FOIA-Flooded Elections

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After the 2020 election, the United States has witnessed a crisis in confidence in election outcomes. The crisis has fueled massive public pressure on election offices to release election records via state "freedom of information act" (FOIA) requests. This deluge of records requests places enormous strain on already overburdened and underfunded state and local election offices. Operating under strict statutory FOIA response deadlines, election officials spend hundreds of hours on records requests to the detriment of election preparedness—potentially further exacerbating criticism of their offices. Making matters worse, election officials often lack guidance on which records may and may not be released; state records access laws often feature vague wording and spotty coverage. This compounds distrust and breeds litigation. The mandate that elections be transparent is sacrosanct. But so too is protecting a functioning democratic process. The justice system has processes in place to curb vexatious litigation and abusive discovery practices to ensure courts are not overrun. Should states adopt similar measures to protect elections? How can states stem FOIA flooding without diminishing the public's right to transparent elections? FOIA-Flooded Elections takes up these questions, offering concrete paths to protecting both efficient election administration and public confidence in election outcomes.

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I. INTRODUCTION

Since 2020, U.S. election workers have traversed a perilous path. Between threats and harassment,[1] resignations and short-staffed offices,[2] dramatic underfunding,[3] and shifting election rules,[4] election workers face tremendous

[1] SARAH J. ECKMAN & KAREN L. SHANTON, CONG. RSCH. SERV., IN11831, ELECTION WORKER SAFETY AND PRIVACY 1 (2023), https://crsreports.congress.gov/product/pdf/IN/IN11831 (on file with the *Ohio State Law Journal*) (documenting responses and reform proposals to address increased threats against election workers since the 2020 election).

[2] Numerous media have reported on what some call the "great resignation," election officials resigning under increased pressure and threats. *See, e.g.*, Michael Waldman, *The Great Resignation . . . of Election Officials*, BRENNAN CTR. FOR JUST. (Apr. 25, 2023), https://www.brennancenter.org/our-work/analysis-opinion/great-resignation-election-officials [https://perma.cc/7YLP-AJLM]; Joey Palacios, Dan Katz & David Martin Davies, *A Texas County's Election Administrators All Resigned, Leaving the State to Step In*, HOUS. PUB. MEDIA (Aug. 23, 2022), https://www.houstonpublicmedia.org/articles/voting/2022/08/23/431451/a-texas-countys-election-administrators-all-resigned-leaving-the-state-to-step-in/ [https://perma.cc/DT5E-W9ZH]; Fredreka Schouten, *Alarm Grows as More Election Workers Leave Their Posts Ahead of Election Day*, CNN (Sept. 1, 2022), https://www.cnn.com/2022/09/01/politics/election-workers-officials-harassment-kentucky-texas/index.html [https://perma.cc/H5CF-8VHD].

[3] *See* CHARLES STEWART III, MIT ELECTION DATA & SCI. LAB, THE COST OF CONDUCTING ELECTIONS 2–5 (2022), https://electionlab.mit.edu/sites/default/files/2022-05/TheCostofConductingElections-2022.pdf [https://perma.cc/GHU9-P387] (detailing what elections cost states and how funding is universally inadequate); ELECTION INFRASTRUCTURE INITIATIVE, 50 STATES OF NEED: HOW WE CAN FULLY FUND OUR STATE AND LOCAL ELECTION INFRASTRUCTURE 2, 6 (2021), https://static1.squarespace.com/static/6083502fc0f6531f14d6e929/t/61f836e405feca3722d63b9d/1643656990641/50-States-Of-Need.pdf [https://perma.cc/FCX7-9Z4M] (describing funding shortfalls in state and local election administration post-2020).

[4] *See, e.g.*, Madison Fernandez & Zach Montellaro, *Key Battleground States Are Moving to Change Election Laws Ahead of '24*, POLITICO (Jan. 2, 2023), https://www.politico.com/news/2023/01/02/battleground-election-laws-2024-00075525

pressures. Adding to this tangle of woes is a new phenomenon: a massive influx of public records requests (often termed "FOIA" requests)[5] at local and state election offices. Fueled by calls from national figures to scrutinize state elections, election officials around the country report exploding increases in requests.[6] Officials in Pennsylvania have witnessed a four-fold increase in such requests;[7] in North Carolina, one election official reported records requests rising from sixteen requests in 2018 to sixty requests in 2020, and again to 171 requests in 2022;[8] and South Carolina reported a 500 percent increase in the number of requests to access election records since 2020.[9]

[https://perma.cc/5E3K-YZZS] (describing the shifting landscape of election laws post 2022).

[5] *See Frequently Asked Questions*, FOIA.GOV, https://www.foia.gov/faq.html [https://perma.cc/DY8S-3D7H]. State laws ensuring public records access are often termed "state FOIA laws." *See, e.g.*, *FOIA Request Response Times by State*, BALLOTPEDIA, https://ballotpedia.org/FOIA_request_response_times_by_state [https://perma.cc/6E8F-6XP3].

[6] *See* Amy Gardner & Patrick Marley, *Trump Backers Flood Election Offices with Requests as 2022 Vote Nears*, WASH. POST (Sept. 11, 2022), https://www.washingtonpost.com/nation/2022/09/11/trump-election-deniers-voting/ [https://perma.cc/BXL6-HW9X].

[7] *Id.*; *see also* Jane C. Timm, *Amateur Fraud Hunters Bury Election Officials in Public Records Requests*, NBC NEWS (Mar. 26, 2023), https://www.nbcnews.com/politics/elections/amateur-fraud-hunters-bury-election-officials-public-records-requests-rcna15432 [https://perma.cc/6Y2R-GTYD] (noting that "county and city-level administrators . . . in Pennsylvania, Michigan, Florida, Arizona and Virginia—report being inundated with time-consuming records requests and inquiries . . . ."); Amena H. Saiyid, *Loudoun County Slammed with Unprecedented FOIA Requests for 2020 Election Process*, LOUDOUN TIMES-MIRROR (Sept. 19, 2022), https://www.loudountimes.com/news/loudoun-county-slammed-with-unprecedented-foia-requests-for-2020-election-process/article_52a6c63a-3393-11ed-a052-ab2ef9bd6a37.html [https://perma.cc/43ZG-KPUP] (discussing Virginia county being inundated with open records requests (187 separate requests) for access to a wide range of materials related to the 2020 election).

[8] Jasmine Gallup, *Local Boards of Elections Face Harassment, Influx of Public Records Requests, Spread of Disinformation*, INDY WEEK (May 10, 2023), https://indyweek.com/news/local-boards-of-elections-face-harassment-influx-of-public-records-requests-spread-of-disinformation/ [https://perma.cc/MA46-CAR2].

[9] James Pollard & David A. Lieb, *Presidential Battleground States Weigh More Election Funding*, ASSOCIATED PRESS (Apr. 29, 2023), https://apnews.com/article/presidential-election-2024-state-funding [https://perma.cc/8MCS-7ZZM]; *see also* Jen Fifield, *"Where's Celia?,"* VOTEBEAT ARIZ. (Sept. 15, 2023), https://arizona.votebeat.org/2023/9/15/23874134/celia-nabor-maricopa-county-arizona-election-fraud-signature-verification-public-records [https://perma.cc/AG4S-3PDH] (noting "Maricopa County, Arizona, went from receiving 100 election-related records requests in 2019 to nearly 12 times that in 2022. In Fulton County, Georgia — already the recipient of nearly 200 requests in 2020 — the number increased to 326 by 2022. Requests quadrupled to more than 1,200 in Harris County, and ballooned by sevenfold in Wake County, N.C.").

Requests for access can be intensely time-consuming. One election worker in Florida reported that responding to records requests ate up sixty or seventy percent of his time.[10] Yet election cycles stop for no records request; by law, election officials must respond to records requests in a timely manner *and* run elections.[11] Caught in this bind, Robert Macomber, an election official in Kent County, Michigan, uploaded a post on social media before the 2022 midterm election that encapsulates the pressure election workers face:

> 48 hrs to our wedding & I'm responding to a flurry [of] FOIA requests about the election. Not the last one or the 5 before that, but 2020's, two years ago. I'm every election official right now, while still doing life & managing the next election. Thank yours when you see them.[12]

Part of the reason election record requests are so time-consuming is the expansive range of election material often sought, requiring lawyers to parse what can and cannot be released. One Milwaukee election official reported requests for access to thirty-four different types of election documents: "poll books, voted ballots, spoiled ballots, remade ballots, absentee voter forms and voter registration applications," to name a few.[13] Sometimes election workers—and requesters themselves—are not quite sure what is being requested.[14] Adding to the dilemma, state laws are often fuzzy on which records may be released either because the state's election code conflicts with its public records law or because neither contemplated the existence of the type of record requested.[15]

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[10] Timm, *supra* note 7.

[11] *FOIA Request Response Times by State*, *supra* note 5 (Thirty-eight state statutes impose response time limits for FOIA requests, "11 allow agencies to extend response times in certain cases, while 27 allow no exceptions. Eight states require[] responses in three days or less, 10 in five days or less, 13 in ten days or less, and seven in 20 days or less.").

[12] Carla Bayron, *Michigan County Clerks Swamped with 2020 Election Fraud Conspiracy FOIA Requests*, WZZM 13 (Sept. 16, 2022), https://www.wzzm13.com/article/news/politics/elections/west-michigan-county-clerks-swamped-with-2020-election-foia-requests/69-55a18d9f-2df8-4036-a4b6-a79288cf9059 [https://perma.cc/Q27A-KWXG]; *see also* Carrie Healy, *Western Massachusetts Town Clerk Says Local Officials Overwhelmed by 'Predatory Records Requests*,*'* ME. PUB. (July 14, 2022), https://www.mainepublic.org/2022-07-14/western-massachusetts-town-clerk-says-local-officials-overwhelmed-by-predatory-records-requests [https://perma.cc/QB6Z-REM5] (describing the experience of a frustrated local election official).

[13] Gardner & Marley, *supra* note 6.

[14] Described one account in Kentucky, "[election] officials don't recognize the technical-sounding documents they're being asked to produce—and when they seek clarification, the requesters say they don't know, either." *Id.* "'It's the public's right to transparency, and I understand that,' said Chuck Broerman, the Republican clerk of El Paso County, Colo., who has hired an additional employee for the 10-person elections division to handle public records requests. 'But at the same time, it's been reported to me that some of this has been done perhaps deliberately to break the system. And you have to ask yourself, why do they want to do that?'" *Id.*

[15] *See infra* Part II.

The enormous volume and scope of requests post-2020 amounts to a new phenomenon, termed here the "FOIA flood." National ringleaders casting doubt on the result of the 2020 presidential election encourage state activists and local supporters to inundate state and local election offices with hundreds of requests, often providing pre-filled forms for doing so.[16] A cascade of verbatim requests—sometimes across multiple states—then rain down on election offices (often with obvious signs of this cut and paste approach).[17] Some suggest conspiracy theorists unleash FOIA floods to purposefully sow chaos in election offices (much like a distributed denial-of-service (DDoS) attack online)[18] or to harass individual election officials to feed the narrative that elections and/or individual election officials cannot be trusted.[19] Yet parsing motives is tricky. Many requesters are acting in good faith, believing they are doing their part to ensure elections are trustworthy.[20] Regardless, FOIA floods wreak havoc—siphoning precious staff time and resources and clogging courts with litigation.

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[16] Gardner & Marley, *supra* note 6.

[17] Gallup, *supra* note 8; *see also* Bayron, *supra* note 12 (suggesting that requests seem to be in a "copy-and-paste" format prompted by national individuals and organizations promoting distrust in the 2020 outcome). At a "Moment of Truth Summit" hosted by MyPillow election denier Mike Lindell in Missouri in the months leading up to the 2022 midterm elections, speakers instructed attendees how to request election-related records and provided templates for doing so. *See* Gardner & Marley, *supra* note 6; Soo Rin Kim, Laura Romero, Patrick Linehan & Kate Holland, *With 10 Weeks Until Midterms, Election Deniers Are Hampering Some Election Preparations*, ABC NEWS (Aug. 30, 2022), https://abcnews.go.com/US/10-weeks-midterms-election-deniers-hampering-election-preparations/story?id=89007798 [https://perma.cc/NKN2-FE8W] (describing how FOIA requests are obviously using templates noting some are incomplete, still reading [insert county here]). 2020 election-denying activists are not the only political force behind rampant records requests. While not intending false equivalency, progressive groups have also increased pressure on election offices in the last several years to release election records. To cite one example, the group American Oversight pressed Georgia Secretary of State for access to voter registration records. *See Pushing for Transparency in Georgia Election Administration*, AM. OVERSIGHT (Mar. 7, 2023), https://www.americanoversight.org/investigation/pushing-for-transparency-in-georgia-election-administration [https://perma.cc/8J3P-Q35B].

[18] *Understanding Denial-of-Service Attacks*, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY (Feb. 1, 2021), https://www.cisa.gov/news-events/news/understanding-denial-service-attacks [https://perma.cc/8YEU-HTS8].

[19] Gardner & Marley, *supra* note 6.

[20] Open records laws exist to enable members of the public to "know what their government is up to." U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) (emphasis and quotation marks omitted) (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)) ("The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to *know what their government is up to*.").

Adding salt to the wounds, FOIA flooding contributes to the mass exodus of election workers from the profession, creating even shorter-staffed offices.[21] Observers worry that widespread resignations will make elections harder to run.[22] Administering elections is a human endeavor; the less institutional knowledge brought to bear, the more likely mistakes will occur.[23] As one election official described, "when resources are spread thin and staff is overworked, there's a real possibility that election security could be affected."[24] FOIA-flooded election offices generate a classic vicious cycle.

Some election officials have reacted to this intensely difficult situation by throwing open their doors, diligently working to respond as broadly as possible to each request.[25] Others, citing concerns for voter privacy, election security, election worker safety, and workload realty have pushed back—often landing their offices in court.[26] Some states have taken steps to relieve the pressure, proposing increased resources for election offices[27] or revising open records

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[21] *See, e.g.*, Daniel Walton, *'Ripe for Political Violence': US Election Officials Are Quitting at an Alarming Rate*, GUARDIAN (July 30, 2023), https://www.theguardian.com/us-news/2023/jul/30/us-election-officials-leaving-2024-elections-north-carolina [https://perma.cc/ATV9-F7ZK] (describing alarming rates at which election officials are resigning their posts around the country).

[22] Zach Montellaro, *'Potential Crisis for Democracy': Threats to Election Workers Could Spur Mass Retirements*, POLITICO (June 16, 2021), https://www.politico.com/news/2021/06/16/election-workers-mass-retirements-494790 [https://perma.cc/WH8B-FKV8] (quoting elections expert Lawrence Norden, "It's a big challenge and, I think, a potential crisis for democracy . . . . The real question is: Who replaces them when they leave?").

[23] Peter Eisler & Linda So, *One in Five U.S. Election Workers May Quit Amid Threats, Politics*, REUTERS (Mar. 10, 2022), https://www.reuters.com/world/us/one-five-us-election-workers-may-quit-amid-threats-politics-survey-2022-03-10/ [https://perma.cc/T74V-5CSQ] (citing a former Republican Philadelphia City Commissioner, "The consequence of this threat environment is that you have more people leaving and they're replaced by less experienced election administrators . . . .").

[24] Bree Fowler, *Why Our Election System Is Under Assault*, CNET (Oct. 13, 2022), https://www.cnet.com/news/misinformation/this-is-the-biggest-threat-to-our-election-system/ [https://perma.cc/VT7V-V5JH].

[25] For example, one election official in Dane County, Wisconsin tried to stem the flow of requests by proactively uploading election material online, including ballot images. *See* Timm, *supra* note 7; *see also* U.S. ELECTION ASSISTANCE COMM'N, BEST PRACTICES: PUBLIC RECORDS REQUESTS 3–5 (Mar. 2023), https://www.eac.gov/sites/default/files/electionofficials/Public_Records_Requests_Best_Practices_508.pdf [https://perma.cc/MN3P-JUAL] (highlighting local election officials' efforts to post legal opinions on the release of certain election materials, create searchable databases for previously requested documents, and streamline requests by record type).

[26] *See, e.g.*, Mark Scolforo, *Fight Over 2020 Election Records Lands in Pennsylvania Court*, WHYY (June 28, 2022), https://whyy.org/articles/2020-election-records-pennsylvania-court [https://perma.cc/QN3U-E32B].

[27] Pollard & Lieb, *supra* note 9 (describing states like South Carolina, North Carolina, Arizona, Georgia, Nevada, Oregon, and Wisconsin exploring increased funding of local election offices to help with the increased workload public scrutiny has created).

rules to stem the flow. In 2023, legislators in Washington State, for example, passed a bill to curb what types of election material the public may access.[28] Yet constricting public access to election records risks criticism. One open government advocate criticized Washington's new law as "a huge overreaction."[29] He continued, "[i]n my opinion, this rush to hide even more of how elections are conducted just reduces trust . . . . Transparency is important. If it were up to me, our elections would be more transparent, not less."[30]

FOIA-Flooded Elections steps back to examine these trends and suggest possible ways forward, starting from the premise that solutions must ease open records burdens on election workers *and* ensure significant and meaningful election transparency. Part II lays out core principles behind election transparency and examines the recent hydraulics of requests at election offices. Part III describes FOIA basics, FOIA abuse generally, and particular obstacles to addressing FOIA abuse in elections. Part IV contrasts how the judicial system curbs vexatious litigation and abusive discovery practices to protect access to courts and judicial functioning. Part V proposes paths forward to protect the election process without sacrificing meaningful election transparency.

II. PUBLIC ACCESS TO ELECTION RECORDS

Elections only succeed if members of the public trust the validity of their outcomes. Modern U.S. elections, administered exclusively at the state level, feature numerous mechanisms intended to secure that trust.[31] State open records laws serve a key election transparency function. This Part describes why government transparency is important and why election transparency is doubly so. It then dives into the hydraulics behind the deluge of records requests election offices are experiencing.

