (VI)(d).
New Jersey
“Public agency or agency means . . . the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch[.]” N.J. STAT. ANN. § 47:1A-1.1.
New Mexico
“Public body means the executive, legislative and judicial branches of state and local governments[.]” N.M. STAT. ANN. § 14-2-6(F).
North Carolina
“Public record . . . shall mean all documents . . . made or received . . . by any agency . . . [which shall] . . . include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority, or other unit of government[.]” N.C. GEN. STAT. ANN. § 132-1(a).
Ohio
“State agency includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including . . . the general assembly, [and] any legislative agency[.]” OHIO REV. CODE ANN. § 149.011(B).
Pennsylvania
“Agency [includes] . . . a legislative agency . . . [which includes, among other entities,] [t]he Senate . . . [and] [t]he House of Representatives[.]” 65 PA. STAT. AND CONS. STAT. ANN. § 67.102.
Rhode Island
“Agency . . . means any executive, legislative, judicial, regulatory, or administrative body of the state[.]” 38 R.I. GEN. LAWS ANN. § 38-2-2(1).
Texas
“Governmental body means a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch . . . and that is directed by one or more elected or appointed members[.]” TEX. GOV’T CODE ANN. § 552.003(1)(A)(i).

Utah
“Governmental entity means . . . the Office of the Legislative Auditor General, Office of the Legislative Fiscal Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative committees, except any political party, group, caucus, or rules or shifting committee[.]” UTAH CODE ANN. § 63G-2-103(11)(a)(ii).
Virginia
“Public body means any legislative body, authority, board, bureau, commission, district or agency[.]” VA. CODE ANN. § 2.2-3701.
West Virginia
“Public body means every state officer, agency, [and] department, including the executive, legislative and judicial departments[.]” W. VA. CODE ANN. § 29B-1-2(4).

Table 2: States that cover the legislature based on the interpretation of terms defining the entities subject to an open records law

Arizona
“Officer means any person elected or appointed to hold any elective or appointive office of any public body[.]” ARIZ. REV. STAT. ANN. § 39-121.01(A)(1).
“Public body means this state . . . [and] any branch, department, board, bureau, commission, council or committee of the foregoing[.]” ARIZ. REV. STAT. ANN. § 39-121.01(A)(2).
Iowa
“Government body means this state . . . or any branch, department, board, bureau, commission, council, committee, official, or office[.]” IOWA CODE ANN. § 22.1(1).
Louisiana
“Public body means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, [or] any other instrumentality of state . . . government[.]” LA. STAT. ANN. § 44:1(A)(1).
“Custodian means the public official or head of any public body having custody or control of a public record, or a representative specifically authorized . . . to respond to requests to inspect any such public records.” LA. STAT. ANN. § 44:1(A)(3).
Nebraska
Granting access to public records of “any agency, branch, department, board, bureau, commission, council, subunit, or committee[.]” NEB. REV. STAT. ANN. § 84-712.01(1).
Exempting “correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature[.]” NEB. REV. STAT. ANN. § 84-712.05(12).

North Dakota
<p>“Public entity means all public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota . . . to exercise public authority or perform a governmental function[.]” N.D. CENT. CODE ANN. § 44-04-17.1(13)(a).</p> <p>“The following records, regardless of form or characteristic, of or relating to the legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly are not subject to [the Open Records Statute]: a record of a purely personal or private nature, a record that is legislative council work product or is legislative council-client communication, a record that reveals the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental entity determining the proper use of telephone service, a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved.” N.D. CENT. CODE ANN. § 44-04-18.6.</p> <p>“Record means recorded information of any kind . . . [but] does not include records in the possession of a court[.]” N.D. CENT. CODE ANN. § 44-04-17.1(16).</p>
South Dakota
<p>“Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.” S.D. CODIFIED LAWS § 1-27-1.1.</p> <p>“The provisions of this chapter do not apply to records and documents of the Unified Judicial System.” S.D. CODIFIED LAWS § 1-27-1.12.</p>
Vermont
<p>“Public agency or agency means any agency, board, department, commission, committee, branch, instrumentality, or authority of the State[.]” VT. STAT. ANN. tit. 1, § 317(a)(2).</p>
Washington
<p>“State agency includes every state office, department, division, bureau, board, commission, or other state agency.” WASH. REV. CODE ANN. § 42.56.010(1).</p>
Wisconsin
<p>“Authority means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order[.]” WIS. STAT. ANN. § 19.32(1).</p>

