PRIORITIZING THE PUBLIC’S RIGHT TO KNOW IN A PANDEMIC

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I. INTRODUCTION

More than a hundred years ago, public officials in the United States and abroad sought to downplay the severity of the 1918 pandemic by limiting and softening information provided to the public.1 At a military camp outside Little Rock, the commandant stopped releasing the names of the dead as sick soldiers piled up in corridors and emergency infirmaries.2 In Des Moines, the city attorney warned publishers “that if anything [should] be printed in regard to the disease[,] it [should] be confined to simple preventative measures—something constructive rather than destructive.”3 And in Philadelphia, the public health director claimed the situation was on the mend, even as the disease increasingly ravaged the city.4 When daily deaths surpassed 200, he stated that the “peak of the epidemic has been reached;”5 when that number rose to 300, he remarked that the city was at “the high-water mark.”6 But he wasn’t even close: the city’s daily death toll later crested at more than 750.7

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2. Id. at 335–36.
3. Id. at 336.
5. Id.
6. Id.
7. Id.
Fast forward to 2020, when New York emerged as an early COVID-19 hot spot. Over the course of at least five months, Governor Andrew Cuomo’s office engaged in a “sustained effort to prevent the state’s own health officials . . . from releasing the true death toll” in the state’s nursing homes to the public. A year later, the United States was experiencing one of the most serious and deadly surges in COVID-19 infections, but as cases skyrocketed, the Florida Department of Health altered the way it reported death data to the Centers for Disease Control and Prevention—giving the appearance of a pandemic in decline. As the Miami Herald reported, this “artificial decline”—one of “several, unannounced changes” to the department’s data methodology over the span of the pandemic—made it “difficult to report numbers in a consistent and transparent manner that’s easily understood by the public.”

History, as it is said, may not repeat itself, but it often rhymes. But the current pandemic (unlike its predecessor) has demonstrated that the news media play an essential role in acting as a check on government during national health emergencies. Over the last two years, the news media have been indispensable in obtaining, analyzing, and disseminating information that allows individuals, families, and communities to better navigate an era marked by widespread fear, uncertainty, and misinformation. Public records and open meetings laws, which largely emerged in the mid-twentieth century, have proven to be crucial tools for journalists to gain access to information held by the government—even when disclosing such information proves inconvenient or

10. See, e.g., Sarah Blaskey et al., Data Change Created “Artificial Decline” in Deaths, MIAMI HERALD, Sept. 2, 2021, at 1A.
11. Id. (stating that “Florida death data would have shown an average of 262 daily deaths reported to the CDC over the previous week had the health department used its former reporting system . . . Instead, the Monday update from Florida showed just 46 ‘new deaths’ per day over the previous seven days.”).
12. Id. at 8A.
embarrassing.\textsuperscript{14} As such, the federal Freedom of Information Act ("FOIA"), for instance, has been called a "structural necessity in a real democracy."\textsuperscript{15}

This Article focuses on the evolution of pandemic-related restrictions related to providing government records to the public, chronicling how and when those restrictions have persisted, morphed, and disappeared, and what range of effects these operational states have had on the public’s right to know. It also updates the authors’ prior research that focused on the initial stages of the pandemic,\textsuperscript{16} showing that as communities across the nation obtained access to highly effective vaccines and states’ emergency declarations have steadily lifted, the transparency landscape is brighter than in months past. But compliance with public records laws at both the state and federal levels continues to be influenced by the pandemic, especially with respect to delays in processing requests for records. Using case studies of individual cities, states, and court cases, this article seeks to paint a picture of how access to government documents has fared at various junctures over the past two years.

Finally, in a society constantly rocked by crises, whether with respect to public health, climate change, or civil unrest, this article ends with a call to action that places the principles of transparency and open government at the forefront of any response to a given emergency—rather than being relegated to the sidelines.