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[28] TJ Martinell, *Washington Elections Bill 'More Likely to Cause Insurrection,'* CTR. SQUARE (May 9, 2023), https://www.thecentersquare.com/washington/article_7ee4075c-eeb5-11ed-80a2-c38127bb175b.html [https://perma.cc/JT3Y-PNQD]. Washington's new statute restricts the public from obtaining records including prohibiting access to cast ballots. *Id.* Some state legislatures have moved to protect access to open records requests. For example, the Texas House of Representatives passed a bill that stops counties from being able to claim a litigation exemption when releasing election records. *See County Officials Cannot Deny Public Information Election Record Request to AG Paxton's Office*, KATY NEWS (May 29, 2023), https://thekatynews.com/2023/05/29/county-officials-cannot-deny-public-information-election-record-request-to-ag-paxtons-office [https://perma.cc/4RDS-JN7S].

[29] Martinell, *supra* note 28 (internal quotation marks omitted).

[30] *Id.*

[31] Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467, 472–74 (2022) [hereinafter Green, *Election Observation*] (describing state rules enabling election observers); Rebecca Green, *Adversarial Election Administration*, 101 N.C. L. REV. 1077, 1096–111 (2023) (describing how states staff elections with adversarial partisans to keep each other in check).

A. *The Point of Public Access*

Transparency and democracy intertwine, based on the premise that "exposing powerful institutions to the light of ongoing scrutiny [will] not only 'disinfect' those institutions but also bring about a more effective, responsive, and democratic regulatory state."[32] Open records laws thus exist to check potential government abuses,[33] to ensure an informed citizenry,[34] and to "promote confidence in government."[35] Government transparency and the democratic process are intimately connected; without information about how government is run, voters cannot make informed decisions at the ballot box.[36]

Electoral transparency[37] shares these goals and serves an additional, unique function: securing public trust in election outcomes. Election designers have long understood that just as trials must be open to the public to ensure the decisions of courts are abided, so too must elections be transparent to satisfy public confidence that elections are administered fairly, according to the law, and that the winner of the most votes gains office.[38] Without public trust that elections produce fair outcomes, the peaceful transition of power is threatened.[39]

Though transparent elections are paramount, some aspects of elections are cloaked, the secret ballot being the most obvious example.[40] Other parts of the election process also necessarily exist behind the veil. For instance, state laws prohibit the public release of early and absentee vote totals before polling

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[32] David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 102 (2018).

[33] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (noting that government transparency serves to "hold the governors accountable to the governed").

[34] *See* S. REP. NO. 813, at 3 (1965) (noting that the purpose of the FOIA is to "enact[] into law" "a broad philosophy of 'freedom of information'" in order to ensure the functioning of the theory of an informed electorate, which is "vital to the proper operation of a democracy").

[35] Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 358 (2011) (summarizing general rationales for open meetings/record laws).

[36] For an extensive history of the connection between democratic functioning and government transparency, see MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 11–19 (2021), and MARK FENSTER, THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION 3–6 (2017).

[37] Electoral transparency refers to the ability of the public to observe and examine election processes.

[38] KWOKA, *supra* note 36, at 14–15.

[39] *See, e.g.*, Philip Rucker, Amy Gardner & Annie Linskey, *Trump's Escalating Attacks on Election Prompt Fears of a Constiutional Crisis*, WASH. POST (Sept. 24, 2020), https://www.washingtonpost.com/politics/trump-election-transition-crisis/2020/09/24/068d2286-fe79-11ea-8d05-9beaaa91c71f_story.html [https://perma.cc/FET9-AESU].

[40] Matthew Tate-Smith, *Voters Have the Right to a Secret Ballot*, CAMPAIGN LEGAL CTR. (Mar. 14, 2023), https://campaignlegal.org/update/voters-have-right-secret-ballot [https://perma.cc/8T4P-VBYM].

locations close to avoid influencing ongoing voting.[41] State laws also routinely protect personally identifiable information in voter registration records from public release.[42]

State statutes must balance transparency and secrecy, dictating which categories of election records and information within them are accessible to the public.[43] It is worth pausing here to reflect on a difficult question: what are election records? Part of the definitional hurdle in answering this question is the lack of standard terms in election management across states.[44]

An election record taxonomy is (far) beyond the scope of the current project. An overview of types of election records typically created during the election process, however, may be helpful. Every state uses a similar set of basic processes to administer elections, producing similar types of records at each phase. A first point is that election records emanate from different sources. Voters create some records, for example when they submit voter registration forms, mark ballots, or sign mail ballot envelopes. Election administrators create other records, like lists of registered voters or records associated with locating polling places or certifying voting machines. Complicating matters, some election records the public may request do not exist and must be created for the purpose of responding to the request.[45] For example, election officials may not have a list of voters whose mail ballots were returned as undeliverable but who ultimately cast ballots. Election officials can create such a list in response to a records request, but doing so requires staff time and effort.

In identifying the universe of election records, thinking chronologically provides one method of categorization. Records are generated before elections

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[41] *See, e.g.*, VA. CODE ANN. § 24.2-712(D) (2023) ("No counts of such [absentee vote] tallies shall be determined or transmitted outside of the central absentee voter precinct until after the closing of the polls.").

[42] *See Access to and Use of Voter Registration Lists*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/access-to-and-use-of-voter-registration-lists [https://perma.cc/G5N9-26M4] (Sept. 27, 2023) (table describing elements of voter registration data state statutes require kept confidential).

[43] For examples of categories of records some states deny or limit public access to, see ARK. CODE ANN. § 7-5-702(c) (2023) (providing that voted ballots are sealed absent court order); CAL. GOV'T CODE § 7924.000 (West 2023) (limiting access to information on voter registration lists, including addresses, telephone numbers, email addresses, and unique identifiers); and FLA. STAT. ANN. § 101.62(3) (West 2023) (prohibiting access to information relating to absentee ballot requests).

[44] Terminology conflicts have long been an issue. An Illinois opinion from 2007 demonstrates this problem. In *Kibort v. Westrom*, the court addressed confusion over terms as follows: "The parties agree that the 'tally list' . . . is what plaintiff sought to inspect when he requested production of the 'ballot box tapes.' The parties also agree that the 'poll book' . . . is what plaintiff sought to inspect when he requested production of the 'poll signature cards.'" Kibort v. Westrom, 862 N.E.2d 609, 614 (Ill. App. Ct. 2007); *see* Shepherdstown Observer, Inc. v. Maghan, 700 S.E.2d 805, 813 (W. Va. 2010) (discussing category of records signatures on referendums); Marks v. Koch, 284 P.3d 118, 120–24 (Colo. App. 2011) (discussing confusion over access to "tagged image file format (TIFF) files").

[45] *See* Gardner, *supra* note 6.

such as voting technology certification records, voter registration records, and candidate qualification records. As voting is underway, records are produced as voters check in to vote and mark ballots. For those not voting in person, mail voting produces numerous records including (but not limited to) ballot envelopes, lists of voters who have returned mail ballots, signature verification records, cure lists,[46] mail ballot tracking records, and so forth. After polls close, yet more records are created as officials verify provisional ballots, certify vote totals, and document ballot chain of custody. Voted ballots and ballot image records (sometimes termed "cast vote records" (CVRs))[47] are another category of record. Post-certification, additional records may be generated during recount or contest processes and audits. Election records are also produced in between elections as election workers conduct voter list maintenance,[48] correspond with the public and other officials, implement statutory changes, and so forth. The universe of election records—of which this is certainly and incomplete catalog—is vast and evolving.

A next obvious question becomes a line drawing one: which records should be public and which should not? The present effort leaves these questions to state legislatures. The task is pressing. Dramatic changes to the nature and complexity of the election process contribute to uncertainty over which record types are (or should be) public.[49] Confusion about whether a specific record is publicly-accessible or not often swirls either because of the lack of uniformity state to state, because open records statutes are vague, and/or because statutes governing access predate modern election processes (and the records they produce).[50] An example from Texas demonstrates the problem.

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[46] "Curing" is a process by which voters are given notice of insufficiency in their mailed ballots (e.g., lack of signature or address) and provided an opportunity to "cure" their ballot so it can be included in the official count. *See Table 15: States with Signature Cure Processes*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 28, 2023), https://www.ncsl.org/elections-and-campaigns/table-15-states-with-signature-cure-processes [https://perma.cc/YC6Y-F6L7].

[47] *See* U.S. ELECTION ASSISTANCE COMM'N, GLOSSARY OF ELECTION TERMINOLOGY 19, 65 (July 2021), https://www.eac.gov/sites/default/files/glossary_files/Glossary_of_Election_Terms_EAC.pdf [https://perma.cc/6QHS-BTQX].

[48] Scholars have described increasing efforts by voter integrity groups to access state voter lists to identify ineligible voters. *See, e.g.*, Michael Morse, *Democracy's Bureaucracy: The Complicated Case of Voter Registration Lists*, 103 B.U. L. REV. 2123, 2177–80 (2023) (describing "vigilante oversight" of state voter registration lists).

[49] Rebecca Green, *Rethinking Transparency in U.S. Elections*, 75 OHIO ST. L.J. 779, 782 (2014) [hereinafter Green, *Rethinking*] (describing how state open records statutes have lagged behind pace of change in how elections are run). Especially in counties in which election offices lack staff and state law mandates timely response, election officials often must rely on outside counsel to parse records requests. *See* Meredith Moran, *Misinformation, Frivolous Record Requests Bog Down Election Offices*, NAT'L ASS'N OF CNTYS. (Oct. 10, 2022), https://www.naco.org/articles/misinformation-frivolous-record-requests-bog-down-election-offices [https://perma.cc/4FKF-9WQG].

[50] Green, *Rethinking*, *supra* note 49, at 782.

In the lead up to the 2022 midterm elections, Texas election officials received dozens of open records requests for access to CVRs,[51] a category that neither the Texas election code nor its open records statute address. The Texas Secretary of State instructed county election officials that voted ballots are not public until the conclusion of a mandatory twenty-two month post-election ballot "preservation" period.[52] That advice appeared consistent with Texas statute.[53] Yet a few days later, Texas Attorney General Ken Paxton issued an advisory opinion contradicting the Secretary of State's guidance (and a 1988 attorney general advisory opinion).[54] Paxton advised that voted ballots become public once a county tallies the unofficial result.[55] This sent state election officials scrambling, unsure whether they were required to turn over CVRs to the public the day after November's vote—a practice that could undermine statutorily-mandated preservation of records.[56]

The confusion can be directly linked to statutory ambiguity. The Texas election code contemplates that voted ballots statutorily under lock and key during the preservation period may not be accessed "except as permitted by [Texas code]."[57] Do public access requirements constitute such an authorization? The Secretary of State thought not; the Attorney General thought so.[58] Attorney General Paxton's advisory opinion fed the torrent of public requests for access to CVRs, further increasing demands on election officials caught between opposing directives from higher-ups and the real possibility of

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[51] Jessica Huseman, *Ken Paxton Bucks Legal Precedent and Secretary of State's Advice in Letting Anyone Examine Ballots Right After Elections*, VOTEBEAT TEX. (Aug. 24, 2022), https://texas.votebeat.org/2022/8/24/23320771/ken-paxton-ballots-public-records-election-security [https://perma.cc/TJ7U-Y85Y].

[52] *Id.*

[53] *See* TEX. ELEC. CODE § 66.058(a) (West 2023) ("[T]he precinct election records shall be preserved by the authority to whom they are distributed for at least 22 months after election day.").

[54] Whether Voted Ballots and Software Purchased for the Tabulation of Votes Are Public Information Under the Texas Open Records Act, Tex. Att'y Gen. ORD-505 (1988) ("During the preservation period, the voted ballots are protected from required disclosure by section 3(a)(1) of the Open Records Act in conjunction with section 66.058 of the Election Code.").

[55] Whether a Legislator or a Member of the Public May Inspect or Obtain Copies of Anonymous Voted Ballots, Tex. Att'y Gen. Op. KP-0411 (2022) ("Section 66.058 of the Election Code requires the anonymous ballots to be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period. Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period.").

[56] *See* Huseman, *supra* note 51.

[57] *See* TEX. ELEC. CODE § 66.058(a) (2023).

[58] *See* Huseman, *supra* note 51.

criminal prosecution.[59] In such a charged environment, a clear answer would have helped.[60] Instead, the dispute headed predictably to court.[61]

Statutory uncertainty is one reason FOIA requests at election offices can be burdensome and difficult to process. But this problem alone does not explain why, since the 2020 election, FOIA requests at state election offices have skyrocketed. The next Part examines the hydraulics of the flood.

B. *The Hydraulics of the Election FOIA Flood*

Statutory ambiguity in election transparency is nothing new.[62] What is new is the FOIA flood at election offices. Unpacking who is behind the influx of requests is a first step in understanding the hydraulics of the flood. Circa 2024, four distinct groups feed the FOIA flood: as termed here, "ringleaders," "state activists," "foot soldiers," and "bad-faith requesters."

Ringleaders are state and national figures who since the 2020 election insist that fraud permeates the U.S. system of elections.[63] Ringleaders have

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[59] *See* Natalia Contreras, *Three Texas Counties Are Suing the Attorney General to Get Clarity on When the Public Can Access Post-Election Ballots*, TEX. TRIBUNE (Jan. 24, 2023), https://www.texastribune.org/2023/01/24/ken-paxton-election-access-lawsuit/ [https://perma.cc/39PF-BACV]. Regarding the threat of criminal prosecution, Texas law provides that "[a]n officer for public information, or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public information to a requester . . ." TEX. GOV'T CODE ANN. § 552.353(a) (West 2009).

[60] Washington's legislature is an example of a state that resolved statutory ambiguity with respect to access to cast vote records. *See* S.B. 54590-2023-24, 2023 Leg., 68th Sess. § 4(1)(e) (Wash. 2023) (establishing that cast vote records are ballots and therefore not publicly accessible).

[61] Contreras, *supra* note 59. Texas is not the only state to litigate the question of public access to CVRs. For an additional example, see Audit-USA v. Maricopa Cnty., 525 P.3d 279, 281–82 (Ariz. Ct. App. 2023) (denying access to ballot images and CVRs linked to ballot images under Arizona statute requiring that election officials "ensure that electronic data from and electronic or digital images of ballots are protected from physical and electronic access"); *see also* Shiro Kuriwaki, Jeffrey B. Lewis & Michael Morse, The Still Secret Ballot: The Limited Privacy Cost of Transparent Election Results 9–10 (Aug. 8, 2023) (unpublished manuscript), https://arxiv.org/html/2308.04100v2 [https://perma.cc/YH7N-3NW2] (discussing the privacy/ballot secrecy risks of releasing cast vote records to public).

[62] Green, *Rethinking*, *supra* note 49, at 782 (arguing, in part, that states should revise election transparency statutes to account for how modern elections are run).

[63] *See* Elizabeth Dwoskin & Jeremy B. Merrill, *Trump's 'Big Lie' Fueled a New Generation of Social Media Influencers*, WASH. POST (Sept. 20, 2022), https://www.washingtonpost.com/technology/2022/09/20/social-media-influencers-election-fraud/ [https://perma.cc/HMD4-39ZZ] (identifying individuals leading the election fraud narrative, including former president "Trump himself, his sons Eric and Donald Jr., Trump adviser Stephen K. Bannon . . . [and] Trump allies who gained fame specifically for their false claims of voter fraud, such as attorneys L. Lin Wood and Sidney Powell, and prominent media figures such as Fox News's Sean Hannity, Jim Hoft of Gateway Pundit and Josh Caplan of Breitbart News").

maintained a national stage for such claims and aggressively push the election fraud narrative.[64] They profess genuine alarm but have so far failed to marshal evidence supported in court of their claims.[65] Still, ringleaders have convinced a huge swath of U.S. voters that elections—and, importantly, specific state and local election administrators—cannot be trusted.[66] Ringleaders leverage these claims to raise not only their personal profiles but also enormous sums of money leading to allegations of grift.[67] Eschewing democratic norms, ringleaders cast their political opponents as evil and democratic institutions (and actors within them) as untrustworthy and corrupt.[68]

A second type of requester is the state activist. State activists are repeat requesters who most state election officials can name off the top of their head.[69] State activists routinely file multiple requests a week at state and local election offices.[70] State activists are not motivated by financial gain or political

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[64] *Id.*

[65] JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION 1 (July 2022), https://lostnotstolen.org//wp-content/uploads/2022/07/Lost-Not-Stolen-The-Conservative-Case-that-Trump-Lost-and-Biden-Won-the-2020-Presidential-Election-July-2022.pdf [https://perma.cc/9LXR-WVK5] (providing detailed analysis of failed litigation following the 2020 election); Mark Niesse, *True the Vote Fails to Reveal Evidence of Georgia Voting Fraud Claims*, AJC POLS. (Feb. 14, 2024), https://www.ajc.com/politics/true-the-vote-tells-court-it-has-no-records-to-back-up-fraud-claims/ [https://perma.cc/DK3S-4U4T]; Nick Corasaniti, *2020 Election Lies Keep Unraveling as Courts Push for Evidence*, N.Y. TIMES (Feb. 16, 2024), https://www.nytimes.com/2024/02/16/us/politics/2020-election-lies-no-evidence.html?searchResultPosition=1 [https://perma.cc/V6RQ-ZRP3].

[66] Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Percentage of Republicans Who Think Biden's 2020 Win Was Illegitimate Ticks Back Up Near 70%*, CNN (Aug. 3, 2023), https://www.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html [https://perma.cc/R5QR-X5C3].

