Evaluating Public Access Ombuds Programs:

An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising Under Open Government Laws

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ABSTRACT

Ombuds offices have been established in several states to oversee disputes arising under state open government laws. The author conducted case studies of three of these programs. Using Dispute Systems Design theory, this article analyzes the major themes uncovered in the case studies of Virginia’s Freedom of Information Advisory Council, created in 2000; Iowa’s public records and open meetings position in the state office of the Citizens’ Aide/Ombudsman, established in 2001; and Arizona’s assistant ombuds for public access, created in 2007 in the Ombudsman/Citizens’ Aide office. Results showed that the offices largely comported with the major goals of ombuds programs – independence, impartiality, and providing a credible review process – but weaknesses in perceptions of impartiality hurt the development of the Iowa and Arizona programs. The program with the most perceived success, Virginia’s FOI Advisory Council, also appeared to embrace the tenets of Dispute Systems Design the most in the creation and implementation of the office, such as involving stakeholders and actively pursuing buy-in of government groups in the early days of the program. In conclusion, this article offers best practices for designing new ombuds offices or improving existing programs.
Government transparency is essential in a democracy to ensure that citizens and their proxy, the news media, can effectively scrutinize the conduct of public business. For this reason, the federal government, the District of Columbia, and all 50 states have passed open government laws that are intended to ensure public access to government records and meetings.¹

And yet, more than a century after the earliest of these “sunshine laws” went into effect, citizens and journalists still struggle to consistently receive access to meetings and records as the laws require. Tension is certainly inherent in the relationship between a citizenry that wants to remain informed and agents of government who seek to control information, and the tension may be even greater between government and those given special protection under the First Amendment to monitor government, the news media.

Since Connecticut created the state’s Freedom of Information Commission in 1975, several jurisdictions have developed programs to manage disputes concerning public access to government records and meetings. While every state offers judicial remedies for parties who feel they have wrongfully been denied access to records or meetings under the law, alternative programs have been created in several jurisdictions. As of the end of 2009, 32 states had implemented some kind of alternative dispute resolution (ADR) program to handle public access issues, including administrative agencies, mediation programs, public access counselors, special duties for attorneys general, and groups to provide informal advisory opinions.² Five states have created ombuds programs to scrutinize public access issues, and others have incorporated already existing ombuds programs to investigate complaints regarding public access matters.³

³ Id. at 69-71.
Additionally, the federal government established the Office of Government Information Services, which in 2009 began providing oversight of agencies’ responses to the Freedom of Information Act.  

Though ombuds offices to manage public access disputes have been in existence for nearly a decade, the process of creating and operating these programs has been the subject of little empirical research. As new public access ombuds programs are created, and as other new programs develop, the successes, failures, and challenges faced by other ombuds program can help to inform better design and outcomes. This study, informed by Dispute Systems Design theory, includes the conclusions drawn from case studies of public access ombuds offices in three jurisdictions: Virginia and Iowa, the first two programs, which have been in existence for nearly a decade, and the more recently-created Arizona program.

**LITERATURE REVIEW**

**Ombuds and Public Access:** The first ombuds on record dates to 1713, when King Charles XII of Sweden appointed a “Chancellor of Justice” to provide oversight of the king’s administrators, and the Swedish ombuds concept that developed over the next couple of centuries emerged as a popular model in Europe in the 1950s. The “classical ombuds” concept – an independent government official that investigates and issues recommendations about government activities – did not gain a foothold in the United States until the 1960s, which Howard Gadlin attributed to the changing social and political climate and a “demand for mechanisms by which people could address maladministration by government, educational, and corporate

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bureaucracies.” This “classical ombudsman” concept, which has been adopted by the United States Ombudsman Association and the American Bar Association as the standard for government ombuds programs, includes four essential characteristics: independence, impartiality, providing a credible review process, and confidentiality.

Classical ombuds programs typically have no formal enforcement authority, instead relying on voluntary compliance with recommendations to be effective. However, this does not mean that ombuds are without power. Gadlin notes that ombuds’ investigative and recommendation powers provide “enormous leverage,” even when the ombuds is making informal inquiries and investigations, because ombuds are making decisions about proper and improper conduct. Further, ombuds can report bad behavior and refusals to cooperate with recommendations to enforcement authorities, which may have more formal power to issue sanctions.

Five states – Virginia, Iowa, Arizona, Washington and Tennessee – have created ombuds programs specifically aimed at managing public access disputes arising under open

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7 This classical ombuds provides government oversight, though other kinds of ombuds have developed in other contexts as well, such as the “organizational ombuds” that works within organizations such as businesses or schools, and the “advocate ombuds,” which does not take an impartial approach but rather pushes for needed changes. See AMERICAN BAR ASSOCIATION, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf; Larry B. Hill, The Ombudsman Revisited: Thirty Years of Hawaiian Experience, 62 PUB. ADMIN. REV. 24, 36-38 (2002).

8 The “credible review process” is not specifically mentioned in the American Bar Association standards, though it is incorporated into the “independence” standard. American Bar Association, supra note 6; UNITED STATES OMBUDSMAN ASSOCIATION, GOVERNMENTAL OMBUDSMAN STANDARDS 1 (2003), www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf.

9 Id.


11 VA. CODE ANN. § 30-178(A) (West 2009).

12 IOWA CODE ANN. § 2C.9(1) (West 2009).

13 ARIZ. REV. STAT. ANN. § 41-1376.01 (LexisNexis 2009).

14 Washington’s ombuds was created by the attorney general in 2005. See www.atg.wa.gov/OpenGovernment/Ombudsman.aspx
government laws. Most of these public access ombuds programs resemble the “classical ombudsman,” in that they were established by statute and were created to be independent and impartial reviewers of inquiries and complaints about public access matters. This study focuses on three of these programs: Virginia, Iowa, and Arizona.16

Virginia’s Freedom of Information Advisory Council is the oldest of the five aforementioned programs, starting in the summer of 2000, and it is also the only one that stands on its own as a public-access-specific agency. The Iowa Public Records Open Meetings and Privacy (PROMP) program in the Office of Citizens’ Aide/Ombudsman, begun in 2001, and Arizona Assistant Ombuds for Public Access position, established in 2007, were built into ombuds offices that were already in existence, both legislatively created to serve as agencies independent of other branches of government, and follow more of the “classical ombuds” path.17 These three offices provide ample ground for probing research that can help shed light on the function and effectiveness of public access ombuds programs.

**Dispute Systems Design:** Dispute Systems Design theory (DSD) provides a framework both for designing new dispute resolution systems and for evaluating dispute resolution systems that are already in place. DSD is rooted in the work of Ury, Brett & Goldberg, who examined ideal procedures for effective dispute management and proposed a series of principles to

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15 **TENN. CODE ANN.** § 8-4-601 (2009).
16 Washington and Tennessee were excluded from the study for two important reasons. Washington’s program does not resemble the “classical ombuds” in that it was created by the Office of the Attorney General in 2005 and is conducted through that office; Tennessee’s program was formally authorized in 2009, just as this study was beginning, and thus was not ideal for an in-depth study yet.
17 Compare to Washington’s ombuds program, which is housed in the Office of the Attorney General, and Tennessee’s Office of Open Records Counsel, which is part of the state comptroller’s office.
reconcile parties’ interests, to determine who is right, and to manage power issues.\textsuperscript{18} The authors used these lessons to build a framework of six basic principles of DSD:

1. Putting the focus on interests by creating processes that identify the core concerns of relevant interest groups;
2. Providing “loop-backs” in the process to encourage a return to interest-based methods as a dispute progresses through the system;
3. Providing low-cost alternatives to reach satisfactory resolutions;
4. Encouraging discussion about the nature of disputes and the best ways to resolve them early in the process;
5. Arranging procedures from low-cost to high-cost; and
6. Ensuring that adequate resources are committed to motivate and educate parties so that they can make the system work.\textsuperscript{19}

Costantino & Merchant embraced these principles and incorporated lessons from organizational design to build on this framework in the organizational context.\textsuperscript{20} These authors suggest addressing in the first instance whether ADR systems are appropriate for the type of conflict at hand, and they encourage programs that are simple to use, easy to access, and that are narrowly tailored to address particular problems.\textsuperscript{21} Further, they encourage emphasis on the design and review of dispute resolution systems, calling for stakeholder involvement in the design process.\textsuperscript{22}