I. CONTINUED ENCUMBRANCES ON OPEN GOVERNMENT AS "NORMALCY" RESUMES

As of late 2021, the United States’ transparency landscape is significantly brighter than during the beginning of the pandemic. When modifications to public records laws were at their peak in 2020, one or more of the following laws or policies were present in over two-thirds of U.S. states plus the District of Columbia:

- State legislative bodies voted to modify or suspend portions of their public records laws;

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  \item State legislative bodies voted to modify or suspend portions of their public records laws;
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Governors issued proclamations or executive orders to suspend public records laws or portions thereof; and

Specific agencies or municipalities restricted access to public records.\textsuperscript{17}

Today, fewer than half of U.S. states are exhibiting one or more of these characteristics, a marked improvement.\textsuperscript{18} At the time of this writing, at least twelve states fall within one or more of these categories, a decrease that takes into account the lifting of executive orders that had removed or tolled statutory deadlines for responding to requests, as in Connecticut, Maryland, and Michigan, and the lifting of states of emergencies which served as the basis for suspensions of public records laws, as in Delaware.\textsuperscript{19}

Jurisdictions where modifications are still in place or delays are still reported at the time of this writing include California, Florida, Georgia, Idaho, Massachusetts, New York, Oregon, and Washington, where individual agencies and municipalities are still citing processing delays due to the pandemic.\textsuperscript{20} Additionally, in the District of Columbia, legislation that permitted processing extensions of up to forty-five days, while having expired on October 27, 2021, is still causing delays that are expected to persist through early 2022.\textsuperscript{21} Furthermore, in the spring of 2021, Hawaii’s Office of Information Policy “portend[ed] a . . . situation in which requesters may wait for many years before [public records administrative] appeals can be resolved” due to the suspension of the Uniform Information Practices Act’s deadlines.\textsuperscript{22} In Kentucky, even though the state’s Attorney General stated that the statute’s original deadlines control as of June 29, 2021, agencies are still citing to

\textsuperscript{17} Id. at 203–04.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
legislative changes which had extended those deadlines. Finally, in Rhode Island, inspection of public records remains “at the[] discretion” of the agency.

Despite states and localities easing or lifting restrictions on the processing of requests for government records, the ripple effects from those measures persist. In particular, the backlogs generated by government bodies’ decisions to suspend compliance with public records statutes became formidable. In Texas, the Dallas Independent School District suspended all records requests for seven months, despite the fact that district staff likely could have processed requests for electronic records while working from home. When staff returned to in-person work on October 7, 2020, the school district had a backlog of over 400 records requests. In Washington, D.C., the D.C. Council passed the “COVID-19 Response Emergency Amendment Act of 2020” in March 2020 to allow local agencies to refuse to process D.C. FOIA requests during “days of a COVID-19 closure.” While the Council voted in late 2020 to reinstate the law’s processing deadlines for 2021, the backlog of unanswered FOIA requests had skyrocketed in the interim. According to data obtained by the D.C. Open Government Coalition, the backlog from March to September 2020 grew to approximately 2000 unanswered requests—“double the level” from the previous year.

Even after the termination of a temporary pause or suspension of a state public records law, some government agencies


26. Id.


29. Id.
persisted in citing such temporary measures to delay providing records. In New Jersey, for example, the legislature amended the state’s Open Public Records Act (“OPRA”) to strike its statutory time limits for responding to requests but only in the case of an active state of emergency. While New Jersey’s COVID-19 Public Health Emergency was lifted on June 4, 2021, state agencies continued to automatically invoke the COVID-19 pandemic as a means to delay processing OPRA requests. Similarly, in Kentucky, the legislature passed Senate Bill 150, which lengthened the amount of time that agencies have to respond to requests under the Kentucky Open Records Act during the declared state of emergency. In 2021, when the legislature attempted to terminate the state of emergency by June 28, 2021, it led to “confusion” regarding the continued impact of S.B. 150 on public records processing, prompting the Kentucky Attorney General to issue guidance explaining that the normal statutory provisions of the Open Records Act once again control. Such instances tend to confirm the predictions from some open government advocates that new “policies that ‘harm the free flow of information’” imposed during the public health crisis “are ‘going to be much harder to undo when the crisis starts winding down.’”