[67] *See, e.g.*, Jim Small, *Election Denial Is Lucrative: Kari Lake Raised $2.5 Million After Election Day*, ARIZ. MIRROR (Jan. 24, 2023), https://www.azmirror.com/2023/01/24/election-denial-is-lucrative-kari-lake-raised-2-5-million-after-election-day/ [https://perma.cc/UNH6-7DCQ]; *see also* Fifield, *supra* note 9 (describing how leaders of one group behind FOIA flood tactics in Arizona, We The People, used contributions to their group to pay themselves roughly $80,000).

[68] *See* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 270 (2022) (describing election subversion tactics); Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J.F. 312, 313–14 (2022) (describing the threat of democratic participants unlawfully undermining elections from within).

[69] *See* KWOKA, *supra* note 36, at 78 (noting how those who process FOIA requests are intimately familiar with who repeat requesters are. "If you talk to the FOIA officials, they know who their requesters are and what they want. They may find some of these requesters frustrating—at times even abusive of the process . . . .").

[70] Nicholas Riccardi, *Voter Challenges, Records Requests Swamp Election Offices*, ASSOCIATED PRESS (Sept. 17, 2022), https://apnews.com/article/2022-midterm-elections-voting-georgia-presidential-florida-dfbe7f00418a35c70c9d53fa3a260111 [https://perma.cc/5TV6-JAMX].

prominence; they simply believe ringleaders' claims that elections are being stolen or are otherwise untrustworthy.[71] Activists are highly motivated and make it their personal mission to hold state election offices to account, certain their persistence will yield evidence of what they earnestly believe is widespread election fraud and/or corruption in their state.[72] They have taken up the call from national ringleaders to ferret out wrongdoing.[73] Some activists are so convinced elections are untrustworthy that no amount of explanation or evidence to the contrary will convince them.[74]

A third type of requester is the foot soldier. They, too, are often well-meaning individuals, but they do not make election oversight a full-time occupation. Instead they are the rank and file who sporadically heed calls from ringleaders and activists to submit records requests at local and state election offices. Foot soldiers often file "cut and paste" requests when called upon to do so.[75] They are generally unfamiliar with the intricacies of how elections are run or exactly what they are submitting requests for.[76] Foot soldiers believe they are doing their bit to contribute to a larger cause. In isolation, foot soldier requests might be innocuous; in aggregate, they create havoc at local election offices inundated with the flood.

A final category is the bad faith requester. Bad faith requesters cross a line from seeking information to satisfy legitimate, specific concerns to harassing, targeting, or worse. By way of example, consider the experience of an election official in Maricopa County, Arizona named Celia Nabor.[77] FOIA requests began flooding Maricopa County election offices after the 2020 election culminating in the legislature's move to contract with a private firm called CyberNinja to conduct an audit of the 2020 election.[78] After an error-riddled audit found no evidence of fraud,[79] conspiracy theorists nevertheless remained active.[80] Following the 2022 midterm elections, failed gubernatorial candidate

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[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Greg Jaffe & Patrick Marley, *In a County Rife with Conspiracy Theories, a GOP Clerk Fights to Win Voters' Trust*, WASH. POST (Nov. 4, 2022), https://www.washingtonpost.com/politics/2022/11/04/election-official-fights-misinformation/ [https://perma.cc/7N5S-C5MA] (A Michigan election official "had come to realize that calling out lies didn't fix the problem in Ottawa County or, for that matter, anywhere.").

[75] *See supra* note 17 (describing the cut-and-paste request phenomenon).

[76] *See supra* note 14 and accompanying text.

[77] Fifield, *supra* note 9.

[78] Brad Dress*, Cyber Ninjas Shutting Down After Judge Fines Arizona Audit Company $50K a Day*, HILL (Jan. 7, 2022), https://thehill.com/regulation/cybersecurity/588703-cyber-ninjas-shutting-down-after-judges-fines-arizona-audit-company/ [https://perma.cc/Q9FR-LRM9] (describing the implosion of Cyber Ninja's following its flawed audit).

[79] *See* DANFORTH ET AL., *supra* note 65, at 7; Dress, *supra* note 78.

[80] Jonathan J. Cooper, *What's Wrong with Arizona's 2020 Audit? A Lot, Experts Say*, ASSOCIATED PRESS (Aug. 22, 2021), https://apnews.com/article/arizona-

Kari Lake and other ringleaders perpetuated conspiracies of fraud, filing lawsuits and calling on supporters to issue FOIA requests at local election offices in Arizona.[81]

After she resigned her position, in part due to the stresses of coping with the FOIA flood, bad faith requesters began to target Nabor personally.[82] They sought access to "all of [Nabor's] texts and her emails."[83] They further requested "information on how [Nabor] and the employees under her performed their jobs and whether they were disciplined."[84] An online mob then formed, posting Nabor's home address and featuring one comment that threatened, "BANG BANG."[85] Others called for "track[ing] her phone, credit cards, social security number, and social media."[86] "Find her," someone wrote.[87]

Perhaps some requests about Nabor's activities sought records to sate genuine doubts about her official actions. But context matters. Repeated requests flowing from unsubstantiated and clearly false claims and requests targeting specific officials that fit a pattern of documented harassment and threats cross a line. These actions threaten livelihoods and safety of dedicated public servants and represent a serious threat to democratic functioning.[88] They swamp offices to the point of collapse.[89] And they perpetuate election distrust.[90]

An exacerbating factor in understanding the hydraulics of FOIA floods is the unique nature of elections, as distinct from other government processes. Elections are enormously complex operations that vary in significant ways in

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5179ca25963431ae137a86ef999a69c2 [https://perma.cc/UUE4-59SK] (describing errors in CyberNinja's audit process).

[81] Nick Phillips, *County Opposes Lake's Expedited Public Records Request*, ARIZ. CAPITOL TIMES (Dec. 1, 2022), https://azcapitoltimes.com/news/2022/12/01/county-opposes-lakes-expedited-public-records-request/ [https://perma.cc/E8WE-8JTC] (describing unsuccessful attempt to expedite open records request); Joe Duhownik, *Kari Lake Makes Final Push for Access to Voter Signatures as Arizona Trial Winds Down*, COURTHOUSE NEWS (Sept. 25, 2023), https://www.courthousenews.com/kari-lake-makes-final-push-for-access-to-voter-signatures-as-phoenix-trial-winds-down/ [https://perma.cc/YQ62-JASQ] (describing Lake's suit to access voter absentee ballot signatures).

[82] Fifield, *supra* note 9 (offering a detailed description of harassing tactics that contributed to an Arizona election official's decision to resign).

[83] *Id.* During her testimony before the Arizona Senate's Elections Committee, Shelby Busch—co-founder of an election-denying political action committee called We The People AZ Alliance—suggested that Nabor's true reason for resigning was to avoid sitting for a deposition with the group's lawyers. *Id.* Soon after this public imputation, the Maricopa County Election Office became inundated with requests for Nabor's personal correspondence. *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *See, e.g.*, Fifield, *supra* note 9.

[89] *Id.*

[90] *Id.*

each state and within states.[91] In the current election-distrust furor, stoked by ringleaders, any seeming-inconsistency begets a FOIA flood. An example demonstrates the point. The Current Population Survey (CPS) is administered monthly by the Census Bureau for the Bureau of Labor Statistics.[92] It includes a Voting Supplement questionnaire each November of even-numbered years to coincide with federal elections.[93] In that supplement, CPS asks citizens to self-report their voter registration status (as it has done since 1964).[94] Trouble arose in 2022 after the CPS listed 3,162,000 individuals who self-reported being registered to vote in Colorado.[95] Yet the Colorado Secretary of State's official listed 4,424,211 total registered voters as its official figure.[96] Strangers to self-reported data saw over a million mystery voters on the state's voter rolls; the FOIA floodgates opened.[97] Colorado election officials attempted to explain that

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[91] *See Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels [https://perma.cc/AY5P-XSYX]; *see also* Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. REV. 1421, 1426, 1461 (2022); Joshua A. Douglas, *The Right To Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1068–69 (2017); Derek T. Muller, *Complexity Confronting State Judges and the Right to Vote*, 77 OHIO ST. L.J. FURTHERMORE 65, 67–71 (2016) (discussing jurisdiction-by-jurisdiction variation); Samuel Issacharoff, *Weaponizing the Electoral System*, 74 STAN. L. REV. ONLINE 28, 33–34 (2022); *2024 Election Threats Emerge*, STATES UNITED DEMOCRACY CTR. (June 9, 2023) https://statesuniteddemocracy.org/2024-election-threats/ [https://perma.cc/5U67-2JLK] (discussing proposed and enacted statutes furthering variance between state and local elections).

[92] *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS. (Mar. 24, 2020), https://www.bls.gov/cps/cps_over.htm [https://perma.cc/P82K-PM85].

[93] *Questions on the Voting Supplement of the Current Population Survey*, U.S. CENSUS BUREAU, https://www.census.gov/library/visualizations/interactive/cps-voting-supplement.html [https://perma.cc/4QYK-9VQ6] (Mar. 16, 2023).

[94] *Current Population Survey—Subject Definitions*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/cps/technical-documentation/subject-definitions.html#reportedregistration [https://perma.cc/7QL8-FLSR] (Nov. 3, 2023) (defining "voter, *reported* participation" and "voter, *reported* registration" (emphases added)); *Voting and Registration Highlights from the Current Population Survey: 1964 to 1980*, U.S. CENSUS BUREAU (Feb. 1984), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p23-131.html [https://perma.cc/52X9-ZTFJ].

[95] *Voting and Registration in the Election of November 2022*, tbl. 4, U.S. CENSUS BUREAU (Apr. 2023), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html [https://perma.cc/NC9U-6DT7].

[96] COLO. SEC'Y OF STATE, TOTAL REGISTERED VOTERS BY STATUS (Dec. 2022), https://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2022/November/VoterCountsByStatus.pdf [https://perma.cc/8MHJ-EMZ2].

[97] "Local leaders must [consider the] impacts of unreliable data on their community members' ability to trust election officials and election results." ZUHAYR AHMED & DANA WATTERS, NAT'L LEAGUE OF CITIES, DATA GAPS IN NATIONAL VOTER REGISTRATION AND VOTER PARTICIPATION REPORTING 7 (2022), https://www.nlc.org/wp-content/uploads/2022/01/CS-Census-Fact-Sheet.pdf [https://perma.cc/LC47-HK7L].

the self-reported number from the Census is an undercount[98]—many people do not fill out Census surveys; those who do may not answer all questions.[99] But there is only so much to be done to allay doubt once a supposed discrepancy is unearthed.

The individuals and circumstances feeding the hydraulics described above make it exceedingly difficult to address FOIA flooding at election offices. Legislators and election officials work hard to make elections transparent and trustworthy. Yet releasing information about election administration can breed rather than ease doubts.[100] Ringleaders may be acting with nefarious purpose or otherwise intentionally stoking distrust in the U.S. system of elections for political or pecuniary gain, yet most agree the First Amendment protects their ability to sow distrust from the rooftops.[101] When activists and foot soldiers then seek answers, they do so for the precise reasons government transparency exists: oversight and accountability. Any steps to curb activist and foot soldier access to election information is sure to backfire.[102] And policing bad faith requesters and the chaos they unleash is fraught as well: classic good faith/bad faith line-drawing treacheries constrain efforts to rein them in.

These hydraulics—the constitutional untouchability of ringleaders, the earnest motives of many activists and foot soldiers, and the challenges of sorting

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[98] Telephone Interview with Judd Choate, Colo. Dir. of Elections (Aug. 7, 2023) (notes on file with author).

[99] AHMED & WATTERS, *supra* note 97, at 2.

[100] *See infra* note 107 (discussing scholarship questioning whether government transparency in fact builds trust); *see also* Andrew Moshirnia, *Who Will Check the Checkers? False Factcheckers and Memetic Misinformation*, 2020 UTAH L. REV. 1029, 1038–39 (2020).

[101] Richard Hasen has suggested that false speech relating to the mechanics of elections (e.g., "Vote on Wednesday!") might escape First Amendment protection. *See* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 71 (2013). That said, there may yet be legal consequences for spreading misinformation in elections. *See* Indictment at 1, United States v. Trump, No. 1:23-cr-00257-TSC (D.D.C. Aug. 1, 2023) (election obstruction case); Indictment at 16, Georgia v. Trump, No. 23SC188947 (Fulton Cnty. Sup. Ct. Aug. 14, 2023).

[102] *See* Graham Moomaw, *Buckingham Registrar Charges $200 'Convenience Fee' in FOIA Feud With County Official*, VA. MERCURY (May 5, 2023), https://www.virginiamercury.com/2023/05/05/buckingham-registrar-charges-200-convenience-fee-in-foia-feud-with-county-official/ [https://perma.cc/TKN4-79M6]; Ashley Lisenby, *D.C. Council Tables Controversial FOIA Bill*, WAMU (May 14, 2019), https://wamu.org/story/19/05/14/d-c-council-tables-controversial-foia-bill/ [https://perma.cc/3B76-P4WD]; Andrew Mobley & Cory Evans, *Arkansas in Uproar Over Governor's Bill Limiting Freedom of Information: "Assault on Our Republic*," KATV (Sept. 13, 2023), https://katv.com/news/local/arkansas-in-uproar-governors-bill-limiting-freedom-of-information-faces-growing-bipartisan-backlash [https://perma.cc/TNP7-BJJ4]; *see also* Graham Moomaw, *Conservative Group Threatens Lawsuit After Being Told It Can't Publish Virginia's Voter Rolls*, VA. MERCURY (Aug. 4, 2022), https://www.virginiamercury.com/2022/08/04/conservative-group-threatens-lawsuit-after-being-told-it-cant-publish-virginias-voter-rolls/ [https://perma.cc/LNV5-T7NX].

good faith from bad-faith requesters—make addressing FOIA-flooded election offices enormously challenging. With these difficulties in mind, Part II examines FOIA's presumption of openness and ways in which open records statutes (and courts interpreting them) constrain access.

III. FOIA OPENNESS AND LIMITS

Open records law hinges on a presumption of openness. In a democracy, government records belong to the people.[103] And yet openness is not absolute for privacy and practical reasons. This Part sets up the basics of federal and state freedom of information law and describes limits federal and state law necessarily place on access.

A. *FOIA Basics: A Presumption of Openness*

Upon signing the federal Freedom of Information Act into law on Independence Day in 1966, President Lydon B. Johnson professed a "deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."[104] If there is a foundational tenant of federal and state open records law, it is the strong presumption of openness.[105] The Supreme Court has underscored that the presumption of openness "should not be dismissed as a convenient formalism."[106] Rather, "[i]t defines a structural

[103] KWOKA, *supra* note 36, at 12–13 ("As representative democracies came into being, philosophers began articulating transparency as a foundational element of legitimate government." (citing IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH 138–39 (William Hastie trans., 1891) (1795)).

[104] SUBCOMM. ON ADMIN. PRACTICE & PROC., 930RD CONG., FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 1 (Comm. Print 1974).

[105] *See* FENSTER, *supra* note 36, at 4; *see also* Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1463 (2020) (noting that "virtually every public records law in the country . . . is structured with a presumption of openness").

[106] Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 171–72 (2004).

necessity in a real democracy."[107] Guidance from the Justice Department echoes this counsel: "In case of doubt, openness should prevail."[108]

Consistent with the presumption of openness, neither the identity of the requester nor their motive is relevant to access decisions.[109] This is so for several reasons. One is that public officials might too readily deny access for administrative efficiency reasons or to prevent their own accountability. In addition, the oversight function is enhanced if requesters need not have a stated reason for their request. Due to a massive information asymmetry between requesters and record holders, placing the onus on the requester to provide an

[107] *Id.* at 172. *But see* Lawrence Lessig, *Against Transparency*, NEW REPUBLIC, Oct. 21, 2009, at 37 (noting concern that transparency in the digital age "will simply push any faith in our political system over the cliff"); PIERRE ROSANVALLON, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST 259 (Arthur Goldhammer trans., 2008) (arguing that transparency as a means of curbing state power "engenders the very disillusionment it was intended to overcome" by leaving the state unable to "respond to the demands placed on it"); Christina Garsten & Monica Lindh de Montoya, *Introduction: Examining the Politics of Transparency*, *in* TRANSPARENCY IN A NEW GLOBAL ORDER: UNVEILING ORGANIZATIONAL VISIONS 7 (Christina Garsten & Monica Lindh de Montoya eds., 2008); ("[O]ne may wonder whether [transparency] measures do not in fact serve to amplify a sense of insecurity and mistrust, rather than to ease uncertainty and restore trust."); Hans Krause Hansen & Mikkel Flyverbom, *The Politics of Transparency and the Calibration of Knowledge in the Digital Age*, 22 ORG. 872, 875 (2015) ("[T]ransparency, usually promoted as a trust-enhancing measure, can spur mistrust.").

[108] MERRICK GARLAND, U.S. ATT'Y GEN., MEMORANDUM ON FREEDOM OF INFORMATION ACT GUIDELINES (Mar. 2022), https://www.justice.gov/media/1212566/dl?inline [https://perma.cc/RSA5-UNZB].

[109] EPA v. Mink, 410 U.S. 73, 86 (1973) (FOIA, "by its terms, [does not] permit inquiry into particularized needs of the individual seeking the information . . . ."); U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 771 (1989) (affirming that "the identity of the requesting party has no bearing on the merits of his or her FOIA request"). For examples of state statutes that underscore this point, see CAL. GOV'T CODE § 7921.300 (West 2023) (There are no "limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure."); IND. CODE § 5-14-3-3(a) (2023) ("No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute."); LA. STAT. ANN. § 44:32 (2023) (the requester's purpose may not affect his right to obtain records since the custodian of the records "shall make no inquiry of any person who applies for a public record, except an inquiry as to the age and identification of the person."); NEV. REV. STAT. ANN. § 239.0107(1) (LexisNexis 2023) (allows any person to request records); N.M. STAT. ANN. § 14-2-8(C) (West 2009) ("No person requesting records shall be required to state the reason for inspecting the records."); N.C. GEN. STAT. § 132-6(b) (2023) (requester's purpose is irrelevant, and public officials are prohibited from inquiring about it); R.I. GEN. LAWS § 38-2-3 (West 2023) (no limitation on the purpose for which a request for records may be made); and R.I. GEN. LAWS § 38-2-3(j) (2022) (Public records cannot "be withheld based on the purpose for which the public records are sought.").

adequate reason for access would limit the public's ability to oversee government.[110]

FOIA laws seek to ensure effective and timely access by mandating that some records be affirmatively made public,[111] imposing strict response deadlines,[112] imposing fines on record holders for delays, enabling the right to judicial relief for delays or wrongdoing in processing requests, and awarding attorneys fees to requesters who successfully appeal open records denials.[113] Seventeen states impose criminal penalties and fines against public officials who knowingly and willfully violate public records laws.[114]

Statutes, rules, and judicial interpretations underscore broad presumptions of access and the critical function transparency plays in functioning democratic government. Yet open records law limits access in certain circumstances.[115] The next section provides an overview of ways in which open records access is curtailed.