\textsuperscript{18} WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLOBERG, GETTING DISPUTES RESOLVED xiv (1988).
\textsuperscript{19} Id. at 42-64.
\textsuperscript{20} See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996).
\textsuperscript{21} Id. at 121.
\textsuperscript{22} Id. at 49.
training and education of stakeholders,\textsuperscript{23} and constant evaluation of whether the program is meeting its intended goals.\textsuperscript{24}

The goal of DSD goes beyond effective management of the many disputes that arise. Costantinow & Merchant recognized that good systems should do more than “tinker at the edges of conflict,” instead seeking to change the culture of conflict in an organization.\textsuperscript{25} Slaikeu & Hasson provide the metaphor of “rewiring” people and organizations to change the way they think about conflict, training stakeholders to understand and approach conflict management in an effective manner.\textsuperscript{26}

Another important issue in DSD is a “thorough self-assessment” at the front end of a systems design process, noted Fader in her “distillation” of the DSD literature.\textsuperscript{27} Through this self-assessment, relevant stakeholders are brought together to discuss the characteristics of their disputes and their existing procedures, with a goal of determining the proper kind of system that can address these kinds of disputes most effectively. It is only after this kind of self-assessment is completed and supported by leadership that the actual design of the new dispute system should begin.\textsuperscript{28}

Conflict management systems design has received much attention from scholars, but little social science research has been done to help build theory in this area.\textsuperscript{29} Empirical research that examines both the design process and the outcome can help build theory in DSD,

\textsuperscript{23} Id. at 134-135.
\textsuperscript{24} Id. at 168.
\textsuperscript{25} Id. at 218.
\textsuperscript{26} Karl A. Slaikeu & Ralph H. Hasson, \textit{Controlling the Costs of Conflict} 199 (Jossey-Bass, 1998).
\textsuperscript{28} Id. at 486-487.
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particularly by addressing how system design affects the function of the system.\textsuperscript{30} Case studies of the public access ombuds programs in Virginia, Arizona and Iowa contribute to this body of research by providing illustrations of the design process as each was created and implemented, allowing for analysis from a Dispute Systems Design perspective.

\textbf{METHOD}

This article examines the results of case studies conducted from December 2008 to March 2009 by the author of the public access ombuds programs in Virginia, Iowa and Arizona. Case studies are ideal for studying complex social dynamics, allowing multiple methods of data gathering to study an individual case or cases in depth, allowing them to be compared and contrasted and used to build theory.\textsuperscript{31} However, what case studies provide in depth, they lack in breadth, with the obvious weakness of not being generalizable. Using three case studies and comparing and contrasting the experience in each mitigates this weakness, allowing the researcher to search for broad themes in common among the studies.

The case studies focused on the formal design of each program, how each was implemented and has developed since it was created, and how each comports with the tenets of the classical ombuds model. The primary method of gathering data in the case study was depth interviews, supplemented by legal research and a review of government documents and news reports.

For the case studies, 24 sources were interviewed, at least seven in each state. Interviews typically took between 30 minutes and one hour, with a total of about 15 hours of interviews.


\textsuperscript{31} ROBERT SOMMER & BARBARA SOMMER, \textit{A Practical Guide to Behavioral Research} 203 (2002).
resulting in more than 50,000 words of transcribed interviews. The primary ombuds officer in charge of open government issues was interviewed, as were sources representing news media and government groups (see list of interview subjects in Appendix A) to get an understanding of how users of the office evaluate its strengths and weaknesses. The source interviews provide a level of depth that would be unattainable from reliance on legal research or government documents only, allowing commentary and examples to aid understanding of how these offices have had an impact on dispute resolution and conflict management involving open government matters.

The case studies were aimed at addressing three research questions:

RQ1: What aspects of Dispute Systems Design are reflected in the creation of public access ombuds programs?

RQ2: To what extent do public access ombuds program follow the tenets of “classical ombuds” programs?

RQ3: What are the best practices in designing a public access ombuds program?

Below, the experience of each of the three programs is summarized briefly, followed by analysis of the themes that emerged from the case studies.

CASE STUDIES

Virginia: The Virginia Freedom of Information act was passed 1968 to require that government records and meetings be open to the public. The act requires liberal construction of its terms to favor openness, narrow construction of exceptions, and a requirement that “all

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32 Unless otherwise noted, direct quotes and paraphrases of quotes attributed to the sources are from these interviews.
33 Full-length case studies for each program were written by the author. The purpose of this study is to provide a brief overview of these case studies to lead to the analysis and conclusion addressing the research questions. Publication of the full-length case study of the Virginia Freedom of Information Advisory Council was published in 2010, see Daxton R. “Chip” Stewart, 9 App. J.L. 217 (2010). This section is excerpted from that article.
public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.”

Before 2001, when disputes arose, the primary mechanism to resolve disputes was through litigation and judicial enforcement. The law offered “no implementation or enforcement authority,” and there was “no statutory provision mandating alternative dispute resolution” or other informal methods of resolving disputes outside of litigation. Advocates for journalists and citizens expressed frustration with having litigation as the only avenue for resolving disputes under the act.

“There was nothing there that provided for continuing day-to-day advocacy work for compliance with the state’s Freedom of Information Act,” said Frosty Landon, a longtime editor of The Roanoke Times and the former executive director of the Virginia Coalition for Open Government. “It was a constant source of frustration for media and citizen watchdogs. While the legislature gave all of the right lip service to open government, the practical application was that you had to go to court, and after a couple of years and $50,000 in costs, the court may not give you a satisfactory result.”

Landon said he founded the Coalition for Open Government with an eye toward reforming the Freedom of Information Act. The group called for a legislative study on the public access laws, and in 1998, the Virginia General Assembly approved a resolution to create “a joint subcommittee to study the Virginia Freedom of Information Act…to determine whether any revisions to the Act were necessary.”

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35 Id.
38 Id. at 3.
During the study group’s first meeting on June 12, 1998, the Virginia Coalition for Open Government suggested that the committee “explore several approaches used by other states in ensuring compliance with public access laws, including the creation of (i) a quasi-independent FOIA office, (ii) a FOIA enforcement agency, (iii) an expanded FOIA role for the Attorney General or (iv) some hybrid of these approaches.”

During its next meeting, the committee heard comparisons of the approach of several states that used either “an assisting agency relative to enforcement or implementation of the laws” or “the use of alternative dispute resolution” to handle disputes arising under open government laws. However, by the end of the year, the joint subcommittee did not reach a conclusion on how to create or operate such an office. Thus, the committee “agreed to continue its study for an additional year” to focus on the possibility of creating “a state ‘sunshine office’ to resolve FOIA complaints, conduct training and education seminars, issue opinions on final orders, and offer voluntary mediation of disputes.”

The push was aided by results from an audit of open records law compliance conducted by 14 Virginia newspapers in 1998 that showed that only 58 percent of officials in the state’s 135 cities and counties complied with requests.

The membership of the joint subcommittee remained the same as it was the previous year. Three members came from the House of Delegates, including Chip Woodrum, who again served as the chairman of the group. Two state senators also served on the committee, as did newspaper editor John B. Edwards and attorney Roger C. Wiley, who represents counties and cities across the state. As it had the previous year, the committee welcomed several perspectives

39 Id. at 10.
40 Id. at 11.
41 Id. at 25.
to the table to discuss their interests and proposals for revising the Virginia Freedom of Information Act.

After its first meeting, the committee reached consensus that a “sunshine office” should be “an independent agency that would not be subject to direct political pressure while it serves Virginia citizens and state and local public bodies.”\textsuperscript{43} Ultimately, the joint subcommittee decided to house the office in the division of Legislative Services to shield it from interference. The subcommittee settled on a 12-member Freedom of Information Advisory Council made up of a mix of government officials, media representatives and citizens that could issue non-binding advisory opinions on matters involving the Freedom of Information Act.\textsuperscript{44} The council was also to be responsible for training government employees and creating educational materials about the law.\textsuperscript{45}

The terms “ombudsman” and “mediator” were used frequently in these discussions to describe what function the agency would have in dispute resolution. Landon said the Coalition for Open Government preferred to think of the role as an “ombudsman.”

“We called it that from day one,” Landon said. “We were just using it as a descriptive term. There’s no tradition for actual ombudsman in Virginia with a capital O.”