While filing a lawsuit usually forces an agency dragging its feet into action, even litigation has not guaranteed positive results during the pandemic. Consider the experience of the Philadelphia Inquirer and its reporter, Samantha Melamed, who sought records from the Philadelphia Police Department in July of 2020, reflecting the names of police officers the department had terminated from duty that year. The Inquirer submitted its Pennsylvania Right to

32. See, e.g., @CJGriffinEsq, TWITTER (July 8, 2021, 10:50 AM), https://perma.cc/P9AQ-CMB7.
35. CAMERON, supra note 23, at 3.
Know Law ("RTKL") request against a backdrop of daily protests in Philadelphia and neighboring cities in support of racial justice and police accountability following the murder of George Floyd by police officer Derek Chauvin in Minneapolis, Minnesota.38

After submission of the request, Melamed was informed by the Philadelphia Police Department that RTKL deadlines were suspended “as part of the City’s plan to assure the continuity of operations and best meet the needs of the citizens of Philadelphia during the period of emergency declarations” that emerged during the pandemic.39—an action which Pennsylvania’s Office of Open Records ("OOR") argued poses a “danger of having a court review their actions at a later day and sanction them for bad faith.”40 In her appeal to the OOR, Melamed explained that the fulfillment of the request

is a time-sensitive matter, as it is the City’s position that those dismissals are no longer public once a fired officer has appealed or entered arbitration . . . Additionally, as the past months of protests over police misconduct and brutality, along with numerous officers being fired or criminally charged, have shown us, this is a matter of profound public interest[].41

Five months later, the OOR determined that the requested records were exempt from disclosure, at which point the Inquirer and Melamed sought judicial review.42 But just before the Department’s legal brief was due to the court—and nearly one year after submission of the records request—the Department lamented it still needed more time to defend its denial of access citing “various priority public safety operations” and that operating at “staggered, half-capacity rotation in the office” had made it “challenging to

39. Certified Record at OOR Exhibit 4, Melamed, No. 01744.
41. Notice of Appeal at Exhibit F, Melamed, No. 01744 (Dec. 29, 2020) (Ms. Melamed’s administrative appeal was filed on July 23, 2020).
42. Id. at Exhibit A, 1, 7.
collect evidence and secure signatures of necessary affiants from the Philadelphia Police Department.”

According to Melamed, these “repeated requests for delays, now a part of almost every Right to Know request involving certain agencies, have become a means to render legislated deadlines meaningless and to prevent the law from enforcing the timely transparency it was designed to ensure.”

As of the writing of this article, the case is still pending without resolution.

It is also not just government officials that are seeking to curtail access to information about the pandemic. In Wisconsin Manufacturers and Commerce v. Evers, a Wisconsin public records case, news media had filed records requests with the Wisconsin Department of Public Health Services seeking documents about state businesses with outbreaks of COVID-19. The department intended to release records containing the names of businesses employing at least twenty-five people, where at least two employees tested positive for COVID-19 or had close contacts that were investigated by contact tracers. However, industry groups, including Wisconsin Manufacturers & Commerce, filed suit to bar the release of those records. Among their reasons for attempting to block disclosure was the claim that disclosure would “sow a scarlet ‘C’” on businesses, causing “irreparable” economic harm.

A coalition of news media groups participated as amici in the case and argued that “[a]ccess to public records that communicate the scope of the coronavirus pandemic’s toll on local communities—including on local businesses—will educate and inform Wisconsinites as they make decisions about daily life during the pandemic, and evaluate the performance of government officials in response to the novel coronavirus.” Fortunately, the Wisconsin Court of Appeals held that the industry groups’ suit was

43. Motion for Extraordinary Relief, Melamed, No. 01744 (May 27, 2021).
44. E-mail from Samantha Melamed, Rep., The Phila. Inquirer (Nov. 17, 2021) (on file with author).
47. Id.
unfounded under the law and noted the impropriety of a suit that “urge[d the] court to disregard . . . the legislature’s express policy in favor of the presumption that all governmental records are open to the public.” The case is now before the Wisconsin Supreme Court.