B. *Limits on Access to Public Records*

Federal and state open records laws limit access through explicit exemptions tied to enumerated lists of sensitive records and, less commonly, prohibitions tied to certain types of requesters. Every federal and state open records statute

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[110] *See* Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 31–32 (1988) (noting the "relatively weak position" requesters occupy and the "inherent imbalance in knowledge" between requesters and agencies).

[111] 5 U.S.C. § 552(a)(1)–(2) (2018) (mandating that certain records be published in the Federal Register and that certain categories of records be made available for public inspection—the so-called "reading room" provision—updated in 1996 to require *electronic* reading rooms enabling remote access to such records).

[112] *See supra* note 11 and accompanying text (describing state FOIA response deadlines).

[113] For a general overview federal sanctions, see *Sanctions for Violating FOIA*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/usam/eousa-resource-manual-137-sanctions-violating-foia [https://perma.cc/Q7D2-DYZ8]. For a survey of state sanctions, see NAT'L FREEDOM OF INFO. COMM., BLUEPRINT TO TRANSPARENCY: ANALYZING NON-COMPLIANCE AND ENFORCEMENT OF OPEN RECORDS LAWS IN SELECT U.S. STATES 5–16 (Feb. 2020) [hereinafter NFOIC REPORT], https://www.nfoic.org/wp-content/uploads/202002/Blueprint%20to%20Transparency_%20Enforcing%20Open%20Records%20Laws-4.pdf [https://perma.cc/SJZ2-EWK2], and Daxton R. "Chip" Stewart, *Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265, 290–92 (2010).

[114] NFOIC REPORT, *supra* note 113, at 5.

[115] For an election-related statement of this principle, see Fann v. Kemp, No. 1 CA-SA 21-0141, 2021 WL 3674157, at *3 (Ariz. Ct. App. Aug. 19, 2021) ("though there is a presumption in favor of disclosing public records, this presumption can be rebutted by a demonstration of 'confidentiality, privacy, or the best interests of the state.'" (quoting Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co., 955 P.2d 534 (1998)).

contains exemptions to protect against the release of sensitive information.[116] Most state and federal public access laws contain exemptions for personnel records, records pertaining to national security, investigatory records compiled for law enforcement purposes, records containing trade secrets, and other enumerated categories explicitly exempted from disclosure.[117]

FOIA requesters commonly file suit challenging agency assertions of exemptions in denying access.[118] The process of determining whether an exemption applies often sends courts into forbidden territory—that is, considering the purpose and sometimes even the identity of the requester. A terrorist's request for FBI files[119] and a requester's identity as a convicted murderer[120] provide two examples of instances in which courts have considered the identity of the requester and the purpose of the request as relevant in weighing an access request. Even the U.S. Supreme Court has weighed the identity and motive of requesters, finding that journalists' reason for requesting the criminal rap sheet of a crime boss was not sufficiently related to government oversight to overcome the federal FOIA's personal privacy exemption.[121]

In addition to exemptions tied to certain sensitive record types, state carve outs also preclude certain requesters from access. For example, several states explicitly deny access to records sought for commercial gain.[122] In another example, the U.S. Supreme Court held constitutional the right of states to deny

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[116] *See, e.g.*, U.S. DEP'T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2022, at 8 (May 2023) [hereinafter FOIA REPORTS 2022], https://www.justice.gov/media/1289846/dl?inline [https://perma.cc/AW4A-AAY4].

[117] Federal FOIA exemptions are found at 5 U.S.C. § 552 (b)(1)–(9).

[118] In 2022, the federal government reported spending $40,958,233.39 on litigation-related activities. *See* FOIA REPORTS 2022, *supra* note 116, at 20.

[119] *See* Ayyad v. U.S. Dep't of Just., No. 00 CIV. 960, 2002 WL 654133, at *3 (S.D.N.Y. Apr. 18, 2002) (denying access due to a "high likelihood that Plaintiff's file contains information regarding previously less active 'sleeper cells' that the Government may need use to detect threats to the integrity of the nation's security").

[120] *See* Shores v. Fed. Bureau of Investigation, 185 F. Supp. 2d 77, 84 (D.D.C. 2002) (finding that the plaintiff-requester's identity as a convicted murderer and his previous retaliation against a witness impacted whether to require disclosure).

[121] U.S. Dep't Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 757, 780 (1989).

[122] *See, e.g.*, N.Y. PUB. OFF. LAW § 89(2)(b)(iii) (McKinney 1988) ("[S]ale or release of lists of names and addresses may be denied if such lists would be used for commercial or fund-raising purposes"); WASH. REV. CODE ANN. § 42.56.070(8) (West 2017) (agencies may not sell or provide access to lists of individuals requested for commercial purposes); 5 ILL. COMP. STAT. 140/3.1(c) (2023) (prohibits requesters to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose).

public records access to non-residents.[123] State courts have also sanctioned laws barring access to other classes of individuals.[124]

Despite limits on access and complexities of which records may be released, the strong presumption of openness drives large volumes of FOIA requests at federal and state agencies.[125] It has also led to significant abuse, to which the next section turns.

C. *How FOIA Processes Are Abused*

The phenomenon of FOIA abuse is neither new nor unique to post-2020 election administration. Changes in how governments collect and store records, in how requesters submit requests, and in civic and commercial culture have all combined to place great pressure on federal and state open records practices at the state and federal level. After describing abusive FOIA practices generally, this Part turns to examine mechanisms states and the federal government use to combat FOIA abuse.

At the federal level, most individuals make FOIA requests for reasons other than government oversight. Margaret Kwoka, in her book *Saving the Freedom of Information Act*, meticulously documents such motives.[126] Kwoka shows that the vast majority of requesters seek access to federal agency records for commercial uses (often resale) and to assist with personal claims and suits.[127]

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[123] McBurney v. Young, 569 U.S. 221, 230–31 (2013) (finding requirement that nonresidents conduct internet searches to obtain property records did not "impose any significant burden on noncitizens' ability to own or transfer property in Virginia"). Eight states require requesters to be residents (Alabama, Arkansas, Delaware, Georgia, New Hampshire, New Jersey, Tennessee, and Virginia). *See List of Who Can Make Public Record Requests by State*, BALLOTPEDIA, https://ballotpedia.org/List_of_who_can_make_public_record_requests_by_state [https://perma.cc/EM42-KLHY].

[124] *See, e.g.*, Newsday, Inc. v. State Dep't of Transp., 833 N.E.2d 210, 212–13 (2005) (acknowledging that an agency could deny access to tort plaintiffs under certain circumstances).

[125] At the federal level, the Department of Justice annual FOIA report revealed that "[d]uring FY 2022, . . . [t]he total estimated cost of all FOIA related activities across the government was $584,752,705.30. Nearly 93% ($543,794,471.90) of total costs were attributed to the administrative processing of requests and appeals by agencies. Seven percent (7%) ($40,958,233.39) was reported to have been spent on litigation-related activities." FOIA REPORTS 2022, *supra* note 116, at 20. High volumes of requests have led to significant agency backlogs. *See id.* at 9 ("The total number of backlogged requests across the [federal] government at the end of FY 2022 was 206,720 . . . a 34.91% increase from . . . FY 2021.").

[126] *See generally* KWOKA, *supra* note 35.

[127] For example, in a chapter appropriately titled "FOIA-Inc." Kwoka documents how for-profit entities dominate public records requests exploiting open records for pecuniary gain. *Id.* at 116–35. In part due to the flood of non-oversight uses, David Pozen argues that modern FOIA "saps regulatory capacity; distributes government goods in an inegalitarian fashion; and contributes to a culture of adversarialism and derision . . . ." David E. Pozen,

Exploiting public records for resale or accessing public records data for personal use do not fit the traditional oversight paradigm FOIA laws exist to serve. "Abuse," as understood here, is something more: the deliberate use of open records laws to inflict harm on government actors or processes, or on other adversaries.

At the state level, abuse of open records processes is rife.[128] One area in which such abuse has been particularly pronounced is in university settings. Scholars have documented how public records law is abused to influence tenure and promotion processes and harass academics working in controversial disciplines.[129] Scholars have warned that FOIA abuse at universities jeopardizes academic freedom and exposes professors at public institutions to politically-motivated attacks and retribution.[130]

FOIA abuse is not limited to university settings. Threats against public servants are on the rise.[131] Abusive open records requests are one vehicle

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Freedom of Information Beyond the Freedom of Information Act, 165 U. PA. L. REV. 1097, 1097 (2017).

[128] *See* Keith W. Rizzardi, S*unburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 434 (2015) (Public records law, among other things, "can chill collegial decision-making and cause fewer meetings and less documentation, leading to reduced efficiency. They can encourage an overreliance on individual staff, force disclosure of sensitive information, and create barriers to honesty and compromise. In the worst cases, the public records laws '[r]eward[ ] the [s]cofflaw' who ignores the law, create large volumes of work for the scrupulous official who tries to precisely comply with the law, and ultimately 'breed contempt for the law.'").

[129] *Id.* at 435.

[130] *Id.* at 435. One university counsel in California mused that, "seven people fully exercising their rights under the California public records act could shut [a] university down." *Id.* (quoting JAMES C. HEARN, MICHAEL K. MCLENDON & LEIGH Z. GILCHRIST, GOVERNING IN THE SUNSHINE: OPEN MEETINGS, OPEN RECORDS, AND EFFECTIVE GOVERNANCE IN PUBLIC HIGHER EDUCATION 20 (2004)); *see also* MICHAEL HALPERN, CTR. FOR SCI. & DEMOCRACY, FREEDOM TO BULLY: HOW LAWS INTENDED TO FREE INFORMATION ARE USED TO HARASS RESEARCHERS 2–3 (2015); Brier Dudley, *Harassment, Public-Records Requests Bombard UW Truth Seeker After Jan. 6 Hearings Cameo*, SEATTLE TIMES (Oct. 19, 2022), https://www.seattletimes.com/opinion/harassment-public-records-requests-bombard-uw-truth-seeker-after-jan-6-hearings-cameo/ [https://perma.cc/263H-HH8P].

[131] According to a National League of Cities report issued in 2021, over 80 percent of public officials reported experiencing harassment, threats, and violence. *See* Press Release, Nat'l League of Cities, New Report: Harassment, Threats and Violence Directed at Local Elected Officials Rising at an Alarming Rate (Nov. 10, 2021), https://www.nlc.org/post/2021/11/10/new-report-harassment-threats-and-violence-directed-at-local-elected-officials-rising-at-an-alarming-rate/ [https://perma.cc/P672-V6VX]. For a vivid description of one such harassing requester, see Clark Kauffman, *Persistent Newton Requester Inspires Proposal That Could Limit Iowa Public Records Access*, DES MOINES REG. (Sept. 25, 2023), https://www.desmoinesregister.com/story/news/2023/09/25/iowa-public-records-access-could-be-restricted-in-reaction-to-one-man/70936174007/ [https://perma.cc/59ND-68JB], and Pozen, *supra* note 127, at 1128 (discussing the use of FOIA for political ends, e.g., to thwart climate science).

through which harassers pursue vendettas against officials and agencies.[132] As Keith Rizzardi describes, "broadly written laws designed to ensure transparency can become weapons 'to discredit political opponents, intimidate critics, and simply to harass private citizens for no better reason than that they are government employees.'"[133] State legislative proposals to restrict access to home addresses and other personal information of public employees are in direct response to this rising threat environment.[134]

In some instances, quirks in state FOIA laws breed abuse. For example, some states provide requesters monetary awards when government offices fail to follow the letter of the public records law.[135] This leads to extortive behavior by requesters exploiting such provisions. The problem is particularly acute in notoriously access-friendly states like Florida and Washington where,

> [i]f the government takes too long to respond, or makes any error at all—even in a good faith response—citizens can file the most trivial of lawsuits, knowing that they will be paid fees and costs. The public records laws have granted the people rights without responsibility. People can, and do, misuse these laws, seemingly immune from consequences.[136]

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[132] As part of a recent effort in Delaware to curb FOIA abuse, for example, the state solicitor described an alarming pattern in that state of "records requesters focusing on specific state employees and using FOIA information 'in an effort to harass or stalk' . . . public employee(s)." Randall Chase, *Lawmakers Eye More Exemptions to Target "Abuse" of FOIA*, ASSOCIATED PRESS (June 9, 2021), https://apnews.com/article/government-and-politics-01308df97ce01632451c8e4aacecda3c [https://perma.cc/S8QH-PGAZ].

[133] Rizzardi, *supra* note 128, at 435–36 (quoting Howard Schweber, *Open Records Laws Go from Sunshine to Sunburn*, HUFFPOST (Apr. 6, 2011), https://www.huffpost.com/entry/open-records-laws-go-from_b_845432 [https://perma.cc/E2BV-TEJM]).

[134] David A. Lieb, *States Shield Addresses of Judges, Workers After Threats*, ASSOCIATED PRESS (Mar. 14, 2023), https://apnews.com/article/sunshine-week-secrecy-home-address-26306e390694f6ab9c95f978f4e4c207 [https://perma.cc/WP5N-83MB] (describing various states taking up measures to protect public officials under threat, noting that "[i]n New Mexico, a series of drive-by shootings at the homes of Democratic elected officials prompted the Senate to pass legislation that would let public officials keep secret their home addresses on election-related documents and government websites").

[135] *See* Rizzardi, *supra* note 128, at 484 (In Florida "[s]elf-proclaimed citizen watchdogs and other citizens can push the public records laws to their logical extreme. A requester can ask for a public record, and if the government does not respond to the satisfaction of the requester, the rush to the courthouse follows with the filing of a lawsuit and a claim for attorney's fees.").

[136] *Id.* at 426.

FOIA abuse in and outside the election context is a growing problem.[137] Before discussing ways to address the problem, the next Part examines why FOIA abuse in elections is particularly fraught.

D. *The Challenge of FOIA Abuse in Elections*

That elections must be transparent for the public to abide election outcomes is sacrosanct. And yet for elections to function, public officials must have some means to prevent abuse. But where to draw the line between legitimate and abusive election records requests at election offices? Since election transparency is about more than accountability—it must deliver public trust in outcomes too—an argument that such a line cannot be drawn is powerful. A few examples demonstrate the dilemma.

It is easy to identify examples of legitimate election records requests. They might look something like *Tatko v. Village of Granville*. In that case, a candidate for office in September 2020 lost his special election bid to become a village trustee by a vote of 180-164.[138] Ninety-one of his opponent's votes were cast by absentee ballot, while only 14 ballots from his vote total were cast absentee—far fewer than the roughly neck-in-neck race would suggest he should have received.[139] The candidate suspected an irregularity might explain why he failed to receive a proportionate share of absentee votes; he submitted a public access request for absentee ballot materials.[140] While the candidate was unsuccessful in accessing much of the material he sought,[141] his request was the opposite of abusive. It served a core purpose of election transparency: it enabled a candidate and his supporters a means to satisfy themselves that the outcome was correct. Particularly in a world in which supporters of losing candidates are far more likely to question election outcomes,[142] such transparency is indispensable.[143]

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[137] Election officials are not alone. Many state and local public institutions like schools and libraries are facing FOIA flooding as well. *See, e.g.*, Hannah Natanson & Karina Elwood, *Schools Forced to Divert Staff Amid Historic Flood of Records Requests*, WASH. POST (Mar. 27, 2023), https://www.washingtonpost.com/education/2023/03/27/school-district-foia-records-request/# [https://perma.cc/G8SJ-3S86].

[138] Tatko v. Village of Granville, 207 A.D.3d 975, 975 (N.Y. App. Div. 2022).

[139] *Id.*

[140] *Id.*

[141] *Id.* The court noted, for example, that absentee ballot applications in New York include sensitive information concerning voters' reasons for requesting absentee ballots. Importantly, election officials did permit the candidate to inspect (sometimes in redacted form) much of the material he requested though refusing to provide physical copies. *Id.* at 976–77.

[142] *See, e.g.*, Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 943–44 (2005) (noting that winners tend to have more confidence in election outcomes than losers).