The bill authorizing creation of the Virginia Freedom of Information Council was signed into law by Gov. Jim Gilmore on April 10, 2000.\textsuperscript{46} Besides the mandate of fostering compliance, the council was to (1) furnish “advisory opinions or guidelines” to any person “in an expeditious

\textsuperscript{43} VA. HOUSE DOC. NO. 106, supra note 34 at 33.
\textsuperscript{44} \textit{Id.} at 37-38.
\textsuperscript{45} \textit{Id.} at 39.
\textsuperscript{46} ASSOCIATED PRESS, Bill creating Freedom of Information panel signed into law, April 10, 2000.
manner”; (2) “(conduct) training seminars and educational programs” for public officials and employees; and (3) publish educational materials about the Freedom of Information Act\textsuperscript{47}

After a brief interview process, Maria Everett, who had helped to facilitate discussions during the joint subcommittee hearings as a staffer in the Division of Legislative Services, was hired to serve as the council’s executive director.\textsuperscript{48} The council gave Everett the authority to conduct the office’s day-to-day functions as one of its first acts as it began work in 2000.\textsuperscript{49} Every source interviewed for this case study mentioned Everett’s hiring as the most significant factor in the council’s successful implementation and development.

“When the FOIA Council was created, Maria was such a good person to put into that position,” said Dana Schrad, executive director of the Virginia Association of Chiefs of Police, noting that choosing another person may have delayed the council’s effectiveness as a resource. “She made the council a practical resource for government folks, journalists other interests groups on how FOIA applies in Virginia.”

Everett said she sensed skepticism from the government side, particularly from local government attorneys, early in her tenure as the council’s executive director. After a hostile reception while speaking on a panel before a group of local government attorneys shortly after the office was created, Everett penned an article aimed at people in local government entitled “Friend or Foe? The Virginia Freedom of Advisory Council.”\textsuperscript{50} The article noted the council’s goal of providing an independent resource for handling open government matters for anybody, whether from government, media or the public, but it particularly emphasized what the council

\begin{footnotes}
\item[47]VA. CODE ANN. § 30-179.
\item[48]Everett said she wasn’t angling for the job. “They opened the hiring process. It was not like thou shalt be appointed, but they had the Press Association and local government representatives on the panel, and they wanted me to do it. I didn’t want this.”
\item[50]Maria J.K. Everett, Friend or Foe? The Virginia Freedom of Information Advisory Council, 6 J. OF LOC. GOV’T L. 2 (June 4, 2001).
\end{footnotes}
offered to government employees and officials. Leo Rodgers, county attorney for James City County, said that these outreach efforts were critical in getting local government attorneys to buy in to the program. Further, Landon used grant money to help publicize the FOI Advisory Council by printing color posters and having them sent to local and state government bodies.

Much of the council’s outreach efforts involved conducting training and education on open government matters. From July 2000 to November 2001, the first 15 months the office was open, Everett conducted about 40 presentations to numerous groups, such as the Richmond City Council, the Virginia Municipal League, the Virginia Association of Counties, the Virginia Press Association, at both the University of Virginia and Virginia Tech, and the Virginia Coalition for Open Government. The office now conducts about 70 training sessions each year.

Increased legislation involving the Freedom of Information Act has been one of the unintended consequences of the creation of the FOIA Advisory Council. The council has become what Landon calls a “permanent study commission on FOI issues,” a place where legislators can send any matters pertaining to the Freedom of Information Act for further consideration before drafting new bills. Wiley said that while unintended, this development has turned out to be very important in the council’s mission.

**Iowa:** Iowa passed its open government laws in 1967, requiring that government records and meetings be accessible to the public. For more than 30 years, the only formal mechanism

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available to people who believed they had been wrongfully denied access to meetings or records under the laws was judicial enforcement. However, sources agreed that litigation was not a viable way to consistently handle disputes arising over access to public records and meetings.

Iowa’s Office of Citizens’ Aide/Ombudsman, which was created by the legislature in 1972, has always had jurisdiction to investigate citizen complaints about access to public records and meetings, said Bill Angrick, who has served as Iowa’s ombudsman since 1980.

In the spring of 2000, a dozen newspapers across the state conducted an audit, sending reporters to each of Iowa’s 99 counties to ask for public records. Compliance was spotty at best, particularly in the area of law enforcement records; 58 percent of sheriff’s departments denied requests about the concealed-carry permits, and 42 percent of police departments denied access to incident reports.

Numerous sources cited this audit as the force that spurred the Iowa legislature to authorize the creation of a new position in the Office of Citizens’ Aide/Ombudsman to handle public records and open meetings issues. Angrick noted that the audit came out toward the end of the legislative session, and it drew the attention of the Iowa General Assembly’s legislative council, which appoints the ombudsman and approves hires and budgets for the office.

“That particular year, after that sunshine study was published in papers and on television in Iowa, I was appearing before the legislative council, and I got asked, ‘What are you doing in this area?’” Angrick said. “I said, ‘We are doing some things, but we could be doing more, especially if I had a staff assistant to focus on this, to do outreach and education and those kinds of things.’ They asked how much would it cost, and I said it would be for an entry-level person.

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54 The Ombudsman Act was passed by the Iowa legislature in 1972, but the role of ombudsman was first created in 1970 in the governor’s office. Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2003 4 (2004).
56 Id.
So they approved it, and I advertised, and later that year I hired Robert Anderson who was working at the University of Missouri Freedom of Information Center at the time.”

The legislative council approved the hiring of one additional full-time employee in the ombudsman’s office to be paid about $36,500 per year, specifying that “the additional position would be assigned the special responsibilities of public records and open meetings issues in addition to regular casework.”\(^57\) Anderson was appointed to this position in 2001, and the position became known as PROMP, an acronym for Public Records Open Meetings and Privacy.\(^58\) Though the position was created specifically to handle open government matters, no legislation was amended to reflect this. Instead, the new assistant ombudsman position would be subject to the same duties as established by the Iowa Citizens’ Aide Act.\(^59\)

Every source interviewed for this case study noted that the ombudsman has no formal enforcement powers, and some sources saw this as a significant drawback for the office. Within the Office of Citizens’ Aide/Ombudsman, however, the lack of enforcement power is seen as part of the proper role of an ombudsman.

“My model is a softer model,” Angrick said. “I’d rather prevent the problem than enforce it, because prosecuting cases is costly and doesn’t always work. My particular strategy is to build up a lot on the front end, meet with city clerks, county officials, state officials, and to get people thinking that this is not only the law but the right thing to do.”

Angrick said this “softer” approach allows the office to handle more cases and to resolve them in a timelier manner than adjudicative or other administrative enforcement.

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\(^{57}\) See Minutes from Legislative Services Committee (Dec. 12, 2000), as cited by Angela Dalton via e-mail on Feb. 11, 2009.

\(^{58}\) Robert Anderson, Message from Iowa’s first public records ombudsman, OMBUDSMAN’S REPORT 2001 2 (2002).

\(^{59}\) IOWA CODE ANN. § 2c.23
When Anderson was hired in 2001, Angrick directed him to begin outreach efforts through training and education of government employees throughout the state. Anderson noted that he reached out to officials in law enforcement and local government to help them understand “that allowing access to public records is an important part of their public trust.”

As Anderson was doing this work, he was diagnosed with bone cancer. It turned out that he was terminally ill, and he resigned from the office in June 2002 when the cancer made it impossible for him to work. He died in November of that year.

The PROMP work was then divided among other ombudsman staff “as part of our shared and general responsibilities,” Angrick reported in 2002. In February 2003, Angrick hired Angela Dalton as an assistant ombudsman to fill one of the vacancies on the staff. Angrick asked Dalton, who had a background in law enforcement but no particular history dealing with public records and open meetings issues beyond that, if she would be interested in taking over the Public Records, Open Meetings and Privacy duties.

“Bill asked if I would take that position,” Dalton said. “I hadn’t been hired yet, so of course my answer was yes. It wasn’t four or five months before he asked me if I’d like to fill this position. I’d already taken an interest to it, it seemed like a natural fit, and I’ve been here ever since.”

Sources mentioned Dalton’s background, attitude and professionalism as keys to her performance in the PROMP role.

“I think she’s been great,” Richardson said. “I like Angie. I think she’s smart and well-intentioned. I remember talking with her when she first got the job. She’s certainly grown in the

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60 Anderson, *supra* note 58 at 2.
job and grown in her expertise. I can’t remember having any disputes with her or her interpretation of the law or anything.”