II. FLUX, ADAPTATION, AND “THE NEW REALITY”

At the outset of the pandemic, it quickly became obvious that responses to records requests would, like many—if not most—aspects of life, be affected for some time. In recognition of the difficulties faced by government officials suddenly working from home or in new conditions, the Reporters Committee for Freedom of the Press published a list of best practices emphasizing the importance of “[m]utual communication and flexibility between requesters and responding agencies.” Two years later, examples of adaptation abound—and what was once abnormal is now our new daily life. Thus, the public can and should expect government functionality to be restored: As the Baltimore Sun Editorial Board has written, it’s time “to fully adapt to the new reality. Just as residents had to resume paying taxes and state emissions inspections have opened, it’s time that agencies resume filling public information requests at a reasonable rate.”

Fortunately, many states and localities have opted to do precisely that. In contrast to the enduring delays that continue to impede the public’s right to know in certain states, requesters in other jurisdictions are now hardly—if at all—affect ed by the pandemic’s reach. For instance, in mid-2020, the City of Santa Cruz informed requesters that “response times for public records act

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50. Wis. Mfrs. & Commerce, 960 N.W.2d at 459.
requests during this closure will be delayed,55 but at the time of this writing, the city is not reporting any pandemic-related delays.56 Similarly, the City of Pittsburgh initially notified the public that it was “suspending the deadlines of all pending and incoming [Pennsylvania] Right-to-Know Law requests” through at least January 2021.57 However, committing to “updat[ing that] notice as the COVID 19 situation changes,”58 the city is no longer reporting pandemic-induced delays.59

In Illinois, the Public Access Bureau—the government body charged with resolving disputes about agencies’ compliance with the state’s Freedom of Information Act—transitioned to online trainings and hosted ten remote sessions in 2020 that were attended by more than 800 people.60 The Illinois Attorney General, in announcing the bureau’s access accomplishments in spite of the public health crisis, noted that the “pandemic has brought uncertainty to so many aspects of daily life, and it is important that uncertainty not extend to government operations.”61 That is why the Public Access Bureau “will continue to examine ways to increase the number of trainings held across the state, in addition to creating programs tailored for specific units of government and public bodies that are interested in promoting transparency and openness in government.”62 These real-time adaptations reflect the ability of governments to acclimate to a new reality ushered in by the public health crisis.

The judiciary has also stepped in, in some cases, to ensure that government entities comply with their statutory mandates to produce public records. In the spring of 2020, the American

58. Id.
61. Id.
Immigration Council sued the Department of Homeland Security when it failed to timely disclose records related to Immigration and Customs Enforcement’s (“ICE”) pandemic response plans.\(^{63}\) The Department informed the Council that it was “unable to estimate”\(^ {64} \) when it would be able to complete its review and production of the approximately 800 pages of records it identified as responsive (a volume of records that any FOIA practitioner would consider exceedingly manageable). As a result, the Council sought injunctive relief, noting that accessing these records promptly was “critical to ensuring [it] can provide information to the public, including attorneys, advocates and policymakers, for the purpose of helping to secure the release of at-risk individuals[;]” to “understand the care . . . available to those who remain detained[;]” and “to help ensure public accountability over ICE’s response to the pandemic.”\(^ {65} \)