[143] *Olson v. County of Dakota* provides a more recent example of an access request that meets the core purpose of election transparency. In that case, a voter whose absentee ballot

To see how quickly these waters muddy, take a harder question: whether attorney Lin Wood's access request in the lead up to the 2021 U.S. Senate runoff election in Georgia might be characterized as abusive. In that case, Wood (who three years hence would retire amidst disbarment proceedings)[144] sought to prevent the runoff from taking place.[145] Wood alleged in his suit that the state was conducting its election in contravention of Georgia statute.[146] As part of his suit, Wood sought a court order granting access to "absentee ballot mail-in envelopes received and/or processed thus far and access to view and verify the signatures against those on file."[147] The Eleventh Circuit affirmed the district court's finding that Wood lacked standing because the harms he asserted were too speculative.[148]

> [Wood] hazards that "there is actual harm imminent to him" because "Dominion was founded by foreign oligarchs and dictators to make sure that Venezuelan dictator Hugo Chavez never lost another election." Not only is this allegation astonishingly speculative, but it also presumes that because independent bad actors allegedly fixed the election of a now-deceased Venezuelan president, fraud will recur during Georgia's runoff . . . . Even if Wood's alleged fraudulent events were to ultimately occur, he has not shown more than a possible future injury. This is insufficient to confer standing.[149]

The court's standing analysis performed the function of vetting Wood's reason for seeking access—and found it lacking. But had Wood's claim started and stopped with his access request, is denying access the right call if the aim is to secure public trust in the runoff's outcome? Wood's motive for accessing election records—concededly wrapped up in a much larger and wackier bid to stop the runoff—at least arguably served a fundamental purpose election transparency is meant to serve: satisfying those who question whether an

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was rejected in a presidential primary sought access to 44 rejected absentee ballot envelopes in the county where he voted, presumably to determine whether the county's system for rejecting absentee ballots was faulty. While the trial court dismissed the claim citing a statute protecting the political privacy rights of primary voters, the appellate court reversed noting that the exemption applied to lists of voters who *voted* in political primaries, not materials associated with *rejected* ballots. *See* Olson v. Cnty. of Dakota, No. A21-0241, 2021 WL 3716714, at *1–4 (Minn. Ct. App. Aug. 23, 2021).

144 Jacqueline Thomsen, *Lawyer Who Challenged Trump Loss Retires Amid Disciplinary Probes*, REUTERS (July 5, 2023), https://www.reuters.com/legal/legalindustry/lawyer-who-challenged-trump-loss-retires-amid-disciplinary-probes-2023-07-05/ [https://perma.cc/622P-F7H3].

145 Wood v. Raffensperger, No. 1:20-CV-5155, 2020 WL 7706833, at *1 (N.D. Ga. Dec. 28, 2020), *aff'd per curiam*, No. 20-14813, 2021 WL 3440690 (11th Cir. Aug. 6, 2021).

146 *Id.*

147 *Id.*

148 Wood v. Raffensperger, No. 20-14813, 2021 WL 3440690, at *2 (11th Cir. Aug. 6, 2021) (per curiam).

149 *Wood*, 2020 WL 7706833, at *5 (alterations in original omitted).

election is administered according to the law. Did the Eleventh Circuit's refusal to allow Wood access to these records fuel the fire?[150]

One argument against access is democratic fragility. Zealous oversight of elections can (and has throughout U.S. history and today) lead to harassment, threats, and intimidation of voters and election officials.[151] As a result, while the urge to throw the transparency door open to anyone who doubts election outcomes is strong, a careful balancing is nevertheless required.[152] While every effort should be made to protect and strengthen election transparency, the need is as urgent to ensure that transparency measures do not produce democratic harms or threaten election functioning.

Elections are not the only American institution that must navigate this balance. Part IV turns to the judicial example. The judiciary must also thread the needle between ensuring transparency and protecting the interests of litigants, witnesses, judges, and judicial functioning. Rules curbing vexatious litigation and abusive discovery requests balance these concerns and are thus instructive here.

IV. CURBING ABUSE OF COURTS: VEXATIOUS LITIGATION AND BURDENSOME DISCOVERY LIMITS

Process abuses are hardly unique to FOIA. Those looking to exploit government processes for malicious ends have options too numerous to document here. This Part examines how the judiciary seeks to protect judicial functioning amidst two analog problems: vexatious litigation and discovery abuse.

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[150] Notably, a different group of plaintiffs obtained access to absentee ballot records, aided in part by the Georgia legislature's revision to its public access statute in May of 2021 (providing that scanned ballot images created by an electronic voting system are considered public records subject to disclosure). *See* GA. CODE ANN. § 50-18-71(k) (2023). Even before the legislature acted, Fulton County (the target of the records request) consented to allowing access to ballot images. Favorito v. Fulton Cnty., No. 2020CV343938, 2021 WL 6062142, at *3 (Ga. Super. Oct. 13, 2021) ("Fulton County consented to the production of scanned ballot images so as to allow Petitioners to determine whether these scanned ballot images could be a substitute for a more onerous, expensive, and time-consuming production."). As the group continued to litigate standing on its due process and equal protection claims, the trial court granted its public access request to absentee ballot records noting that the plaintiffs could access the material only "in accordance with protocols and practices that will be set forth by further order of the Court." Order to Unseal, Favorito v. Fulton Cnty., 2021 WL 6062142 (Ga. Super. Oct. 13, 2021) (No. 2020CV343938).

[151] Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. 289, 291, 336 (2022) (describing instances in which election oversight efforts become harassing).

[152] *Id*. at 301 ("[W]e are learning that more watching is not always better, that transparency has its downsides, and that modern information architectures enable distorting effects that can undermine democratic functioning.").

A. *Vexatious Litigation*

Rules constraining vexatious litigation test constitutional protections of the right to seek redress.[153] Yet the right access the justice system is not unbridled. Numerous federal and state statutes,[154] rules of procedure, rules of professional conduct,[155] and even tort law[156] constrain vexatious litigants.[157] In addition,

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[153] In 1972, the U.S. Supreme Court explicitly connected the First Amendment right to petition with access to courts. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."). For an example of a state constitutional right to petition, see TEX. CONST. art. I, § 27.

[154] An early example is the federal statute 28 U.S.C. § 1927, first enacted in 1813. An Act Concerning Suits and Costs in Courts of the United States, ch. 14, § 3, 3 Stat. 19, 21 (1813) (current version at 28 U.S.C. § 1927). Section 1927 allows a court to require "any attorney or other person admitted to conduct cases in any court of the United States" to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred" from conduct that "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. Congress originally intended Section 1927 "to prevent attorneys from filing multiple lawsuits where one suit would suffice." *See* Joseph T. Janochoski, *Punishing the Pettifogger's Practice: Applying the Sanction Power of 28 U.S.C. § 1927 to Law Firms*, 102 MINN. L. REV. 1733, 1735 (2018).

[155] Under the Model Rules of Professional Conduct, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2011).

[156] As Jeffrey Utermohle describes, all fifty states recognize the tort of "abuse of process" (or some variant). Jeffrey J. Utermohle, *Look What They've Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland*, 32 U. BALT. L. REV. 1, 7–8 (2002). Justice Souter defined abuse of process as, "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." *See* Heck v. Humphrey, 512 U.S. 477, 495 n.2 (1994) (Souter, J., concurring) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 897 (5th ed. 1984)); *see also* Batten v. Abrams, 626 P.2d 984, 988 (Wash. Ct. App. 1981); 1 AM. JUR. 2D *Abuse of Process* § 1, Westlaw (database updated Oct. 2023) (defining abuse of process); RESTATEMENT (SECOND) OF TORTS § 682 (AM. L. INST. 1977) ("One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.").

[157] Though the terms are often intermingled, as understood here, frivolous litigation refers to filing claims lacking merit or basis in law. Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1070–71 (1994) (providing a review of narrow vs. broad understandings of frivolous litigation). In contrast, vexatious litigation is the filing of multiple frivolous claims or even meritorious claims filed for the sole purpose of harassing or abusing the justice system, individuals within it, or opposing parties. *See* Gurman v. Metro Hous. & Redevelopment Auth., 884 F. Supp. 2d 895, 900–01 (D. Minn. 2012) (clarifying that vexatious litigation is not a sanction for merely filing a frivolous suit but rather is meant to tackle abuse of the court system); Erin Schiller & Jeffrey A. Wertkin, *Frivolous Filings*

well-developed common law principles support courts' inherent discretion to impose sanctions against litigants who abuse the judicial process.[158]

In 1896, England passed the first law addressing vexatious litigation, after a single individual caused much trouble.[159] Australia followed in 1927, also spurred by one particularly aggressive litigant.[160] California passed the first U.S. vexatious litigant statute in 1963.[161] Eleven other states eventually followed.[162] State vexatious litigation statutes, building on common law traditions, consider a variety of factors in determining whether litigants should be sanctioned or barred from access to courts. Such considerations include:

> (1) the litigant's history of litigation and whether it entailed vexatious, harassing or duplicative lawsuits;
> (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?;
> (3) whether the litigant is represented by counsel;
> (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and
> (5) whether other sanctions would be adequate to protect the courts and other parties.[163]

Vexatious litigation remedies vary considerably. Courts can impose sanctions on vexatious litigants that range from attorneys' fees to punitive fines

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and Vexatious Litigation, 14 GEO. J. LEGAL ETHICS 909, 909 (2001) (explaining the general conception about vexatious litigators is that they abuse the court system).

[158] *See, e.g.*, Shafii v. British Airways, PLC, 83 F.3d 566, 571 (2d Cir. 1996) (noting that courts have discretion to place limitations on litigants who persists in filing vexatious or frivolous suits); Frank O. Carroll III, *"Vex My Soul": A Primer on Vexatious Litigants*, 6 HLRE: OFF REC. 231, 232–33 (2016).

[159] For an entertaining description of his antics, see Michael Taggart, *Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896*, 63 CAMBRIDGE L.J. 656, 656 (2004).

[160] Grant Lester & Simon Smith, *Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On*, 13 PSYCHIATRY, PSYCH. & L. 1, 1, 8 (2006).

[161] CAL. CIV. PROC. CODE § 391 (West 2023).

[162] HAW. REV. STAT. ANN. § 634J-1 (LexisNexis 2023); TEX. CIV. PRAC. & REM. CODE ANN. § 11.054 (West 2013); ARIZ. REV. STAT. ANN. § 12-3201 (West 2016); FLA. STAT. ANN. § 68.093 (West 2000); IDAHO ADMIN. CODE r. 59 (2011); MICH. CT. R. 7.316(C) (1985); NEV. REV. STAT. ANN. § 155.165 (West 2015); N.H. REV. STAT. ANN. § 507:15 (LexisNexis 2023); N.D. Admin. Code 58 (2023); OHIO REV. CODE ANN. § 2323.52 (West 2016); UTAH R. CIV. PROC. 83 (2021). In addition, several federal statutes seek to prevent abusive litigation in specific legislative areas. *See, e.g.*, Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. (1996); Prison Litigation Reform Act, S. 1279 104th Cong. (1995); Attorney Accountability Act, H.R. 988, 104th Cong. (1995); Y2K Act, H.R. 775, 106th Cong. (1999).

[163] Safir v. U.S. Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986) (describing standards courts consider in finding a litigant vexatious).

to liability for damages in tort through abuse of process claims.[164] Vexatious litigation statutes also permit courts to bar litigants from filing claims or require litigants deemed vexatious to submit a prefiling motion to a judge before that litigant may file a future claim.[165] Another interesting feature of vexatious litigation statutes is their cross-jurisdictional effect. Being declared a vexatious litigant in one jurisdiction can prevent the litigant from filing suit in other jurisdictions that have identified that litigant as vexatious (similar to cross-jurisdictional impacts of sex offender status and sex offender registries).[166]

Constitutional challenges to vexatious litigation statutes have been unsuccessful. In 1997, a trial court plaintiff identified as a vexatious litigant in California challenged the statute as a violation of his First Amendment right to petition.[167] He argued that California's statute conferred an impermissible "chill" upon those who lose several suits against the government.[168] He contended such individuals might not bring forward legitimate grievances for fear of being branded a vexatious litigant.[169] A California appellate court rejected this argument, finding that the First Amendment does not immunize baseless litigation.[170]

A similar outcome befell the plaintiff in *Gordon v. Marrone* who challenged vexatious sanctions against him.[171] In *Gordon*, a New York court sanctioned a property owner not for his frivolous appeal (his appeal was found to have merit), but because evidence demonstrated his primary purpose on appeal was to harass and punish an environmental group opposed to his plans for a subdivision.[172]

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[164] California requires plaintiffs to post a security for lawsuit costs when defendants file a motion to shift costs to the vexatious litigator. *See* CAL. CIV. PROC. CODE § 391.1(a) (West 2023). Texas allows parties to be sanctioned or held guilty of a contempt if they file vexatious pleadings to delay a trial on purpose. *See* TEX. R. CIV. PROC. 13; *see also supra* note 156 (describing tort of abuse of process and its use to curb vexatious litigation).

[165] CAL. CIV. PROC. CODE § 391.7 (West 2023). For examples cases imposing prefiling requirements, see *In re* Kinney, 135 Cal. Rptr. 3d 471, 474–79 (Cal. Ct. App. 2011); Rath v. Rath, 988 N.W.2d 548, 550 (N.D. 2023), *opinion corrected on reh'g* (Apr. 26, 2023); and *In re* Prefiling Ord. Declaring Vexatious Litigant, 435 P.3d 1091, 1096–98 (Idaho 2019).

[166] Since 1991, California has maintained a list of vexatious litigants. *See* JUD. COUNCIL OF CAL., VEXATIOUS LITIGANT LIST (Oct. 2023), http://www.courts.ca.gov/documents/vexlit.pdf (on file with the *Ohio State Law Journal*). As of October 1, 2023, the sixty-six page list included over 3,000 individuals. *Id.* For an example of a cross-jurisdictional vexatious litigation statute, see TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.101, 11.054 (West 2013) (providing that persons declared vexatious litigants in any state or federal jurisdiction are prohibited from filing claims in Texas); CAL. CIV. PROC. CODE § 391(b)(4) (West 2023) (providing that vexatious litigation in other states counts towards declaring a litigant as vexatious in California courts); and Blizzard Energy, Inc. v. Schaefers, 301 Cal. Rptr. 3d 724, 725 (Cal. Ct. App. 2022).

[167] Wolfgram v. Wells Fargo Bank, 61 Cal. Rptr. 2d 694, 703–04 (Cal. Ct. App. 1997).

[168] *Id.*

[169] *Id.*

[170] *Id.* (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983)).

[171] Gordon v. Marrone, 202 A.D.2d 104, 105–06 (N.Y. App. Div. 1994).

[172] *Id.* at 110.

The property owner alleged the sanctions infringed on his First Amendment right to access the courts for non-frivolous claims.[173] In denying the plaintiff's claim, the court described why sanctions for abusive suits became the norm in New York:

> [A]busive litigation practices were causing unjustifiable burdens on an already overcrowded court system. Inordinate delays in the resolution of genuine disputes and increases in the expense of lawsuits for both litigants and the courts were the result. The need for sanction power had become obvious.[174]

The court held that "[e]nforcement of the sanctions rule is essential to deter conduct that wastes judicial resources and inhibits the proper administration of the court system. Any effect it may have on substantive rights, as alleged by the petitioner, is merely incidental and not prohibited."[175]

Curbs on abusive litigation have several important implications relevant to curbing FOIA floods in elections. First, they establish that government institutions must be empowered to protect their core function. Second, vexatious litigation statutes have stood up well to constitutional challenge. Although the right of access to courts is firmly enshrined and constitutionally protected, courts routinely underscore the profound imperative to protect judicial functioning. If courts are swamped with abusive claims, the right of access to judicial remedy is reduced for all litigants. Court capacity is a finite resource.[176] Likewise, FOIA-flooded election offices diminish the ability of election administrators to run elections effectively—and by extension the right of every American to cast an effective vote.[177] Election officials have limited time and resources to run elections; FOIA floods reduce election office capacity to ensure elections are accessible, reliable, and accurate.[178]

Vexatious litigation curbs provide one area of comparison. The next Part examines restrictions in place to prevent discovery abuse that also provide food for thought in stemming FOIA floods.

B. *Discovery Abuse*

Discovery provides litigants a means of gathering information to support (or defend against) claims in litigation. It also produces information that can be used to prevent future misconduct.[179] In that sense, both FOIA laws and discovery practice provide a means by which actors seeking accountability can inform

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[173] *Id.* at 111.
[174] *Id.* at 108.
[175] *Id.* at 111.
[176] *See id.* at 108.
[177] *See infra* Part II.
[178] *Id.*
[179] Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2045 (2018).

themselves. Like FOIA, discovery is susceptible to abuse. Discovery abuse generally takes two forms: requesters making "impositional" requests seeking to harass, delay, or bury an opponent or discovery targets using bad faith tactics (stonewalling, etc.) to repel access.[180] The discussion here focuses on the former.[181]

The Federal Rules of Civil Procedure and state analogues provide a means to curb abusive discovery requests.[182] Specifically, Federal Rule 26(b)(1) enables federal courts to limit discovery,

> if, considering the totality of the circumstances, including the needs of the case, the amount in controversy, the parties' resources, the importance of an issue, and the importance of the discovery in resolving the issue, compliance with the request would be unduly burdensome or oppressive, or where the harm of disclosure outweighs the need of the person seeking discovery of the information, or if the request is overly broad.[183]

Generally speaking, courts have found that "a discovery request is overly broad or unduly burdensome on its face if it '(1) uses an omnibus term'"[184] and "(2) applies to a general category or group of documents or a broad range of

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[180] John W. Heiderscheit III, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 OR. L. REV. 57, 59–60 (1989) (describing classification of abusive discovery between failure to make documents available (responder side) and over-discovery (requester side)).

[181] *Id.* Most reform efforts have focused on addressing problems associated with the response side—litigants refusing or otherwise creating obstacles to prevent opponents from accessing needed information. *Id.*

[182] The federal rule provides that "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1). For examples of state analogs, see W. VA. R. CIV. PROC. 26(b)(1), and UTAH R. CIV. PROC. 26(b).

[183] 10 FED. PROC., LAW.'S ED. § 26:96 (2023) (internal citations omitted).