Outreach and training remain as essential duties for the PROMP position. Dalton said some of the training she does includes an hour-long law enforcement academy, with 30 to 40 people in each class, and jail school trainings, which involve discussions about public records and other jail issues.

One of the major challenges the Office of Citizens’ Aide/Ombudsman has faced since creation of the PROMP position is managing a growing caseload. Angrick noted that while Dalton performs the public records, open meetings and privacy role, she also has other responsibilities in the office.

“Right now, my office handles about 4,500 cases a year,” Angrick said. “With 11 investigators, we don’t have time for just one person to handle open records and open meetings. Everybody does some of them, and Angie does the most. For PROMP issues, I estimate we’ll have 275 this year, which is fair but still a small percentage of what we get each year.”

Another challenge the office faces is a perception among sources interviewed for this study who said the agency seemed to advocate too strongly on behalf of citizens at the expense of government concerns.

“One criticism I have, and I’ve told this to Bill (Angrick) himself, is that the title of the office is Citizens’ Aide, and they take that title quite seriously it appears because they tend to side with citizens long before they talk to the public body with whom they have a beef,” said Mary Gannon, who has been representing the school board association since before the creation of the PROMP position in the ombudsman’s office. “The office comes across as significantly biased.”
Dalton disagreed with this assessment, saying she understood the danger of being perceived as biased toward citizens. When the office gives off this sense, she said, it may be because her duty is to be an advocate of the public records and open meetings laws, which favor citizen access.

The sources interviewed for this study all cited enforcement as one of the most troublesome areas of Iowa’s public records and open meetings laws. In response to perceived issues with enforcement, state Senator Mike Connelly sponsored legislation in the 2008 session that would have created an independent board intended to enforce the public records and open meetings laws. The recommendation came after a legislative study group had advised creation of an “Iowa Public Information Board” that could “receive, investigate, and prosecute complaints” in contested cases, as well as offering mediation. The bill passed the Senate in April 2008, but agreements between media groups and local government groups on the Senate Bill fell apart before a final version could be approved by the House.

Angrick said he has been in conversations to revive the enforcement agency with interested groups, though several sources mentioned that finding money to create a new office during difficult economic times will be hard.

“We’ve been revisiting the enforcement model, dialoguing with legislators, and the FOI folks and media definitely wanted an enforcement agency,” Angrick said. “But state budgets have gone belly up, they’re not going to find half a million or a million dollars to fund it.”

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63 Freedom of Information, Open Meetings and Public Records Interim Study Committee, FINAL REPORT 5-6 (July 2008).
64 Id. at 9.
Arizona: Arizona’s Public Records Law\(^{65}\) was adopted in 1901 and creates a presumption of openness of any record in the office of any government officer.\(^{66}\) The state’s Open Meetings Law\(^{67}\) is a much more recent creation, enacted in 1962. Neither law included a formal mechanism for resolving disputes under the act besides judicial remedies.\(^{68}\) Unlike the records law, however, the Open Meetings Law called for enforcement by the attorney general or county attorney,\(^{69}\) leading the Arizona attorney general’s office to establish the Open Meeting Law Enforcement Team (OMLET) in 1982 to handle complaints from citizens about violations.

The lack of enforcement in public records issues became more publicized with the results of an audit conducted in 2001 by several media organizations in Arizona.\(^{70}\) Just over half of the law enforcement agencies audited complied with a request under the Public Records Law.\(^{71}\) The audit prompted several newspapers to publish editorials calling for stronger enforcement of the Public Records Law, including calls for the legislature to do something about it.\(^{72}\) John Fearing, representing the Arizona Newspapers Association, said the audit made it clear that people needed other options to aid them in open government matters.

Fearing lobbied for the creation of an office similar to Indiana’s Public Access Counselor, and in 2005, the Arizona Senate passed a bill that would have appropriated $185,000

\(^{65}\) ARIZ. REV. STAT. ANN. § 39-121 et seq. (Lexis 2008).
\(^{67}\) ARIZ. REV. STAT. ANN. § 38-431 et seq.; see also Cooner v. Board of Education, 663 Ariz. 11, 11 (Ct. App. 1982), in which the court noted that “the open meeting law was enacted in 1974…although it was preceded in 1962 declaring that it was the public policy of the state that proceedings of government bodies be conducted openly.”
\(^{68}\) ARIZ. REV. STAT. ANN. § 38-431.07.
\(^{69}\) ARIZ. REV. STAT. ANN. § 38-431.07(A).
to create a “public access adviser’s office.” However, the bill died before final passage by the legislature. Fearing persevered, coming back for the 2006 legislative session with a new sponsor and another bill, one that would create new duties in the office of Ombudsman-Citizens’ Aide to investigate public access complaints and to conduct training and education. The bill appropriated $185,000 to the Ombudsman’s office to hire two assistants, one of whom was to be an attorney, to handle public access matters.

The public access program in the Arizona Ombudsman-Citizens’ Aide office was created despite skepticism or outright lack of support from other people usually on the same side in access matters, such as the First Amendment Coalition of Arizona and some metro newspapers, and citizen representatives do not appear to have been involved in discussions about creating the program. Opposition from government groups, while presented during consideration of the legislation by Chris Thomas, director of legal services and general counsel for the Arizona School Boards Association, also did not seem to have any impact on shaping the legislation that created the office, according to sources. The bill passed the Senate by a vote of 27-2, and Governor Janet Napolitano signed the bill into law on June 21, 2006.

The Arizona Ombudsman-Citizens’ Aide office had already been operating since 1996, and Patrick Shannahan, a retired Army colonel, had served as the ombudsman since the founding of the office. Shannahan said the office is intended to be a “neutral, impartial and independent” resource for citizens and government officials. The office is in the legislative branch of government, but it has the power to investigate complaints about all areas of government except

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73 ASSOCIATED PRESS, House defeats bill on public access, May 11, 2005.
74 Id.
for the judiciary and state universities.\textsuperscript{76} The office’s physical location also is intended to represent its independence; the office cannot be in the state office complex or next to any state agency.\textsuperscript{77}

Shannahan said he approached the new public access duties the same way he did the other duties of the office, with two major exceptions. First, the statute creating the public access duties calls for one of the two new assistant ombudsmen to be an attorney.\textsuperscript{78} Though none of the other assistants in the office were attorneys, Shannahan said he saw the necessity of having an attorney in this role.

“It is absolutely essential to have an attorney do this as opposed to a lay person like me,” Shannahan said. “The other stuff we do, we don’t have attorneys doing it, we have lay people doing it, and it works. But when it comes to public access, there’s so much law involved, and people calling the shots are often attorneys. There’s a tremendous amount of attorney to attorney discussion going on, so it’s absolutely essential that our person is an attorney. If I didn’t have an attorney in that position, I think we’d be lost. We need an attorney to be credible, someone who can cite case law and have conversations with attorneys.”

Second, the statute calls for the public access ombudsman “to train public officials and educate the public” about public access laws through “interpretive and educational materials and programs.”\textsuperscript{79}

Shannahan emphasized the importance of these duties in public access.

“(We) don’t approach it just as a case complaint office,” Shannahan said. “I think the education piece of it is critically important. What we find is that government people out there

\textsuperscript{76} ARIZ. REV. STAT. ANN. § 41-1371(2)
\textsuperscript{77} ARIZ. REV. STAT. ANN. § 41-1382.
\textsuperscript{78} ARIZ. REV. STAT. ANN. § 41-1376.01(A).
\textsuperscript{79} Id.
are eager to be taught, school boards and city councils and fire districts are always asking us, can you come out and spend a day with us? They are eager and thirsty to be told how they should do this because it’s very complicated.”

After the legislature passed the changes creating the new public access duties in the ombudsman’s office, Shannahan had a little more than six months to get the office ready to begin work on Jan. 1, 2007. Shannahan hired Elizabeth Hill, an attorney who had worked in the attorney general’s office for three years and who had spent time on the Open Meetings Law Enforcement Team, to serve as the primary ombuds in charge of public access cases.

When she and I started work together, the first thing we did was develop a business plan, kind of analyze the mission,” Shannahan said. “Who do we need to talk to, what do we need to say, what are our objectives? Then, we had to figure out how to get the word out to two sides. First, the public needed to know that the office existed, and second, how to get the word out to clerks and lawyers to know the office was in place.”