In July of 2020—at the time the court ruled on the Council’s motion for injunctive relief—at least two immigrant detainees had died of COVID-19 in ICE custody.\(^ {66} \) Fortunately, the court ruled that since the FOIA request at issue “concern[ed] a serious and time-sensitive matter,” the Council was “entitled to an order requiring Defendants to process and produce responsive documents on a more expeditious timeline.”\(^ {67} \) Perhaps most critically, when confronted with the agencies’ attempts “to downplay the urgency of” the Council’s request by asserting it could not “point to any concrete deadline by which it needs the records because the COVID-19 pandemic continues,” the court emphasized that “the fact that the COVID-19 pandemic is an ongoing public health crisis only bolsters Plaintiff’s claim of irreparable harm” flowing from delayed disclosure.\(^ {68} \)

In another federal case, the Federal Bureau of Investigation (“FBI”) (known for its abrupt and complete shuttering of its online FOIA portal at the outset of the pandemic)\(^ {69} \) insisted in January and February of 2021 that its records management division could only


\(^{64}\) Id. at 35.

\(^{65}\) Id.

\(^{66}\) Id. at 36 (citation omitted).

\(^{67}\) Id. at 37.

\(^{68}\) Id. at 38 (emphasis added).

process audio files at a rate of just fifteen minutes per month, purportedly due to pandemic-related complications. In that case, a documentary film production company was seeking audio records in conjunction with a documentary film scheduled to premiere soon thereafter. Judge Tanya Chutkan, unwilling to accept the extent to which the FBI claimed its hands were tied as a result of the pandemic, referred to the agency’s claims about processing rates as “startling” and “difficult to believe,” and ordered the FBI to process the two hours of audio requested by the filmmakers within nineteen days, which they were able to incorporate into their documentary film in time for its worldwide premiere.

State courts have also taken action. Consider one Ohio court that oversaw a public records case in which a requester sought records about a claim by a public official that 68% of recycled materials in Cleveland, Ohio are contaminated and have to be sent to landfills. Over two months lapsed from the time of the request to the first release of records, and over four months lapsed from submission of the request to the completion of the records production—a delay violative of the Ohio Public Records Law. Although the court “acknowledge[d] the difficulties caused by the pandemic and the [government’s] efforts to provide the records,” the court ultimately ruled that the records were not provided “within a reasonable time” and ordered an award of $1000 in statutory damages to the requester.

These transparency triumphs—both those that stem from government adaptation and those where courts forced compliance with the law—show that even as the present public health crisis
persists, the fundamentals of open government can and must endure. Because the need for timely and accurate information is at its apex in times of crisis and uncertainty, honoring the public’s right to know through comprehensive, swift information sharing is a critically important component to an effective pandemic response plan. Indeed, as the next section explores, any effort to ameliorate a period of emergency or uncertainty should prioritize transparency.

III. THE IMPORTANCE—AND URGENCY—OF TRANSPARENCY IN TIMES OF CRISIS

As COVID-19 has progressed and the Delta and Omicron variants entered the scene, it has become ever-clearer that a stronger, more coordinated response to the pandemic has been hampered by a lack of rapid, accurate information sharing.78 Recently, the Washington Post noted a “growing frustration” with the U.S. government’s “slow and siloed approach to sharing data, which prevented officials across the government from getting real-time information about how the delta variant was bearing down on the United States and behaving with greater ferocity than earlier variants—an information gap th[at] stymied the response.”79 While accurate and timely intergovernmental information sharing should certainly be a priority, governments must also prioritize the distribution of information to the public.

As an initial matter, public transparency during a crisis can have important positive effects on outcomes. Writing about the failure of governments to acknowledge the seriousness of the 1918 pandemic, Professor John M. Barry notes that their “[l]ies and silence cost authority figures credibility and trust.”80 In any health crisis, he writes, credibility and trust are necessary for effective adherence to government recommendations.81 Indeed, the United Nations Committee on Economic, Social, and Cultural Rights has

79. Abutaleb & Sun, supra note 78.
80. Barry, supra note 4, at 324.
81. See id.
specifically noted that “[a]ccurate and accessible information about the pandemic is essential both to reduce the risk of transmission of the virus and to protect the population against dangerous disinformation.” No matter the century, trust depends on truth-telling.