[184] Transamerica Life Ins. Co. v. Moore, 274 F.R.D. 602, 609 (E.D. Ky. 2011) (citing Moses v. Halstead, 236 F.R.D. 667, 672 (D. Kan. 2006)). An omnibus term is a word used in the discovery request or motion that make "arduous the task of deciding which of numerous documents may conceivably fall within its scope." *In re* Urethane Antitrust Litig., 261 F.R.D. 570, 576 (D. Kan. 2009) (quoting Johnson v. Kraft Foods N. Am., Inc., 238 F.R.D. 648, 658 (D. Kan. 2006)) (describing omnibus terms). Omnibus terms such as "concerning," "relating to," "relate to," or "refer to" potentially indicate that a discovery motion could be over broad. *Id.* "When . . . the omnibus phrase modifies a sufficiently specific type of information, document, or event, rather than large or general categories of information or documents, the request will not be deemed objectionable on its face." *Id.* (quoting Johnson, 238 F.R.D. at 658).

information."[185] The power to determine whether a request is overbroad or unduly burdensome lies squarely with the trial court.[186]

A second tool available to judges to detect and deter discovery abuse is an affirmative certification requirement. Rule 26(g)(B) requires litigants to certify that every discovery request and response is:

> (i) . . . warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[187]

The certification requirement serves an important signaling and deterrence function, requiring attorneys and pro se litigants to stand behind the good faith motive of their discovery requests.

Despite these (and other) provisions in federal law and state equivalents,[188] and despite periodic empirical work demonstrating that concerns are overblown,[189] the sentiment persists that litigants abuse discovery in numerous ways.[190] Courts routinely impose sanctions on attorneys for abusive discovery practices.[191] Scholars and jurists have for decades acknowledged the need to curb discovery abuse to improve efficiency of dispute resolution in courts, to advance the truth-seeking function of the adversarial system, and to prevent

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[185] *Transamerica Life Ins. Co.*, 274 F.R.D. at 609 (citing Moses v. Halstead, 236 F.R.D. 667, 672 (D. Kan. 2006)).

[186] *See, e.g.*, Punt v. Kelly Servs., 862 F.3d 1040, 1047 (10th Cir. 2017) (describing discretion of trial court in overseeing discovery); *In re* Application to Obtain Discovery for Use in Foreign Procs., 939 F.3d 710, 730 (6th Cir. 2019), *abrogated by* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2091 (2022).

[187] FED. R. CIV. P. 26(g)(1)(B).

[188] Rule 26 is not alone in policing discovery abuse. Federal Rule of Civil Procedure 37 enables courts to impose sanctions for discovery abuse. FED. R. CIV. P. 37(b)–(d). And 28 U.S.C. § 1927 authorizes courts to require lawyers engaged in "unreasonabl[e] or vexatious[]" discovery to pay the costs involved. 28 U.S.C. § 1927.

[189] Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685–89 (1998) (describing results of empirical studies of discovery abuse).

[190] *Id.* at 684–85 (describing how empirical studies consistently undermine the narrative that discovery abuse occurs on a massive scale).

[191] *See, e.g.*, Brenner v. Comm'r of Internal Revenue, 164 F. App'x 848, 850–51 (11th Cir. 2006) (upholding sanctions against abusive discovery requests in tax dispute); Iniguez v. Wayfair LLC, No. 5:21-cv-00880-MWF, 2022 WL 4606190, at *4 (C.D. Cal. May 16, 2022) (denying party request for sanction of abusive discovery tactics); Braden v. S. Main Bank, 837 S.W.2d 733, 742 (Tex. App. 1992) (ordering that attorneys engaged in abusive discovery practices perform community service as sanction).

harassment. But curbing discovery abuse presents a conundrum. Judge Frank Easterbrook summarized the inherent difficulties in doing so:

> A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests.[192]

Given these realities, Easterbrook goes on to lament:

> The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands . . . have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole . . . from a request that was not justified at the time? Ex post perspectives are no answer to problems that must be solved ex ante.[193]

By way of solutions, Judge Easterbook settles on two that are instructive for present purposes. The first is to address legal uncertainty which exacerbates impositional requests.[194] Judge Easterbrook observes that litigants will not be restrained in what they request in an environment of legal uncertainty because they will be unsure what information will prove salient before a trier of fact.[195] "Legal uncertainty," Easterbrook observes, "is the godfather of discovery abuse."[196] This reflection rings true in the case of election record requests. The lack of statutory clarity about which records are public and which are not creates uncertainty and exacerbates the potential for overly burdensome records requests.[197]

A second suggestion Easterbrook forwards involves judicial management of the discovery process. Easterbrook points to civil law systems which employ

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[192] Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

[193] *Id.* at 638–39 (footnote omitted).

[194] *Id.* at 643–44.

[195] *Id.*

[196] *Id.* at 644.

[197] A related contributor is poor public understanding of how elections are run. *See About ASAP*, ALL. OF STUDENTS AT THE POLLS, https://asapelections.org/about/ [https://perma.cc/768E-4HT2]. Most voter education activity focuses on how to vote (where to find polling places, who is on the ballot, etc.). *Id.* Not enough voter education focuses on how elections *work* and what guardrails are in place to ensure accuracy and fairness. *Id.*

a judicial officer to make preliminary decisions on the merits that help guide the discovery process.[198] As Easterbrook describes, the link of discovery to merits greatly cuts down on the number of discovery demands.[199] This observation suggests that solutions lie in administrative records management and dispute resolution mechanisms, ideas explored in Part IV below.

Aside from Easterbrook's learned observations, one other aspect of discovery abuse mitigation is worthy of mention: customization. In certain areas, discovery abuse is addressed through development of specific doctrines when the dispute type is regularized and both the discovery landscape and the players within it are well understood. One example of this phenomenon is the "Apex Doctrine" in corporate discovery disputes. In corporate litigation, demands to depose top executives are commonly used as a tactic to intimidate or harass corporate defendants.[200] While not formally adopted at the federal level, the Apex Doctrine has evolved as a means of addressing such burdensome, frivolous and/or harassing demands on executives and CEOs.[201] The Apex Doctrine calls on courts to entertain a multi-factor test that examines whether the executive qualifies as an "Apex individual," the degree to which the executive possesses unique personal knowledge of the issues in dispute, and finally whether less intrusive discovery avenues are available.[202] The Apex Doctrine has been useful in helping limit this narrow form of discovery abuse.[203] Aspects of FOIA floods at election offices might benefit from tailored responses as well.

Solutions to curb vexatious litigants and harassing discovery demands reveal the judiciary's recognition that access rights cannot come at the cost of judicial functioning. Part IV weaves these ideas into suggestions for how states might approach protecting election functioning in the face of FOIA floods.

V. STEMMING THE FOIA-FLOOD IN ELECTIONS

How can states ensure election records access satiates those who distrust elections outcomes while ensuring elections can function? This Part turns to

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[198] Easterbrook, *supra* note 192, at 644–45; *see* JAMES R. MAXEINER, GYOOHO LEE & ARMIN WEBER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE 151–53 (2011) (comparing the American system of discovery to the German and Korean systems).

[199] Easterbrook, *supra* note 192, at 645. He continues, "Litigants in nations that employ this system do not complain about abusive discovery; to the contrary, they like their process and complain when portions of our system (which they think barbaric) begin to intrude." *Id.*

[200] *See* W. Warren Hedgepeth, *You Can't Simply Say "No!" Almighty CEO: Georgia's View on the Apex Doctrine and Discovery Abuse*, 74 MERCER L. REV. 377, 377–78 (2022) ("Depositions are not only expensive but can be disruptive, especially to high-level corporate executives whose time and dedication to their companies should be their primary focus.").

[201] *Id.* at 378.

[202] *Id.*

[203] *Id.* at 385.

potential solutions from a variety of angles: statutory reform, administrative solutions, accountability mechanisms, affirmative disclosure practices, and potential automated fixes.

A. *Statutory Reform*

Abusive and harassing requests at federal and state agencies often take the form of extremely broad access requests.[204] Rules prohibiting burdensome FOIA requests are one means by which agencies may push back.[205] Federal courts have stressed that Congress did not intend FOIA to transform government agencies into "full-time investigators on behalf of requesters."[206] Courts have recognized that requesters must frame requests with sufficient particularity to ensure agencies can comply without unreasonable burden.[207] Notably, a heavy burden alone does not entitle agencies to deny access.[208] Generally, courts will weigh whether the request sufficiently enables the agency's staff to reasonably ascertain and locate responsive records.[209]

State laws similarly enable agencies to push back against overly burdensome requests. In 2017, for example, the Washington legislature amended its public records access statute such that requests "for all or substantially all" of an agency's records are not considered a valid request for

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[204] *Cf.* HALPERN, *supra* note 130, at 15–16.

[205] *See, e.g.*, Am. Fed'n of Gov't Emps., Loc. 2782 v. U.S. Dep't of Com., 907 F.2d 203, 209 (D.C. Cir. 1990); Nation Mag. v. U.S. Customs Serv., 71 F.3d 885, 891–92 (D.C. Cir. 1995); Int'l Couns. Bureau v. U.S. Dep't of Def., 723 F. Supp. 2d 54, 59–60 (D.D.C. 2010); Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 6 (D.D.C. 2003).

[206] Assassination Archives & Rsch. Ctr., Inc. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989).

[207] *Id.* (citing Yeager v. DEA, 678 F.2d 315 (D.C. Cir. 1982)); Jud. Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 27–28 (D.D.C. 2000); *see also FOIA Guide, 2004 Edition: Procedural Requirements*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/oip/foia-guide-2004-edition-procedural-requirments [https://perma.cc/99YG-3JJ3] (Dec. 3, 2021) (citing cases and explaining that "agencies are not required to conduct wide-ranging, 'unreasonably burdensome' searches for records").

[208] *FOIA Counselor: Questions & Answers*, U.S. DEP'T OF JUST.: FOIA UPDATE (Jan. 1, 1983), https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-21 [https://perma.cc/67EF-NHGY] ("The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A).").

[209] Yeager v. Drug Enf't Admin., 678 F.2d 315, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (second alteration in original) (quoting S. REP. NO. 854 (1974)). *But see Am. Fed'n of Gov't Emps.*, 907 F.2d, at 209 (holding that "[w]hile [plaintiff's requests] might identify the documents requested with sufficient precision to enable the agency to identify them . . . it is clear that these requests are so broad as to impose an unreasonable burden upon the agency" because the agency would have "to locate, review, redact, and arrange for inspection a vast quantity of material").

identifiable records.[210] The amendment allows state agencies to deny multiple bot requests from a requester to the agency within a twenty-four hour period if the agency establishes that responding to the multiple requests would cause excessive interference with other essential function of the agency.[211] The "bot request"—a new phenomenon—is defined in Washington's law as "a request for public records that an agency reasonably believes was automatically generated by a computer program or script."[212] Amendments to Washington's Public Records Act came after numerous reports of open records abuse—including the near bankruptcy of a town after it paid workers to respond to open records requests as state law required.[213] A state Auditor's Office report concluded that state offices spent $60 million in a twelve-month period complying with open records requests.[214] Changes in Washington open records law reflects a reality that other states are acting on as well: government agencies are no match for the current onslaught of abusive requests.[215]

Even in states without statutes addressing overly-burdensome requests, state courts have placed limits on such requests.[216] In *Webster v. Hennepin County*, for example, the Minnesota Supreme Court considered an access request for a

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[210] WASH. REV. CODE § 42.56.080(1) (2023). Many other states feature curbs on overly burdensome requests. *See, e.g.*, KY. REV. STAT. ANN. § 61.872(6) (West 2023). Under Kentucky law, for example, "if an application [for public records] places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof." *Id.* In 2008 the Kentucky Supreme Court set a high bar for agencies to trigger this provision. *See* Commonwealth v. Chestnut, 250 S.W.3d 655, 664 (Ky. 2008) ("[R]efusing to comply with an open records request on this unreasonably burdensome basis faced a high proof threshold since the agency must show the presence of an unreasonable burden 'by clear and convincing evidence.'").

[211] WASH. REV. CODE § 42.56.080(3) (2023).

[212] *Id.*

[213] Jerry Cornfield, *Lawmakers Seek Solutions to Public Records Request Abuses*, HERALDNET (Feb. 2, 2016), https://www.heraldnet.com/news/lawmakers-seek-solutions-to-public-records-request-abuses/ [https://perma.cc/8U2Z-4E57].

[214] Joseph O'Sullivan, *Bill Sets New Fees, Limits on Public-Records Requests in Washington*, SEATTLE TIMES (May 16, 2017), https://www.seattletimes.com/seattle-news/politics/bill-sets-new-fees-limits-on-public-records-requests-in-washington/ [https://perma.cc/RYT7-8P8P].

[215] Erin Murphy, *Iowa Government Transparency Board Considers Proposal to Allow Government to Reject 'Vexatious' Records Requests*, GAZETTE (Sept. 15, 2023), https://www.thegazette.com/state-government/iowa-government-transparency-board-considers-proposal-to-allow-government-to-reject-vexatious-reco/ [https://perma.cc/BRB9-9YAF].

[216] For one amusing example of a township fighting back, *see* C.J. Ciaramella, *New Jersey Town Sues Elderly Woman for Filing Too Many Public Records Requests*, REASON (Mar. 30, 2022), https://reason.com/2022/03/30/new-jersey-town-sues-elderly-woman-for-filing-too-many-public-records-requests/ [https://perma.cc/4UM7-CATT].

county to produce employee emails containing a list of twenty keywords.[217] The county's data governance officer determined that a computer-aided search would produce approximately 8,700 responsive emails and that staff time required to review each email to redact private and confidential data in each would take over 290 hours—over seven weeks of full-time work.[218] The Respondent argued that acquiescing to the requester's demands placed too significant a burden on state government:

> To require government entities to perform specific actions, such as time-consuming computer-aided and human-based searches at the whim of a "requestor," would lead to absurd results. [This] would compel government entities to dedicate enormous resources to create and/or purchase software to comply with these fishing expeditions, and to hire staff dedicated only to performing these searches, and reviewing and producing data. [Such demands] . . . would force government entities to become full-time researchers and cripple their ability to perform other critical government functions.[219]

In examining the level of burden placed on government agencies, the intent of the requester is seldom examined. But not never. Courts in New Jersey, for example, have inquired whether requesters are proceeding in good faith.[220] But where is that line? How might a court determine whether "bad faith" exists?

Three states have asked and answered this question by statute: Hawaii, Connecticut, and Maryland open records laws contain provisions addressing vexatious open records requesters.[221] Connecticut's Freedom of Information

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[217] Webster v. Hennepin Cnty., 891 N.W.2d 290, 291 (Minn. 2017).

[218] Brief for Respondent at 14–15, Webster v. Hennepin Cnty., 891 N.W.2d 290 (Minn. 2017) (No. A16-0736).

[219] *Id.* at 46.

[220] As the Supreme Court of New Jersey observed in *Loigman v. Kimmelman*, "[o]rdinarily, only an assertion of citizen or taxpayer status is necessary for production of common-law records, subject to a showing of good faith." Loigman v. Kimmelman, 505 A.2d 958, 962 (N.J. 1986); *see also* Taxpayers Ass'n of Cape May v. City of Cape May, 64 A.2d 453, 456 (N.J. Super. Ct. App. Div. 1949) (weighing the motives of requesters). In New Jersey, records requests are adjudicated under both the state's public access law and its common law tradition. *See Frequently Asked Questions*, N.J. GOV'T RECS. COUNCIL (2024), https://www.nj.gov/grc/public/faqs/#1 [https://perma.cc/6JAQ-LJ95].

[221] Illinois, Pennsylvania, and Texas have considered similar legislation, as has the federal FOIA Advisory Committee (twice). *See* Katherine Revello, *Vexatious Requester: Testing the Limits of Connecticut's FOI Laws*, CONN. INSIDE INVESTIGATOR (June 11, 2023), https://insideinvestigator.org/vexatious-requester-testing-the-limits-of-connecticuts-foi-laws/ (on file with the *Ohio State Law Journal*); FOIA ADVISORY COMM., LEGISLATION SUBCOMMITTEE REPORT 4 (June 2022), https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/legislation-subcommittee-report-1.pdf [https://perma.cc/K6DQ-AHWK] ("We recognize that defining a vexatious request or requester would be a complex task, and that the requester community is likely to be especially wary of sanctions against requesters. Thus, if future Committee members take on this challenge, we suggest that requesters comprise the majority of the members of the relevant working group."). The report

Commission is in place "to administer and enforce the provisions of the Connecticut Freedom of Information Act, and to thereby ensure citizen access to the records and meetings of public agencies in the State of Connecticut."[222] Connecticut's Commission is empowered to levy fines and punishment against both Connecticut agencies that fail to comply with open records law and individual filers who abuse the system.[223]

Specifically, Connecticut's C.G.S.A. § 1-206 provides that "a public agency may petition the [Freedom of Information] [C]ommission for relief from a requester that the public agency alleges is a vexatious requester."[224] The petition from the public agency must be sworn under penalty of false statement, a misdemeanor in Connecticut, and is keyed to a requester's pattern of conduct.[225] To succeed in its petition, the agency must detail abusive pattern of conduct as evidence by factors including:

> (A) [t]he number of requests filed and the total number of pending requests;
> (B) the scope of the requests;
> (C) the nature, content, language or subject matter of the requests;
> (D) the nature, content, language or subject matter of other oral and written communications to the agency from the requester; and
> (E) a pattern of conduct that amounts to an abuse of the right to access information under the Freedom of Information Act or an interference with the operation of the agency.[226]

Hawaii passed a similar statute in 2010 reportedly in response to being overwhelmed by requests for former President Barack Obama's birth certificate.[227] The current version of Hawaii's law enables state agencies to request that Hawaii's Office of Information Practices (OIP) label a requester vexatious upon showing a "clear pattern of making records requests that are

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also notes that several foreign countries have vexatious requester prohibitions, including vexatious requester laws have been enacted by the United Kingdom, Canada, New Zealand, Ireland, Scotland, and the Philippines. *Id.* at 4 n.25. The federal government has also considered how to address vexatious FOIA requests, concluding thus far that any attempt to define "vexatious" risks impinging on the rights of requesters. *National Archives and Records Administration and Freedom of Information Act Advisory Committee Meeting*, *January 27, 2015 Meeting Transcript*, OFF. OF GOV'T INFO. SERVS. (Feb. 4, 2015), https://www.archives.gov/ogis/foia-advisory-committee/2014-2016-term/documents/january-27-2015-meeting-transcript [https://perma.cc/PAC9-D586].