The office issued a press release and expanded the office’s web site to include public access resources for the public.\footnote{Arizona Ombudsman-Citizens’ Aide, \textit{ANNUAL REPORT 2007} 5 (2008).}

Hill said this involved making “point of contacts” for public bodies across the state and other key players in open government matters.

“For the first month or so, I spent time drafting an introductory letter that I sent out to close to a thousand public entities, key public people such as city attorneys and county attorneys, with the idea that they would then trickle information down to their clients,” Hill said. “And hitting some of the associations that provide assistance to these local government entities, such as the League of Cities and Towns, the Counties Association, building rapport and contact within them to help spread the word about what it is that I do.”
Much of Hill’s early outreach work involved creating educational materials. By April, she had created “open meeting law and public records law handbooks” that include statutes and recent attorney general opinions on open government matters.81 The office distributed more than 4,000 of the handbooks – more than 2,000 each for public records and open meetings issues – to agencies across the state in 2007.82

Hill also began conducting training sessions, conducting 11 sessions – six on open meetings and five on public records – in the office’s first year.83

Sources representing the news media had mixed reactions about the effectiveness of the public access ombuds program in its early years. Media attorney Dan Barr said the office “does a lot of good, especially for non-media requests,” but is not as relevant for journalists. University of Arizona journalism professor David Cuillier said that the ombuds office’s new duties have overall been “a good thing for the state,” and he said his student journalists have had some success when seeking Hill’s assistance.

“I’ve had students who have gone to her because agencies have illegally denied them info for class projects, stories, reporting, data, that sort of thing,” Cuillier said. “They’ve had kind of mixed results. She’s been very responsive about responding immediately and contacting agency, and when it’s blatant, she’s good at talking sense to them.”84

81 Id. The most recent handbook is available at azleg.gov/ombudsman/Public_Records_Book.pdf
82 Id. at 15.
83 Id.
84 Cuillier specifically mentioned Hill’s response to the Tucson Police Department, which he said would “just come up with ludicrous reasons for blowing off students and saying no.” Hill mentioned an incident involving a student reporter and Tucson police in 2007, saying that when the student asked for a database of auto thefts, “she got the run around for more than two weeks” before receiving a document without the make and model of the cars stolen. The reporter was later denied access to the database by a supervisor who cited the federal Freedom of Information Act – which does not apply to state agencies – as a reason. Hill said she called and she also “received the run around for several days” before contacting an attorney for the department, who provided an electronic copy of the record. See Arizona Ombudsman-Citizens’ Aide, supra note 80 at 16.
RESULTS & ANALYSIS

RQ1 - Dispute Systems Design: The first research question addresses the Dispute Systems Design theory implications of the case studies. DSD provides a framework both for designing new dispute resolution systems and for evaluating dispute resolution systems that are already in place. The case studies of public access ombuds programs in Iowa, Virginia and Arizona provide illustrations of the design process as these programs were created and implemented.

None of the three states explicitly used a Dispute Systems Design process in the design and creation phase of their public access ombuds programs. As outlined by Costantino & Merchant, the ideal way to design a dispute resolution system to ensure its effectiveness is to involve stakeholders in the process, to train and educate the stakeholders about resolving disputes, and constantly evaluate the effectiveness of the system once it has begun.85

All three of the public access ombuds programs examined in this study were developed through the legislative process. Of them, only Virginia approached this depth of self-assessment through convening relevant stakeholders, considering multiple options, and building consensus in the design process.

In Iowa, the legislative council and the ombudsman discussed the possibility of adding a new position to handle public records, open meetings and privacy matters, and after a brief consideration about funding for a new position and the new responsibilities of the office, the matter was approved. Stakeholders such as local government groups, law enforcement agencies, citizen advocates and the news media did not take part in the discussions or, once the decision was made to fund the new group, in the implementation of the program. Outreach to these groups was not made until after the office began work in 2001, though since then, the ombudsman’s office has worked to educate citizens and government employees on both public

85 Costantino & Merchant, supra note 20 at 49, 134-135, 168.
access matters and how to handle disputes without the assistance of the office. The activities of the public access program have been reviewed each year in the ombudsman’s annual reports, and the program was scrutinized further during the 2008 legislative session when a new enforcement agency was being considered as an option for handling public access disputes.

Similar to Iowa, Arizona’s public access program was created by legislation that added new duties to an existing ombudsman’s office in 2007. Because the creation involved passage of a bill in the legislature, some stakeholders were present for hearings, including the lobbyist and executive director of the Arizona Newspapers Association, the legal advisor to the Arizona School Boards Association, and the ombudsman himself. However, there were several interested organizations that did not participate, or necessarily approve, of these new duties being created in the ombudsman’s office. In spite of this, the office has had some success in its implementation phase, largely due to the efforts of the Assistant Ombudsman for Public Access Elizabeth Hill, who has reached out to stakeholder groups to inform them about the office and to get them to consider it as a resource. Reviews of the program in its first two years were largely positive, though some sources from the news media expressed skepticism about the usefulness of the office as a resource for them.

Virginia’s FOI Advisory Council was also a legislative creation, but it came as a result of a two-year study conducted by a legislative subcommittee that involved major stakeholders from government, law enforcement, schools, citizens, news media and other interested groups. The subcommittee was chaired by Chip Woodrum, a longtime member of the House of Delegates, who encouraged parties with competing interests to seek consensus through informal negotiations. “We had good, strong players, but they weren’t there looking for a fight,” said Frosty Landon, who lobbied for and participated in the subcommittee as the head of the Virginia
Coalition for Open Government, an advocacy group. “They wanted to resolve conflict between the press and the government, particularly local government. They wanted some fixes. They wanted to stop seeing such bloody conflict, particularly between the press and the local government.”

The stakeholders not only were involved in the design of the program, but they also reached consensus on all major issues before submitting a proposal to the legislature. This process, which seems to be part of the legislative culture in Virginia, may have helped to train the stakeholders about dispute resolution skills and “joint problem-solving techniques,” which Costantino & Merchant say groups “will need in order to use the system with satisfaction and empowerment.” Once the program officially began work in 2000, stakeholder groups such as the Virginia Coalition for Open Government and the Local Government Attorneys group helped to raise visibility of the council as a resource for inquiries and dispute resolution. The effectiveness office has constantly been evaluated, not just through its annual reports but also through audits of government compliance with open government laws by news media groups.

Considering that the Virginia design and implementation experience most mirrors the tenets of Dispute Systems Design in this area, it is not surprising that it continues to have strong support from stakeholders years after its creation. As Costantino & Merchant note:

When the system’s stakeholders are involved collaboratively in the design process, they become true partners in identifying, understanding, and managing their disputes – and have a more vested responsibility for the successful operation of the conflict management system.\(^\text{87}\)

While it may be a product of the legislative culture in Virginia that is difficult to replicate elsewhere, other jurisdictions should strongly consider applying a similar stakeholder process when designing open government dispute resolution programs.

\(^{86}\) Id. at 54.
\(^{87}\) Id.
To what extent, then, do the public access ombuds programs themselves reflect the principles of Dispute Systems Design, which call for an interest-based approach to resolving disputes through early identification and intervention in disputes, using low-cost processes and “loop-backs” to less formal and lower-cost options as disputes progress? Because these principles were developed in the organizational dispute resolution context, it is unsurprising that they are perhaps better reflected by an “organizational ombudsman” approach. Rowe notes that in the organizational context, such as ombuds programs in the corporate workplace, ombuds have more facilitative powers such as “shuttle diplomacy” and mediation, with the ability to conduct informal investigations but rarely advancing to formal investigations.

The classical ombudsman approach belongs more to the “adversarial dispute resolution” tradition, Gadlin notes, distinguishing it from the voluntariness and flexibility of a more mediation-oriented approach. Rather than taking an interest-based approach, which would allow the parties more flexibility to create solutions outside of the legal framework, a classical ombuds focuses more on dealing with parties’ rights.