Table 3: States that cover the legislature based on an interpretation of the definition of a “public record”

Maryland
<p>“Public record means the original or any copy of any documentary material that is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business[.]” MD. CODE. ANN., GEN. PROVIS. § 4-101(j)(1)(i).</p>
Tennessee
<p>“Public record or records or state record or records . . . means all documents, papers, letters . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]” TENN. CODE ANN. § 10-7-503(a)(1)(A)(i).</p> <p>Providing exemptions for access to legislative computer systems. TENN. CODE ANN. § 3-10-108.</p>

Table 4: States that impliedly cover the legislature based on specific statutory exemptions¹⁶³

Maine
<p>Exempting “legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over[.]” ME. REV. STAT., tit. 1, § 402(3)(C).</p>
South Carolina
<p>“Public body means any department of the State, . . . any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, . . . or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body[.]” S.C. CODE ANN. § 30-4-20(a).</p> <p>“A public body may but is not required to exempt from disclosure . . . memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs; however, nothing herein may be construed as limiting or restricting public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information under the provisions of this chapter and not specifically exempted by any other provisions[.]” S.C. CODE ANN. § 30-4-40(a)(8).</p>
Wyoming
<p>“Public records . . . includes any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business[.]” WYO. STAT. ANN. § 16-4-201(a)(v).</p> <p>“The provisions of W.S. 16-4-201 through 16-4-205 [<i>i.e.</i>, the Open Records Act] do not apply to audits or investigations of state agencies performed by or on behalf of the legislature or legislative committees.” WYO. STAT. ANN. § 28-8-113(a).</p>

¹⁶³ North Dakota and Tennessee are not included in this table; relevant statutory citations for these states can be found in Table 2 and Table 3, respectively.

Table 5: States expressly or impliedly excluding the legislature

Alaska
“Agency . . . means . . . [an entity] created under the executive branch of the state government[.]” ALASKA STAT. ANN. § 40.21.150.
Arkansas
“The following shall not be deemed to be made open to the public . . . unpublished memoranda, working papers, and correspondence of . . . members of the General Assembly[.]” ARK. CODE ANN. § 25-19-105(b)(7).
California
“State agency means every state office . . . except those agencies provided for in Article IV [legislature] . . . or Article VI [judiciary] of the California Constitution.” CAL. GOV’T CODE § 6252(f)(1).
Georgia
“Agency means: Every state department, agency, board, bureau, office, commission, public corporation, and authority[.]” GA. CODE ANN. § 50-14-1(a)(1)(A).
Hawaii
“Agency means each state or county board, commission, department, or officer . . . except those in the legislative or judicial branches.” HAW. REV. STAT. ANN. § 91-1.
Kansas
“Public record[s] shall not include . . . records which are made, maintained or kept by an individual who is a member of the legislature[.]” KAN. STAT. ANN. § 45-217(g)(3)(B).
Massachusetts
“A records access officer . . . shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record . . . within the possession, custody or control of the agency or municipality that the records access officer serves[.]” MASS. GEN. LAWS ANN. ch. 66, § 10(a)(ii).
Minnesota
“Government entity means a state agency, statewide system, or political subdivision.” MINN. STAT. ANN. § 13.02, subdiv. 7a. “Long-distance telephone bills paid for by the state or a political subdivision, including those of representatives, senators, . . . and employees thereof, are public data.” MINN. STAT. ANN. § 10.46.
Mississippi
“Within the meaning of [the Mississippi Public Records Act], . . . [an] entity shall not be construed to include . . . any appointed or elected public official.” MISS. CODE ANN. § 25-61-3(a).
New York
“Agency means any state or municipal . . . governmental entity . . . except the judiciary or the state legislature.” N.Y. PUB. OFF. LAW § 86(3) <i>But see</i> N.Y. PUB. OFF. LAW § 88(1)–(2) (Legislative leadership “shall promulgate rules and regulations. . . pertaining to the availability, location and nature of [ten enumerated categories of] records[.]”); <i>see also id.</i> § 88(3).

Oklahoma
“Public body . . . does not mean . . . the Legislature, or legislators[.]” OKLA. STAT. ANN. tit. 51, § 24a.3(2).
Oregon
“State agency . . . does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under . . . the Oregon Constitution.” OR. REV. STAT. ANN. § 192.311.