[222] *Connecticut Freedom of Information Commission*: *About Us*, CT.GOV, https://portal.ct.gov/FOI/Common-Elements/Top-Menu/About-Us [https://perma.cc/BGF4-SQNQ].

[223] Revello, *supra* note 221.

[224] CONN. GEN. STAT. ANN. § 1-206(b)(6) (West 2023).

[225] *Id.*; *id.* § 53a-157b ("False statement is a class A misdemeanor.").

[226] *Id.* § 1-206(b)(6).

[227] Rob Shikina, *Requests Increase for Obama Birth Proof*, STAR ADVERTISER (Dec. 25, 2010), https://www.staradvertiser.com/2010/12/25/hawaii-news/requests-increase-for-obama-birth-proof/ [https://perma.cc/WH4G-QCEQ].

manifestly excessive or in bad faith and interfere with an agency's responsibilities."[228] The statute directs the OIP to consider a list of factors similar to Connecticut's, advising that satisfying one factor alone is not sufficient.[229] If Hawaii's OIP labels a requester vexatious, that person's right to submit public records requests is suspended for up to two years.[230]

In 2021, Maryland passed a vexatious requester provision. The statute vests a Compliance Board with authority to review and resolve an agency's complaints that a request is vexatious as follows:

> [I]f the Board finds that the applicant's request is frivolous, vexatious, or in bad faith, based on the totality of the circumstances including the number and scope of the applicant's past requests and the custodian's responses to past requests and efforts to cooperate with the applicant, issue an order authorizing the custodian to: (i) ignore the request that is the subject of the custodian's complaint; or (ii) respond to a less burdensome version of the request within a reasonable time frame, as determined by the Board.[231]

Critics of vexatious requester laws warn of their misuse. After Hawaii passed its vexatious requester statute in 2010, for example, the Reporters Committee for Freedom of the Press criticized the new law: "[T]he Legislature should have used a scalpel to address the problem of multiple requests, but it . . . use[d] a shotgun."[232] Still, one can easily imagine that legal protections such as these for inundated election offices could help stem the tide.

Reforms to state law governing overly burdensome requests and/or vexatious requesters may be a heavy lift. Short of these reforms, a more basic statutory fix should be considered: improved statutory clarity regarding which records are public and which are not. To paraphrase Judge Easterbrook, legal uncertainty is the godfather of election records request woes.[233] Requesters and election offices need clear guidance—in both state open records statutes and election codes—on what is and what is not public. Doing so will safeguard access and increase efficiency in responding to requests. Rules should be carefully designed to reveal material that helps the public see for itself that elections are running according to the law without sacrificing voting privacy, election official safety, or election functioning. For election officials, clear laws can reduce workloads, save taxpayer dollars, and lessen anxiety about responding to requests.

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[228] H.B. 1518, § 92F, 29th Leg. (Haw. 2017).

[229] *Id.*

[230] *Id.*

[231] MD. CODE ANN., GEN. PROVIS. § 4-1A-04(b)(3) (West 2023).

[232] *Hawaii's New Vexatious Requester Law Could Affect Journalists*, REPS. COMM. FOR FREEDOM OF THE PRESS (May 13, 2010), https://www.rcfp.org/hawaiis-new-vexatious-requester-law-could-affect-journalists/ [https://perma.cc/T658-UQ49].

[233] *See* Easterbrook, *supra* note 192, at 644.

B. *Administrative Solutions*

A variety of fixes to election records request administration could help ease the FOIA flood. One option is to centralize the request process. Restructuring how election offices respond to FOIA requests by removing the burden (or even some of the burden) from local election offices could reduce inefficiencies and redundancies and help states better identify trends and improve transparency overall.

Some states are experimenting with this restructuring fix. Washington state passed a statute centralizing voter registration-related records request processing in 2023.[234] Reformers have proposed a broader approach to centralizing election records management in Wisconsin, where exploding public records requests have been particularly severe.[235] In 2022, the Wisconsin Election Commission (WEC) proposed establishing an "Office of Election Transparency and Compliance" to centralize and improve the process of responding to election records requests.[236] The proposed office would work to ensure questions about election processes and violations are "researched to resolution; improve the WEC's responsiveness to the public, elected officials, and other agencies; and assist the WEC in responding to questions about elections."[237] While it is unclear how or whether such an office would relieve

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[234] *See* Martinell, *supra* note 28 ("SB 5459 will centralize all public records requests submitted to the county auditor with [the secretary of state] if the request concerns the statewide voter registration database.").

[235] Memorandum from Meagan Wolfe, Adm'r, Wis. Elections Comm'n, to Members of the Wis. Elections Comm'n 4–7 (Aug. 31, 2022), https://elections.wi.gov/media/16486/download [https://perma.cc/EVG3-HZM4] (Since 2016, "the average number of public records requests received per month by the [WEC] has increased nearly eight-fold, from about two per month in 2016 to more than 16 per month in 2022. The numbers continue to climb, creating a backlog of requests and lengthening the time each requester must wait for a response.").

[236] Henry Redman, *Elections Commission Votes to Request Creation of Agency Inspector General*, WIS. EXAM'R (Aug. 31, 2022) https://wisconsinexaminer.com/2022/08/31/elections-commission-votes-to-request-creation-of-agency-inspector-general/ [https://perma.cc/LFS6-J6PA] ("The Wisconsin Elections Commission (WEC) voted unanimously [] to include in its next biennial budget request the creation of a new inspector general office within the agency to respond to increasing demand for information from Wisconsin voters."); Anya van Wagtendonk, *Gov. Tony Evers to Propose Changes to Wisconsin Election Laws*, WIS. PUB. RADIO (Feb. 13, 2023), https://www.wpr.org/gov-tony-evers-propose-changes-wisconsin-election-laws [https://perma.cc/77Y7-G3BY]; *Wisconsin Election Officials Aim to Resurrect Inspector-General Office to Rebuild Confidence in Democratic Process*, MARKETWATCH (May 15, 2023), https://www.marketwatch.com/story/wisconsin-election-officials-aim-to-resurrect-inspector-general-office-to-rebuild-confidence-in-democratic-process-d2b5e27f [https://perma.cc/LD7B-ZWR3].

[237] The Office would provide research and assistance to the WEC legal team regarding formal complaints of election law violations and noncompliance of election officials; provide research on election processes, fulfill open records requests, respond to legislative inquiries,

Wisconsin's 1,900+ local elections officials from responding to individual records requests at their offices,[238] such an approach would appear to deliver numerous benefits including addressing systemic distrust of elections in the state, identifying and addressing patterns of concern, and relieving the pressure on local officials to address widespread public (and legislative) misunderstandings about how Wisconsin election's work. The Wisconsin Joint Committee on Finance scuttled the WEC proposal on May 2, 2023.[239]

If restructuring is off the table, another administrative fix to consider is cost. Currently, most states charge nominal fees to produce records.[240] Typically, fees charged are meant to approximate actual costs of providing the records, for example a per sheet photocopy fee.[241] Yet responding to some records requests can cost significantly more to fulfill, especially when the requested "record" does not exist and must be created. A requester might ask, for instance, for a list of provisional vote denials. Creating such a list requires election workers to consult information technology experts whose time is expensive.[242] Raising FOIA fees for such requests would reflect this reality.

Recognizing the significant costs to Utah agencies responding to voluminous FOIA requests, Utah's governor signed a bill into law in 2022 that permits government entities to structure the fees for records requests in a manner

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and respond to public inquiries. WIS. ELECTIONS COMM'N, AGENCY BUDGET REQUEST 2023–2025 BIENNIUM 35–36 (Sept. 2022), https://elections.wi.gov/sites/default/files/documents/1.%20202325%20Biennial%20Budget%20WEC%209.15.22.pdf (on file with the *Ohio State Law Journal*).

[238] *Id.* at 4.

[239] GOVERNOR & JOINT COMM. ON FIN., COMPARATIVE SUMMARY OF BUDGET RECOMMENDATIONS: 2023–25 WISCONSIN STATE BUDGET 3, 185 (June 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/401_comparative_summary_of_budget_recommendations_governor_and_joint_committee_on_finance_june_2023_entire_document.pdf [https://perma.cc/E29A-A2QL].

[240] *How Much Do Public Records Cost*, BALLOTPEDIA, https://ballotpedia.org/How_much_do_public_records_cost [https://perma.cc/6GE5-7LBR] ("In all 50 states, FOIA laws allow records custodians to charge fees associated with finding, sorting, and/or copying records.").

[241] *See, e.g.*, COLO. REV. STAT. ANN. § 24-72-205(5)(a) (West 2023) ("A custodian may charge a fee not to exceed twenty-five cents per standard page . . ."); CONN. GEN. STAT. ANN. § 1-212(a)(2)(B) (West 2023) ("[S]hall not exceed fifty cents per page."); GA. CODE ANN. § 50-18-71(c)(2) (West 2023) ("[N]ot to exceed 10¢ per page . . ."). Some statutes prohibit an agency from charging for digital materials. *See* 2023 Colo. Legis. Serv. Ch. 406 (S.B. 23-286) (West) (prohibiting a per page cost for digital materials).

[242] For examples of statutes that take staff time into account in compiling FOIA responses, see COLO. REV. STAT. ANN. § 24-72-205(6)(a) (West 2023) (providing that, after the first hour, an hourly rate may be charged "in connection with the research and retrieval of public records"), and ME. REV. STAT. ANN. tit. 1, § 408-A(8)(B)(2) (West 2023) ("After the first 2 hours of staff time, the agency or official may charge a fee of not more than $25 per hour.").

that discourages repeat and unreasonable requests.[243] If the requester is not a Utah media representative and has "previously submitted a separate request within [a] 10-day period," the government entity may charge the requester a fee "for the first quarter hour of staff time spent . . . responding . . . ."[244] Further, a requester in Utah now bears the combined staffing and administrative costs of producing the records if, in responding to a particularly voluminous request, the government entity must compile and convert the records into a novel format.[245] Time will tell if raising fees for FOIA requests helps stem the flood at government agencies in Utah. Yet when it comes to election transparency (the Utah law applies to all agencies)[246] raising the cost of access is a risky route. High fees could create a barrier for some requestors, undercutting key election transparency goals.

A third set of administrative fixes relate to response timelines. Some election offices have toyed with public records blackout periods in advance of and after elections to ensure responding to records requests does not interfere with election preparedness.[247] While practical, such a strategy also contains risks. Blackout windows may give the impression that election officials have something to hide. A related possibility is to extend response deadlines for the period before and after elections (for example, extending a forty-eight hour window to seventy-two) or instituting a rule that the response clock restarts when a requester submits a new request when that same requester has an existing request. Time-shifts could give election workers a cushion to manage heavy workloads, especially in the weeks leading up to and after elections when their attention should rightly be focused on ensuring the integrity of the election.

Another administrative avenue to alleviate the FOIA flood is implementing a comprehensive, state-wide communications strategy. Any election official will tell you that there are certain people who will not be convinced of election trustworthiness, regardless of how much information is provided. That said, a comprehensive set of tools to help the public understand how elections are run may help quell concerns of those willing to listen. Already-overburdened local election officials lack communications resources and expertise. Recognizing this need, some states departments of election have focused significant resources on developing effective communications strategies to take the pressure of off local election officials and reduce public distrust of elections. North Carolina's State Board of Elections, for example, maintains a data portal that allows members of the public to explore a wide variety of election data and learn how

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[243] *See* UTAH CODE ANN. § 63G-2-203 (West 2022); *see also* H.B. 96, 64th Leg., 2022 Gen. Sess. (Utah 2022).

[244] UTAH CODE ANN. § 63G-2-203(5)(c) (West 2023).

[245] *See id.* § 63G-2-203(2).

[246] *See id.* § 63G-2-203.

[247] Telephone Interview with Judd Choate, *supra* note 98; COLO. SEC'Y OF STATE, REVIEWING AND REDACTING CASE VOTE RECORDS AND BALLOT IMAGES 1–2 (Dec. 2017), https://www.coloradosos.gov/pubs/elections/VotingSystems/riskAuditFiles/2018/20180104BranscombEditSOSGuidlinesForCORA.pdf (on file with the *Ohio State Law Journal*).

elections in the state are run.[248] Additionally, the North Carolina State Board of Election provides a communications "kit" to its county election boards with comprehensive information counties can use to respond to common questions from the public.[249]

And finally, an administrative change that could help grease the wheels for both requesters and officials responding to election records requests is to establish or improve upon administrative dispute resolution processes. States have actively experimented with open records dispute resolution mechanisms.[250] One study of state approaches concluded that, "[c]reating an ADR procedure to handle FOI[A] disputes . . . can . . . ease the burden on the judiciary and government bodies subject to FOI[A] laws."[251] Thinking carefully about the most efficient ways to resolve disputes surrounding election records requests is crucial to ensuring election efficiency and avoiding unnecessary delay and expense of resolving FOIA disputes in court.[252]

C. *Accountability Mechanisms*

In various contexts, one mechanism increasingly used to deter bad behavior is to "out" it. Sex offender and white-collar crime registries are examples of this "name and shame" approach.[253] California's sixty-five page online list of vexatious litigants is another example.[254] Election offices might consider posting the names of people who file repetitive public records requests as a means deterring abusive behavior. Another option is posting a public log of all records requests. Doing so could deter abusive request practices and assist election offices in identifying and documenting abusive practices. Public

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[248] *Election Data Resources*, N.C. STATE BD. OF ELECTIONS, https://www.ncsbe.gov/results-data [https://perma.cc/8A9M-WT6H].

[249] *County Board Kit: Answers to Frequently Asked Questions*, N.C. STATE BD. OF ELECTIONS, https://www.ncsbe.gov/about-elections/county-boards-elections/resources-county-boards/county-board-kit [https://perma.cc/KZ72-JY2R].

[250] MATTHEW AESCHBACHER, COLO. FREEDOM OF INFO. COAL., FREEDOM OF INFORMATION: STATE-BY-STATE EVALUATION OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES 1–2 (Aug. 2016), https://coloradofoic.org/wp-content/uploads/2016/08/CFOIC_ADR-State-by-State-Evaluation_081716.pdf [https://perma.cc/9LXP-4SEK].

[251] *Id.* at 2.

[252] In her book on improving FOIA, Margaret Kwoka devotes significant attention to agency adjudication options. *See* KWOKA, *supra* note 36, at 201–14 (chapter entitled "Redesigning Agency Adjudication").

[253] For a general overview of sex offender registries and their utility (and drawbacks), see generally Ira Mark Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. PA. J.L. & PUB. AFFS. (2021). For an example of a white collar crime database, see Utah Att'y Gen.'s Off., *Utah White Collar Crime Offender Registry*, STOP FRAUD UTAH, https://www.utfraud.com/RegistryLists [https://perma.cc/4K4R-2XZK].

[254] ADMIN. OFF. OF THE CAL. CTS., *supra* note 166, at 1.

requester logs might have other benefits such as providing the public a catalog of the degree to which election offices are scrutinized and the scope of record types released.[255] Assuming election offices have in fact been appropriately responsive, such an affirmative accounting might help demonstrate to the public that election officials are working hard to be transparent. When response times lag or when requests are frequently denied, a log can help members of the public better hold election offices accountable.

Several states already maintain statewide searchable (if rudimentary) FOIA logs.[256] Such logs typically include the inquiry date, summary of action, requester name, and closing date. At least one state provides election-specific request data: the North Carolina State Board of Elections maintains a FOIA request log.[257]

Another accountability route is requiring requesters to sign a certification or affirmation as a condition of requesting records. Mimicking Federal Rule of Civil Procedure 26(g) discussed above,[258] one might imagine requiring requesters to certify or affirm that their request is not being made for an improper purpose such as to harass election officials or needlessly increase the workload at election offices. Some state public records laws already require certifications, for example that records will not be used for commercial purposes.[259] One could imagine a certification or affirmative statement of purpose retooled to stem abusive FOIA practices at election offices.

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[255] Federal agencies routinely provide such logs. *See, e.g.*, *FOIA Library*, OFF. OF INFO. POL'Y, https://www.justice.gov/oip/available-documents-oip#recent [https://perma.cc/UAG6-XXUM] (Mar. 20, 2024); *FDA FOIA Logs*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/regulatory-information/freedom-information/fda-foia-logs [https://perma.cc/VJF2-8ZGN] (Mar. 1, 2024); *FOIA Logs*, SEC. & EXCH. COMM'N, https://www.sec.gov/foia/docs/foia-logs [https://perma.cc/D8XQ-7GQT] (Feb. 29, 2024).

[256] Five states maintain a state-wide FOIA request log including Massachusetts, Vermont, Oregon, Pennsylvania, and West Virginia. *Public Records Request Database*, SEC'Y OF THE COMMONWEALTH OF MASS., https://www.sec.state.ma.us/RequestSearchWeb/Webpages/SearchResultsDetail.aspx [https://perma.cc/T9Q3-7JSV]; *Statewide Public Record Requests*, VT. AGENCY OF ADMIN., https://aoa.vermont.gov/statewide-public-record-requests [https://perma.cc/T2QG-CR4N]; *Public Records Request Log*, OR. SEC'Y OF STATE, https://sos.oregon.gov/public-records-log/Pages/default.aspx [https://perma.cc/4W9A-6CCQ]; *Docket Search Results*, PA. OFF. OF OPEN RECS., https://www.openrecords.pa.gov/Appeals/DocketResults.cfm?docket=&description=electioe&requester=&agency=&status=&legalIssue=&county=&issueDateFrom=&issueDateTo= [https://perma.cc/4GDT-AWAM]; *FOIA Database Search*, W. VA. SEC'Y OF STATE, https://erls.wvsos.gov/FOIA_Database/Search [https://perma.cc/XNW3-WSQP].