The public access ombuds programs clearly fall more into the classical ombuds conceptualization, particularly when it comes to ensuring that the legal rights and duties created by the open government laws are followed. The somewhat legalistic approach is not typical for ombuds. Maria Everett, the executive director of the Virginia FOIA Council, is an attorney, and her legal knowledge and skills were praised by sources as key to her effectiveness. Hill is the only attorney in the Arizona ombudsman’s office, and sources said having an attorney in this position was necessary. One source in Iowa, while praising public access ombuds Angela

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88 See Rowe, supra note 10 at 353.  
89 Id. at 356-357.  
90 Gadlin, supra note 6 at 42.  
91 Id. at 42-43.
Dalton, also expressed a desire that the public records, open meetings and privacy position be filled by an attorney to address the complex legal issues involved. Representatives from each office described their role as advocates for the open government laws, a rights-based approach which seems to supersede the interests of parties disputing public access matters and may also overlook power issues between the parties. This focus on rights fulfills just one of the three major issues that Ury, Brett & Goldberg identified as essential for effective dispute resolution systems.\(^{92}\)

However, the public access ombuds programs also embrace some of the Dispute Systems Design principles more common in organizational ombuds programs. Each of the offices operates at no cost, a benefit not only for citizens seeking help but also for people in government to be provided free training and free educational materials. Further, each office emphasizes the importance of handling inquiries at an informal level as much as possible. Beginning with training, the ombuds programs try to educate the public and government employees about freedom of information matters to avoid confusion and disputes in the future. When disputes arise, the programs prefer to resolve matters through informal investigation, with most matters resolved in a short period of time after making phone calls and answering questions. This kind of informal facilitation could, if the dispute was not resolved, result in a more formal investigation or a written advisory opinion, though the offices viewed these as a last option and a less than desirable outcome. While loop-backs from more formal processes to less formal processes were not evident, the public access ombuds programs are able to remain flexible in serving the needs of disputing parties.

Another issue complicates the evaluation of the public access ombuds programs, particularly in Iowa and Arizona. In Virginia, the FOIA Council is the only formal dispute

\(^{92}\) Ury, Brett & Goldberg, supra note 18 at 15-18.
resolution option available for parties with open government issues that does not involve filing a lawsuit. Iowa and Arizona, on the other hand, have attorneys general with the power to prosecute violations of open government laws, and both have made some efforts at enforcement; Arizona’s attorney general mostly deals with meetings issues with its Open Meetings Law Enforcement Team, while Iowa’s attorney general has recently assigned investigation and enforcement duties on freedom of information law matters to an assistant attorney general.\textsuperscript{93}

While the public access ombuds programs in Iowa and Arizona often serve as a primary point of contact on open government matters, people can seek the aid of the attorney general in addition to or instead of going to the ombudsman’s office. The more formal enforcement options available at the attorney general’s office are not necessarily coordinated with the operations of the public access ombuds program, meaning that disputes may not begin with the less formal options offered by the ombuds.

The public access ombuds programs in Iowa, Virginia and Arizona do not reflect all of the tenets of Dispute Systems Design, but they do illustrate some of the important principles that should be considered when creating a dispute resolution system, particularly in the open government context. The attention Virginia paid to involving stakeholders and seeking consensus while creating its Freedom of Information Advisory Council seems to have paid off in the stakeholders’ efforts to support the program as it began work and tried to build trust with both the public and the government. The emphasis each program places on training and education can work as a dispute avoidance mechanism, one important way for these programs to be an effective resource on public access matters at a very informal and low-cost level. Additionally, the programs’ attempts to manage disputes at an informal level as much as possible

makes them more efficient resources for parties with public access inquiries or complaints, allowing a more flexible approach even while the programs remain committed to ensuring that the rights and duties established by the open government laws are handled properly. Still, a level of formality may be necessary to ensure that the complex legal issues involved are handled in a way that can vindicate the public policy underlying open government laws, so having an attorney serving as public access ombuds is advisable.

**RQ2 - Evaluating Public Access Ombuds Programs:** The three ombuds programs examined in this study seem to fit into the conceptualization of the classical ombudsman. All three programs were established by statute and created to be independent and impartial reviewers of inquiries and complaints about public access matters. The Iowa and Arizona programs were built into ombuds offices that were already in existence; the heads of these programs, Iowa Citizens’ Aide/Ombudsman Bill Angrick and Arizona Ombudsman-Citizens’ Aide Patrick Shannahan, are both members of the United States Ombudsman Association and mentioned the organization as providing guiding principles for their respective offices. Angrick was on the standards committee of the association that adopted these guidelines in 2003. The Virginia Freedom of Information Advisory Council was not formally created as a “classical ombudsman” office; the words “ombuds” or “ombudsman” do not appear in the statute that created it, though the word was often used in discussions during the legislative study group that recommended creation of the office. However, by its establishment as an independent agency with similar powers and duties as the Iowa and Virginia programs, and by executive director Everett’s own
description the council “serving as an ombudsman” on open government matters,\textsuperscript{94} the Virginia FOIA Council also fits into the “classical ombudsman” conceptualization.

The case studies of these three offices revealed that each aims to comport with these standards, but that some issues have arisen as they try to follow them in the context of handling inquiries and complaints in public access. The studies did not specifically address confidentiality of the complaint process, though the Iowa and Arizona programs allow the offices to provide confidentiality to complainants,\textsuperscript{95} while in Virginia, sources confirmed that the council and staff could provide confidentiality as well. The other three standards – independence, impartiality and credibility of the review process – are addressed in more detail below.

1. \textbf{Independence}

All three of the ombuds programs have safeguards in place to ensure that they are free of control or persuasion by other political bodies, and nearly every source interviewed agreed that these offices had succeeded in being politically independent. As the Arizona and Virginia programs were being considered in the legislation process, the executive and judicial branches of government were rejected as possible homes for the programs because of the potential of political interference; the independent reputation of the already-existing ombuds offices in Iowa and Arizona made them natural homes to provide independent oversight of public access matters.

Each program is located in the legislative branch, meaning each technically serves in the same branch of government that created it. All three ombuds programs serve as advisors to the legislature on public access matters, and as the programs have developed, they have increasingly proposed legislation to solve problems with loopholes and exemptions and other procedural and substantive matters in the open government laws.

Further, the hiring and firing of personnel remain in the discretion of each agency; Shannahan and Angrick have the power to control these decisions without outside influence in Arizona and Iowa, respectively, while the 12-member Freedom of Information Advisory Council has the power to hire its employees, including the executive director. The heads of the Iowa and Arizona ombuds programs are also chosen through bipartisan committees, with Iowa using the legislative council to appoint the citizens’ aide to a four-year term,\textsuperscript{96} and Arizona using an “Ombudsman-Citizens’ Aide selection committee” to hire a person to serve a five-year term.\textsuperscript{97} The 12 members on Virginia’s council include a broad array of political and non-political appointees who serve four-year terms.\textsuperscript{98}

The main concern for each office is continued funding, particularly in a time of shrinking state budgets. The programs are small – Iowa has one assistant ombudsman, Virginia has one and a half positions, and Arizona has two positions – and operate on annual budgets of $200,000 or less. None of the sources interviewed thought that the programs would be targeted during budget cuts, though sources in Arizona mentioned that hiring freezes were a possibility in the ombuds office there.

2. Impartiality

In its nine years of existence, the Virginia Freedom of Information Advisory Council has built a strong reputation for being fair and even-handed in handling inquiries, conducting investigations and writing opinions. Every source interviewed affirmed this, mentioning it as essential in the council’s success as a resource on open government matters. In her early outreach efforts, Everett had to establish the council as an impartial agency on open government matters, particularly to government employees and representatives. After a hostile reception at a

\textsuperscript{96} \textsc{Iowa Code Ann.} § 2c.3 and 2c.5.
\textsuperscript{97} \textsc{Ariz. Rev. Stat. Ann.} § 41.1373 and 41.1375(C).
\textsuperscript{98} \textsc{Va. Code Ann.} § 30-178(B) and 30-178(C).
conference of local government attorneys in the first year of the program, Everett penned an article in early 2001 aimed at people in local government entitled “Friend or Foe? The Virginia Freedom of Information Advisory Council.” 99 The article noted the council’s goal of providing an independent resource for handling open government matters for anybody, whether from government, media or the public, but it particularly emphasized what the council offered to government employees and officials. This and other outreach efforts were critical developments in Virginia, leading sources from both government and news media to praise Everett and her efforts greatly.