A failure of transparency during a crisis also risks damage to the legitimacy of government itself. Consider, for example, the many states and local government bodies across the country that determined fulfilling records requests was “nonessential” during the pandemic, and thus refused to comply or delayed responding. In Nevada, the Department of Public Safety determined that it could not comply with a Las Vegas Review-Journal request for records because it had deemed compliance with the public records law “nonessential.” And in Fresno, California, city Ordinance No. 2020-010 construed California Public Records Act compliance as a “non-essential city service.”

While responding to records requests is certainly different from the efforts of frontline health workers, it does not follow that transparency is not “essential” in a democratic society. This principle was recognized in Virginia, whose attorney general has specifically commented on whether localities may modify or indefinitely extend time limits for responding to records requests made pursuant to the Virginia Freedom of Information Act; in stark contrast to actions taken in Nevada and California, supra, Attorney General Herring emphasized that localities in Virginia possess no “general power to determine whether statutory directives imposed by the General Assembly constitute ‘essential’ or ‘non-essential’ functions, and then, on that basis, to suspend compliance with directives of state law that the locality deems ‘non-essential.’” Indeed, it is precisely during moments of crisis that it is especially important for the public, as the source of governmental legitimacy,
to be informed as to how government officials are responding. As summarized by the *Baltimore Sun* Editorial Board: “If anything we need transparency now more than ever as the pandemic means government business is being conducted in nontraditional ways, such as through Zoom meetings and emergency spending without the normal checks and balances.”

That sentiment is also reflected in the efforts by some New Jersey legislators to open up additional records generated pursuant to the state’s Emergency Health Powers Act. In introducing the legislation, Senator Loretta Weinberg noted that “[i]t is in uncertain times when transparency is most important[.]” That is because “[w]hen the public is frightened, unsure and wondering why the people in power have decided on a particular course of action, open records and transparency builds faith in our institutions and public trust in our choices. Emergencies are not the time for darkness because darkness breeds skepticism, suspicion and mistrust[.]”

The coming decades will undoubtedly see additional and potentially even more disruptive crises. In a climate (both physical and metaphorical) marked by increasing complexity and uncertainty, it is almost guaranteed that political, ecological, social, epidemiological, and other events will require governments to increasingly operate in “crisis” mode. Climate change, for example, will increase the severity and frequency of disruptive weather. In 2021, the City of New Orleans cited “the emergency situation” resulting from Hurricane Ida as a basis to delay responses to requests for public records. It cannot be that the laws that form the basis for our democratic society are jettisoned every time there is an emergency.

Government agencies at all levels should take proactive measures to ensure that transparency laws, including public records and open meetings laws, are complied with in future crises. Based

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90. *Id*.
on the experiences of journalists and the public during the COVID-19 pandemic, we recommend that governments:

- Establish procedures for proactively releasing records during a public emergency that relate to the subject matter of the emergency, including information about the cause of the emergency and the government’s response;

- Modernize record systems to ensure remote access to government records (and backups) wherever possible for government employees who are working from home or alternative locations;

- Provide government employees with the tools and resources to continue responding to records requests even if working remotely; and

- Ensure technological solutions are in place for public viewing and participation in government meetings.

It is also essential that public officials and agency leadership make clear to their workforces that transparency is a priority. No matter how good the rules, policies, or procedures that are put into place, government employees also need to hear that responding to records requests and ensuring access to meetings is important. Affirmative direction that transparency is part and parcel of the response to a crisis will help ensure that the law is followed.

In 1918, Chicago’s director of public health stated that “[i]t is our job to keep people from fear. Worry kills more than the disease.”92 We should ensure that such paternalistic beliefs have no place in the twenty-first century. Transparency should be part of the initial response plan to an emergency, not an afterthought. By establishing policies and procedures before a crisis emerges, governments can protect the public’s right to know in future pandemics and beyond.

92. Barry, supra note 4, at 324.