[257] *State Board of Elections Public Records*, N.C. STATE BD. OF ELECTIONS, https://ncsbe-nc.nextrequest.com/ [https://perma.cc/UC8M-U98C]. It is unclear whether the name and shame approach would work to stem FOIA flooding at election offices; publicity for zealous oversight could easily become a source of pride, not shame.

[258] *See supra* note 187 and accompanying text (Rule 26).

[259] *See* KAN. STAT. ANN. 45-220(c)(2) (2023) (Requesters must certify that they "do not intend to, and will not: (A) Use any list of names or addresses contained in or derived from

More aggressively, states might consider affirmative penalties for the misuse of election records. Though rare, some states do have specific data misuse policies in targeted areas.[260] States might consider legislation imposing sanctions on those who misuse the public records process by filing dozens of requests, harassing election officers,[261] violating voter privacy, seeking profit,[262] or otherwise misusing or misrepresenting election data to maliciously or fraudulently foment distrust in election outcomes. Standards might borrow from Connecticut, Hawaii, and Maryland's processes for identifying open

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the records or information for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed; or (B) sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records or information for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed."); *see also* COLO. REV. STAT. ANN. § 24-72-305.5(1) (West 2015) (requesters of criminal justice records must certify that they do not intend to use the records to solicit business for pecuniary gain). Arizona requires requesters to include a detailed disclosure of their intended commercial use for the records in question. *See* ARIZ. REV. STAT. ANN. § 39-121.03(A) (2023). The custodian of records may request an order to prohibit the requester from obtaining the records if the custodian determines "the commercial purpose [] in the statement is a *misuse of public records* or [] an *abuse of the right to receive public records*." *Id*. § 39-121.03(B) (emphasis added).

[260] *See, e.g.*, WIS. STAT. § 19.35(1)(j) (2017) ("[A] requester shall comply with any regulations or restrictions upon . . . use of information which are specifically prescribed by law."); HAW. REV. STAT. ANN. § 92F-17(b) (LexisNexis 2023) ("A person who intentionally gains access to or obtains a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited, or who intentionally obtains any confidential information by false pretense, bribery, or theft, with actual knowledge that it is prohibited [by] a confidentiality statute, shall be guilty of a misdemeanor."); CONN. GEN. STAT. ANN. § 1-206(b)(6) (West 2023) ("Upon a grant of [a petition of relief from a requester], the commission may provide appropriate relief commensurate with the vexatious conduct, including, but not limited to, an order that the agency need not comply with future requests from the vexatious requester for a specified period of time, but not to exceed one year."). Courts may also police data misuse. *See, e.g.*, UTAH CODE ANN. § 63G-2-404(8)(b) (West 2023) (a court may "limit the requester's use and further disclosure" to safeguard certain interests in the case of private, protected, or controlled records).

[261] Many laws on the books already protect individuals from threats and harassment and can be leveraged to address this problem. *See State Laws Providing Protection for Election Officials and Staff*, NAT'L CONF. OF STATE LEGISLATORS (Sept. 21, 2023), https://www.ncsl.org/elections-and-campaigns/state-laws-providing-protection-for-election-officials-and-staff [https://perma.cc/BNA6-BY38]. Additionally, many states statutes protect election workers from threats and harassment. *See id.*

[262] *See* Jen Fifield, *Media Network Paid by GOP Groups Is Behind Deluge of Election Records Requests*, VOTEBEAT (Sept. 26, 2023), https://www.votebeat.org/2023/9/26/23886141/local-labs-election-public-records-requests [https://perma.cc/KE8D-3PKR] (describing group earning money from filing election records requests around the country).

records abuse.[263] While no one factor would be dispositive, factors might include:

> (1) the number of requests filed and the total number of pending requests;
> (2) the nature, content, language or subject matter of the requests;
> (3) the nature, content, language or subject matter of other oral and written communications to the election office from the requester; or
> (4) a pattern of conduct that amounts to an abuse of the right to access election information or an interference with or disruption of election administrators' personal safety or ability to conduct elections.

Attempts to limit FOIA abuse in elections are certain to meet steep opposition.[264] In New Mexico, for example, efforts to protect voter data misuse face ongoing litigation.[265] Aggressively policing records abuse may have the effect of not only chilling legitimate, needed oversight but also risk perpetuating the narrative that election offices have something to hide.

D. *Affirmative Disclosure Practices*

Affirmative disclosure policies require that every time a government office releases records to one requester, those records are automatically made available publicly.[266] In elections, some states already mandate affirmative records

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[263] *See supra* Part IV.A. Other states are exploring ways to combat public records abuse. *See, e.g.*, Erik Schelzig, *Haile Seeks Open Government Assistance with Effort to Block 'Malicious' Records Requests*, TENN. J. (Aug. 28, 2020), https://onthehill.tnjournal.net/haile-seeks-open-assistance-with-effort-to-block-malicious-records-requests/ [https://perma.cc/6B3Z-6XMU] (describing legislative effort in Tennessee to block malicious public records requests).

[264] *See, e.g.*, Emma Freer, *Legislation Restricting Open Records Requests Likely to Meet Opposition*, AUSTIN MONITOR (Nov. 17, 2022), https://www.austinmonitor.com/stories/2022/11/legislation-restricting-open-records-requests-likely-to-meet-opposition/ [https://perma.cc/X6F7-9ZLJ].

[265] *See* Voter Reference Found., LLC v. Balderas, 616 F. Supp. 3d 1132, 1157–58 (D.N.M. 2022) (granting preliminary injunction to halt New Mexico Attorney General and Secretary of State's efforts to prevent organization from posting voter data online on the grounds that doing so would violate organization's First and Fifth Amendment rights).

[266] The federal government and some states already mandate affirmative disclosure. *See* 5 U.S.C. § 552(a)(2)(D) (requiring federal agencies to automatically make public FOIA-processed records deemed likely to become the subject of subsequent requests). In 2015, the Department of Justice contemplated a more proactive approach by launching a "Release to One is Release to All" pilot program. *See* OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., PROACTIVE DISCLOSURE PILOT ASSESSMENT 1–3 (June 2016), https://www.justice.gov/oip/reports/proactive_disclosure_pilot_assessment/download [https://perma.cc/NM66-EVTE]. Although many journalists and commentators were in favor of this new presumption, an Executive Branch-wide rule was never finalized. At the state level, some states mandate affirmative disclosure. *See, e.g.*, TEX. GOV'T CODE ANN. § 552.007 (West 2023). For example, in Texas, once information has been released to one member of the general public, Texas statute requires that such records must be made

disclosure for some aspects of the election process. In South Dakota, for example, election administrators are statutorily obligated to either proactively disclose certain records or to prepare records for disclosure in anticipation of requests.[267] In addition, some jurisdictions affirmatively post records voluntarily. After the Georgia legislature classified ballot images as public records under Georgia law, some counties decided to affirmatively post ballot images online.[268] In another example, the California Secretary of State's office publishes extensive documentation of California voting technology vendors as well as a library of frequently requested records.[269]

FOIA scholar Margaret Kwoka argues that government agencies should move to "targeted affirmatively disclosure regimes" that anticipate what records a particular agency's constituents need.[270] As Kwoka describes:

> Agencies can and should look at their information constituencies and consider tailored mechanisms for releasing records to those groups of would-be requesters without forcing their requests into the FOIA queue . . . . [T]he strategy can be as simple as making a special process for requesting a certain type of record with uniform attributes and sensible shortcuts.[271]

Kwoka is clear-eyed about potential pitfalls of targeted affirmative disclosure. While logically this practice should reduce the number of public

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available to anyone. *See id.*; Tex. Att'y Gen. ORD-192 at 3 (1978); Tex. Att'y Gen. ORD-163 (1977); Tex. Att'y Gen. ORD-490 at 2 (1988) ("the act prohibits 'selective disclosure.'"); U.S. Dep't of Air Force, Scott Air Force Base v. FLRA, 838 F.2d 229, 233 (7th Cir. 1988) (noting that "[t]he first person to get the information may give it away; so if one person gets it, 'any person' may.").

[267] S.D. CODIFIED LAWS § 12-20-13 (2023) (mandating that county auditors' tabulations of unofficial records be made public "as rapidly as received"). County auditors also curate a "master registration file" to facilitate public records access to voter registration information upon request with appropriate redactions to protect voter privacy. *Id.* § 12-4-9.

[268] *See, e.g.*, *Ballot Images Requests*: *November 3, 2020 Election*, DOUGLAS CNTY., GA., https://www.celebratedouglascounty.com/679/Ballot-Image-Requests [https://perma.cc/5BKB-49Q5]. Arizona Secretary of State Adrian Fontes advocates for election administrators to affirmatively publish digital images of every ballot cast. *See* Steven Rosenfeld, *Show Me the Ballots!*, WASH. MONTHLY (Oct. 29, 2023), https://washingtonmonthly.com/2023/10/29/show-me-the-ballots/ [https://perma.cc/PJ6M-JZEL] (describing Fontes' long-standing belief that the best way to revive public confidence in elections in this age of distrust is by embracing a position of radical transparency).

[269] *Voting Technology Vendors*, CAL. SEC'Y OF STATE, https://www.sos.ca.gov/elections/ovsta/voting-technology-vendors [https://perma.cc/QRC9-ZVFZ]; *Frequently Requested Information*, CAL. SEC'Y OF STATE, https://www.sos.ca.gov/elections/ovsta/frequently-requested-information [https://perma.cc/2M35-H6YN].

[270] KWOKA, *supra* note 36, at 183.

[271] *Id.* at 215, 220 (noting that individuals dissatisfied with such a database could still use public records mechanism to submit requests—i.e., that targeted affirmative disclosure mechanisms do not replace public records request avenues).

records requests, it may counterintuitively feed the fire. Kwoka quotes one federal agency official at the U.S. Citizenship and Immigration Services after the agency experimented with targeted affirmative disclosure: "[T]he more information we release the more information is requested."[272] Election offices are highly susceptible to this phenomenon; records released through affirmative disclosure (targeted or otherwise) may produce more questions than they answer. As discussed above, confusion stemming from the complexities of election processes often transform transparency efforts into conspiracy fodder. Being careful to contextualize and explain data affirmatively released is crucial to ensure targeted affirmative disclosure feeds and does not imperil public trust in elections.[273]

E. *Automated Fixes*

A final frontier of public records access could solve many of the problems discussed here: an online user interface that allows members of the public to easily, efficiently, and cheaply access election records digitally. Such an interface could automatically redact personally identifying information of voters contained in such records and any other data fields or record types a state legislature deems nonpublic.

Again the judiciary provides an example. Since the introduction of electronic court records, courts have wrestled with the best way to provide online records access while protecting litigant (and third party) privacy. Courts recognize that a failure to adequately protect litigant privacy interests threatens the justice system's viability as a dispute resolution mechanism the public will engage.[274] Courts are actively experimenting with AI-powered automated redaction of electronic court records,[275] the removal of discrete categories of

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[272] *Id.* at 198.

[273] Green, *Election Observation*, *supra* note 31, at 493–94 (discussing the importance of contextualized transparency).

[274] *See, e.g.*, Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 205 (2004) (discussing the rising tide of plaintiffs forgoing court due to privacy concerns as court records came online); Jeffrey W. Sheehan, *Confidences Worth Keeping: Rebalancing Legitimate Interests in Litigants' Private Information in an Era of Open-Access Courts*, 21 VAND. J. ENT. & TECH. L. 905, 917 (2019) ("While a real tension exists between public courts and private information, respect for privacy is also integral to the important values of keeping the courts open to all litigants and securing cooperation from third parties with information relevant to a dispute. Civil litigation is voluntary—to some degree—so some respect for private information is a prerequisite to functional public courts.").

[275] *See* NAT'L CTR. FOR STATE CTS., NATIONAL OPEN COURT DATA STANDARDS LEADERSHIP GUIDE 6 (Apr. 2020), https://www.ncsc.org/__data/assets/pdf_file/0036/59859/NODS-Leadership-Guide.pdf [https://perma.cc/3AYK-RU2N] (discussing comprehensive approach to analyzing and standardizing data elements in court records); Maia Spoto, *AI Tool to Redact Minors' Info in Testing for Los Angeles Court*, BLOOMBERG L. (Dec. 8, 2023),

court records information from remote (internet) access, and the increased use of filing under seal for documents routinely containing sensitive personal information.[276]

Though election records do not contain sordid details of divorce proceedings or sensitive financial information, election administrators still must balance transparency with protecting the democratic process.[277] Failure to adequately protect personal information in voter registration databases, for example, could spook would-be voters from participating.[278] Personal information, emails, and text messages of election workers is another category of records release that could have detrimental impacts on election worker privacy and safety.[279] Sophisticated approaches to election data management should keep these realities in mind.

State election departments are actively experimenting with online public records user interfaces. La Paz County, Arizona maintains a public records interface for numerous government offices, including elections, that allows requesters to fill out an electronic form to request records.[280] The portal includes helpful information about what Arizona public records law requires.[281] The

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https://news.bloomberglaw.com/litigation/ai-tool-to-redact-minors-info-in-testing-for-los-angeles-court [https://perma.cc/T4BX-JUVA]; TOM CLARKE, DI GRASKI, JANNET LEWIS & BARB HOLMES, STATE JUST. INST., AUTOMATED REDACTION PROOF OF CONCEPT REPORT 3, 6 (Sept. 2017), https://www.ncsc.org/__data/assets/pdf_file/0019/15238/sji-redaction-sep-2017.pdf [https://perma.cc/KUP8-Q2TK].

[276] David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1817 (2015) (analyzing what sensitive information is contained in court records); *see also* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1442–47 (2017) [hereinafter Ardia, *Privacy*] (discussing strategies for limiting the introduction of sensitive information in court records being filed).

[277] *See* KIM ALEXANDER & KEITH MILLS, CAL. VOTER FOUND., VOTER PRIVACY IN THE DIGITAL AGE 3–5 (May 2004), https://www.calvoter.org/sites/default/files/voter_privacy_in_the_digital_age.pdf [https://perma.cc/ZX3D-MERM] (noting the vast amount of personal information found at the time in voter registration records).

[278] *See* Ira S. Rubinstein, *Voter Privacy in The Age Of Big Data*, 2014 WIS. L. REV. 861, 896–97 (2014) ("A breach of political data may also cause unique harms such as 'diminished faith in publicly supervised political processes.'").

[279] *See supra* Part II.B. Recognizing the importance of protecting state employees' personal information amidst increased threats and harassment, some states are extending existing laws that protect the personal information of sexual assault survivors and domestic violence victims to government workers. *Compare* ARIZ. REV. STAT. ANN. § 11-483 (West 2021), *with* ARIZ. REV. STAT. ANN. § 13-4430 (West 2012). In 2022, California extended such protections to election workers specifically. *See* S.B. 1131, Reg. Sess. (Cal. 2022); *see also* CAL. ELEC. CODE § 2166.8 (West 2022). Arizona took similar steps in 2023. *See* S.B. 1061, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

[280] *See Form Center*, LA PAZ CNTY., ARIZ., https://co.la-paz.az.us/FormCenter/Public-Records-Request-9/Public-Records-Request-Form-Elections-91 [https://perma.cc/53SZ-FVJ8].

[281] *Id.*

Wisconsin Election Commission has created an election-specific platform called "Badger Voters."[282] Badger Voters is an on-demand data hub that enables Wisconsinites to submit records requests for voter records and absentee voting records.[283] Requesters can pay via credit card and access digital versions of requested records through its portal.[284] While it is hard to imagine cash-strapped election offices having sufficient funds to move towards more sophisticated access portals, over time the investment may well pay for itself.

Automating election records access can reduce costs for both requesters and administrators, free up staff time, enable quicker access, and reduce requester aggravation. But election record managers might think even bigger. Courts and other institutions have been actively exploring "privacy by design" tools.[285] A basic tenant of privacy by design is to take both transparency and privacy into account when structuring records maintenance systems so that confidential data is not unnecessarily collected and is easily segregated.[286] Doing so enables institutions to create responsive documents on demand.[287] Thinking through which elements within election records should and should not be made public is a question legislatures answer, but public access portals incorporating privacy by design principles could streamline implementation considerably.

VI. CONCLUSION

Open and transparent elections are a prerequisite to public trust in election outcomes. But election administration capabilities are finite—not to mention chronically underfunded. FOIA-flooded election offices threaten election functioning and exacerbate public distrust of election outcomes in a classic vicious cycle.

Just as the justice system has rules and policies in place to protect judicial functioning, tools to stem the impacts of burdensome public records requests on election offices are sorely needed. Efforts to improve public records access to election information and curb abuse present great risks, challenges, and opportunities: *risks* because burdening avenues of access can feed the fires of

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[282] *See Badger Voters FAQ*, WIS. ELECTIONS COMM'N, https://badgervoters.wi.gov/faq [https://perma.cc/XGA7-HMMZ].

[283] *Id.*

[284] *Id.*

[285] Ardia, *Privacy*, *supra* note 276, at 1447–48 (describing privacy by design protections in court records user interfaces); Edith Ramirez, Comm'r, Fed. Trade Comm'n, Remarks at the Privacy by Design Conference Hong Kong 2–3 (June 13, 2012) (available at https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-design-and-new-privacy-framework-u.s.federal-trade-commission/120613privacydesign.pdf [https://perma.cc/P8LP-QCE5]).

[286] *See* Ari Ezra Waldman, *Privacy's Law of Design*, 9 U.C. IRVINE L. REV. 1239, 1253–59 (2019).

[287] *See generally id.* (describing the European Union law privacy by design legal mandates, what the term means, and how it can be implemented).

election distrust; *challenges* because addressing the problem requires careful thought and balancing of competing and democratically vital interests; and *opportunities* because addressing FOIA-flooded election offices can propel innovation to make elections even more transparent, reliable, and trustworthy.