Sources generally also praised the efforts of the primary contacts in the Arizona and Iowa programs – Elizabeth Hill and Angela Dalton, respectively – to handle public access inquiries and complaints. However, sources expressed concerns about the impartiality, either real or perceived, of the approaches in these programs. In Arizona, sources generally said it was too early to gauge the impartiality of the public access program, though a couple of representatives for the news media expressed concerns that the program may lean toward the government perspective too often. The opposite was the case in Iowa, with every source outside the ombudsman’s office expressing a perceived bias against government agencies by the program. “It appears because they tend to side with citizens long before they talk to the public body with whom they have a beef,” said Mary Gannon, who represents the state school board association. “The office comes across as significantly biased.”

Dalton and Angrick both expressed their desire to approach public access cases in Iowa impartially, and it is reasonable to expect that outside perceptions that the program favors citizen and media complainants could stem from the structure of the state’s open government laws, which presume records and meetings to be open and require government agencies to give

99 Everett, supra note 50.
specific reasons for exempting records or closing meetings. In these cases, being an impartial advocate of the law could mean being perceived as the open government police, who only come calling when a complaint has been made. Dalton and Angrick also both touted the program’s availability as a resource to government agencies, which make inquiries to and receive training on public access matters from the ombudsman’s office.

Any perceptions that the public access ombuds programs are partial in their approach will make it difficult for them to perform their duties effectively. A program perceived as being biased will face grave challenges when it comes to voluntary compliance and having its recommendations taken seriously.

3. Credibility of Review Process

Any perceived lapses in independence or impartiality will necessarily implicate the credibility of an ombuds program as it handles inquiries and complaints. As Gadlin noted:

(W)ith no formal authority to compel compliance, the effectiveness of the ombudsman’s advocacy depends to a very large extent on the respect that the office and the person command as well as on the independence of the office – its ability to be free of direct attempts at political influence.\(^{100}\)

Each of the three public access ombuds programs in this study have made efforts to build credibility among the parties who are most commonly involved in open government disputes. Through their education and training missions, each program has had its agents with the lead public access duties – Everett in Virginia, Dalton in Iowa, Hill in Arizona – involved in outreach efforts, which can help build relationships between the people in the ombuds program and the people most likely to use it as a resource. Any concerns about the council’s impartiality in Virginia were met forcefully in its earliest days. When local government groups in Virginia expressed skepticism about Everett and the FOIA Council, she made several direct overtures to

\(^{100}\) Gadlin, supra note 6 at 42.
them to assure that the council was intended to be an impartial resource, not an advocate for citizens or news media.\textsuperscript{101} A similar forceful and persuasive response to skeptics from the programs in Iowa and Arizona could help build the credibility of those offices.

All three programs prefer to operate at an informal level first, conducting inquiries by phone and trying to avoid escalation to more formal investigations. Once cases reach a formal level, each program has the powers of a classical ombudsman to issue public recommendations and to seek voluntary compliance. The offices in Iowa and Arizona have another option, one that is unavailable in Virginia. The attorneys general in Iowa and Arizona have taken on enforcement authority in public access matters and have made pledges to pursue violations of open government laws. In these states, the ombuds programs have worked to coordinate with the attorney general when enforcement may be necessary. The effectiveness of these enforcement options is unclear; Iowa’s attorney general only recently announced its intentions to cooperate with the ombudsman on open government matters, while Arizona’s attorney general does not have formal enforcement authority on public records matters, and the public access program is still in its early years of coordinating with the office on open meetings matters.

The only state in which sources did not express concerns about compliance or credibility was Virginia, which is the one without the attorney general to turn to as an enforcement option. The FOIA Council appears to have established itself as the authoritative voice on open government matters in the state, and those who come to it as a resource seem to be satisfied with its advice and decisions. Some situations still end up in litigation, but sources said these were usually the kinds of cases that focused on narrow legal issues and required more formal judicial interpretation; one source mentioned an outlier case involving a closed meeting about a three-

\textsuperscript{101} See Everett, supra note 50.
way contract with a school board, a county board and an architectural firm that went to the Virginia Supreme Court.\textsuperscript{102}

Building a similar level of credibility would be ideal for the programs in Iowa and Arizona. When a program lacks this kind of credibility, as the Iowa experience shows, stakeholders may work to create another option, such as the independent open government enforcement agency that was supported by several groups and considered by the legislature in 2008.

While the public access ombuds programs in Iowa, Virginia and Arizona all are formally representative of the “classical ombudsman” concept, in practice, they may actually have elements more representative of other kinds of ombuds offices. For example, the experience recounted by several sources in Iowa makes the public records, open meetings and privacy duties appear to be more like an “advocate ombudsman,” one that becomes an advocate once it finds that violations have occurred. When this happened, one commentator notes, it can cause “an adversarial situation to develop with those being investigated.”\textsuperscript{103}

While its development seems to fit into the major standards outlined for being a “classic ombudsman,” Virginia’s Freedom of Information Advisory Council may in fact be distinct from the Iowa and Arizona programs because it is more of a “quasi ombudsman,” a term one researcher used to describe a uniquely American phenomenon of an office being created to “perform functions similar to those of an ombudsman” without the same structural requirements of a “true ombudsman.”\textsuperscript{104} The Virginia program was modeled after New York’s Committee on Open Government, an agency in the executive branch that does not refer to itself as an ombuds

\begin{itemize}
\item \textsuperscript{102} See White Dog Publishing, Inc. v. Culpeper County Board of Supervisors, 272 Va. 377 (2006).
\item \textsuperscript{103} Hill, supra note 7 at 37. Hill noted an orientation toward citizen advocacy despite the fact that the ombudsman was not supposed to be a citizens’ advocate in Hawaii. Id. at 34.
\item \textsuperscript{104} Id. at 36.
\end{itemize}
office but has similar powers to answer inquiries, conduct informal and formal investigations, and write advisory opinions.\textsuperscript{105}

Regardless of categorization or nomenclature, the public access programs in Iowa, Arizona and Virginia have made important contributions to the understanding of open government laws in each state, and they have provided valuable services to citizens, government and journalists. They are at their best when they are perceived to be independent, impartial and credible agencies for people to turn to when open government issues arise, and the long-term effectiveness of these offices will hinge on the extent to which they can be seen as an authoritative source in public access matters.

\textbf{RQ3 - Best Practices for Designing a Public Access Ombuds Program:} After interviewing two dozen sources closely involved in public access matters and conducting case studies of public access ombuds programs in Iowa, Virginia and Arizona, and in light of the tenets of Dispute Systems Design theory, the following recommendations for best practices in designing a public access ombuds office became evident.

\textbf{1. Involve stakeholders in the design}

Dispute Systems Design suggests that stakeholders – the people most impacted by a dispute processing system – should have a significant role in evaluating the need for a new system and in designing that system.\textsuperscript{106} Of the three public ombuds programs examined in this study, only Virginia engaged in a thorough stakeholder evaluation and design process at the front end, and it appears to be more successful than Iowa and Arizona in terms of stakeholder satisfaction with the system and in stakeholder use of the system. Bringing major players in disputes to the table – citizen advocates, news media organizations, state and local government

\textsuperscript{105} N.Y. PUBLIC OFFICERS LAW § 89 et seq. (McKinney 2009).
\textsuperscript{106} See Costantino & Merchant, \textit{supra} note 20 at 49.
representatives, and others who are interested in access to public records and meetings – and building consensus on an approach to access policy seems to have worked out well in Virginia. This level of consensus also helps to build confidence in the system in its early years, when buy-in by stakeholders is crucial to the long-term success of the program.

It may seem obvious that people are more likely to appreciate and participate in a system they have helped to design. However, this does not appear to have been taken into consideration when public access ombuds programs were created in other jurisdictions. Rather, as was the case in Arizona, the more traditional process of lobbying and legislation pursued by John Fearing and the Arizona Newspapers Association seems to be the norm. When stakeholders are not involved at all, as was the case in Iowa, there may be growing discontent among stakeholders on the goals and procedures of the ombuds program, and there may be perceptions, accurate or otherwise, about the way the program intends to process disputes. While a more thorough stakeholder process in the Iowa legislature failed to come up with consensus on a new program in the 2008 legislative session, the eager participation by several interest groups signaled dissatisfaction with the current system of handling disputes on public access manners in the ombudsman’s office.

2. **Ensure impartiality**

The concern most often voiced by sources interviewed in Iowa was that the ombudsman’s office was not impartial, violating one of the central tenets of ombuds programs. Though sources within the ombudsman’s office denied that this was the case, the appearance of partiality by the office in favor of citizen complaints – noted by advocates for both news media and government organizations – is a fatal flaw for an ombuds office.
Part of the difficulty is housing the public access ombuds program within a larger ombuds office that includes “citizens’ aide” as part of its title – as is the case in both Arizona and Iowa. Government employees perceive an organization serving as “citizens’ aide” to lean toward citizen advocacy, and they may expect undue hostility from that organization. This is the case even if the organization intends to be impartial, holds itself out as impartial, and tries to act in an impartial manner. The appearance of partiality is almost as damaging as actual partiality because it negatively impacts use of the office by government groups and, perhaps more importantly, it can lead them to doubt the legitimacy of the ombuds program’s findings and recommendations. For an office that has no formal enforcement authority and relies on voluntary compliance, stakeholder acceptance of these findings and recommendations is essential.

Each of the three public access ombuds programs has made efforts to hold itself out as an impartial resource for anybody with a question or complaint about public access matters, and years of data show that citizens and government are the primary users of these programs in each jurisdiction, combining to make more than 80 percent of the inquiries in Virginia and more than 90 percent of the inquiries in Arizona.\(^{107}\) While these are good signs for the programs, they still must be able to encourage cooperation with their recommendations to be effective. Sources in Iowa and Arizona complained about government agencies that refused to cooperate with the ombuds’ advice,\(^{108}\) but sources in Virginia did not perceive the same problem. The structure of

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\(^{107}\) See Appendix B for tables. The Iowa ombuds office does not keep records of requests categorized by requester, but sources agreed that news media were in the minority of requesters. Kathleen Richardson, former executive director of the Iowa Freedom of Information Council, said she was “aware of relatively few cases where journalists went through the ombudsman’s office.” In 2007, Dalton wrote, “Most of our cases stemmed from citizen complaints. A few complaints came from journalists.” Angela Dalton, What’s Happening on Public Records, Open Meetings, and Privacy, OMBUDSMAN’S REPORT 2007 3 (2008).

\(^{108}\) David Cuillier, national chairman of the Freedom of Information committee of the Society of Professional Journalists, commenting on the Arizona public access ombuds, said, “A major flaw is that (the ombuds) really doesn’t have any teeth or authority. It’s a real weakness. Agencies can just blow her off.”
Virginia’s FOI Advisory Council, which as more of a quasi-ombuds program can give informal advice and engage in telephone diplomacy but does not have the power to conduct investigations, is more likely to encourage cooperation by government agencies, which may not feel as threatened as they would by a more traditional ombuds. Jurisdictions should strongly consider the quasi-ombuds approach of Virginia and New York that eschews formal investigative powers and calls more for answering inquiries, informally mediating disputes, and writing non-binding advisory opinions when considering options for creating a new public access ombuds program.

Creating a program that is specifically designed to address public access matters also has its benefits. Because the Iowa and Arizona programs were housed in existing ombuds offices, they came with the expectations and perceived “citizens’ aide” role attached to that structure. Virginia’s experience as an independent, public-access-specific program enhances its perception as an authoritative, impartial resource for any citizen, government employee or journalist who has a question about an open government law dispute.

3. Choose a strong leader

Sources interviewed in every jurisdiction emphasized the need for strong leadership in the program. The Virginia FOI Advisory Council’s selection of Maria Everett as executive director was universally praised, and every source interviewed in Virginia said this was a critical step in ensuring the program’s success. Arizona Ombudsman Patrick Shannahan said he was also seeking a strong leader when he hired Elizabeth Hill to be the assistant ombuds for public access, and Iowa Ombudsman Robert Angrick and other sources praised Angela Dalton’s work as the assistant in charge of Public Records Open Meetings and Privacy.
However, different dynamics shape these offices, meaning there is a different role for the leader in each. As executive director of the FOI Advisory Council, Everett is in charge of day-to-day operations and is seen as the face and voice of the council. The council itself comes to decisions on advisory opinions, but it is Everett who fields most of the phone calls and who coordinates most of the training for the program. Her forceful personality and her depth of knowledge in public access matters are widely respected, giving her and the council a sense of authority when inquiries are made. As Schrad said about Everett:

She’s very independent in her thinking, and she doesn’t look to protect anybody or any group in particular. The litmus test for her is, ‘Does it comply with the law?’ She does a very good job of researching issues rather than rushing to judgment. She’s very professional, very forthcoming, and very exacting in her assessment of situations. She knows our FOIA act inside and out, and I trust her and her understanding of FOIA policy.

Hill appears to be building a similar level of authority in her less than two years as the lead ombuds on public access matters. Hill works in the ombudsman’s office and reports to Shannahan, but she is largely free to conduct matters as she sees fit.

Dalton is in a different organizational structure in Iowa ombudsman’s office, one that makes her role more challenging. Because she is one of several assistant ombuds who handle public access matters, there is no one person of authority for people with inquiries to consult with in Iowa. This could diminish the effectiveness of the office.

Further, one source noted that the lead ombuds in charge of public access matters in Iowa should be an attorney because of the complexity of the freedom of information laws in the state. Sources in both Virginia and Arizona cited the importance of Everett and Hill being attorneys in serving their roles. Because an attorney has both a depth of experience in the analysis and application of laws, and because an attorney has a more easily apparent credibility

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109 The source, a representative of an organization of government bodies, requested to remain confidential.
in dealing with legal matters, public access ombuds offices should strongly consider requiring leaders to be attorneys.

Each of the three leaders in the case studies had some background in public access matters before being elevated to their ombuds positions. Dalton had some background in dealing with public records in her career as a law enforcement officer; Everett had experience drafting the laws and serving on the legislative council considering revisions to the public access laws; and Hill had experience as an assistant attorney general dealing with public meetings disputes. However, sources generally said that a specific background in freedom of information matters was not a necessity for serving as a public access ombuds. More important were general legal knowledge and experience, the ability to do outreach and training, and skills as both a mediator and a decision-maker that can be respected by disputing parties.

4. Get stakeholders invested early

Stakeholder involvement in the design process is an essential element in ensuring that they have an opportunity to provide their input and experience and to make sure their voices are heard and considered as a dispute system is created. This kind of process will help to ensure that the stakeholders support, use and promote the dispute system once it has been established.

However, stakeholder involvement should not stop there. Public access ombuds programs should immediately reach out to potential users and to establish themselves as an independent and impartial resource on public access matters. This is an essential step toward establishing the office as the authority to turn to for public access inquiries or when disputes arise.

In the case studies, sources gave several examples of the value of outreach and building stakeholder buy-in. Dalton mentioned her early outreach efforts through training sessions and at
a booth at the State Fair as ways of connecting with potential users of the Iowa ombudsman’s office. In Virginia, when Everett sensed concern about the office’s impartiality from local government attorneys, she worked to address their concerns by speaking at their conferences and penning an article touting the benefits of the FOI Advisory Council for government groups. Further, the Virginia Coalition for Open Government secured funding to help promote the council by printing informational posters in its first year of existence. In Arizona, Hill offers numerous information sessions throughout the state, regularly writes in the ombudsman’s newsletter, and she wrote introductory letters and press releases announcing the creation of the program in its early days. These efforts to build credibility with potential users of the office should, in the long term, help them establish themselves as their respective states’ authority on public access issues.

5. **Emphasize training and education**

Perhaps the greatest difference between traditional ombuds offices and the public access ombuds programs is the training mission. Each public access ombuds program examined here takes a proactive approach to conflict management, offering educational sessions to various groups of citizens, news media, government employees, students and others build a culture of knowledge and understanding about freedom of information laws and how they are supposed to work.

Every source interviewed agreed that the training mission was a crucial one for public access ombuds programs. Besides being another way for the public access ombuds to reach out and build connections with stakeholders and potential disputants who could turn to the office in the future, training can lead to fewer conflicts in the future by building the knowledge base among stakeholders about freedom of information matters.
Training is not only conducted by the public access ombuds, nor should it be. However, to ensure that people are receiving a consistent message about the role and importance of government openness, the public access ombuds should reach out to advocacy organizations, both those representing government interests and those representing citizen and news media interests, to offer assistance or to take part in joint training sessions. This is an area in which the more formalized ADR system in an ombuds office can work in conjunction with less formal channels of dispute resolution involving knowledgeable experts in organizations to build trust and knowledge among potential disputants. Publication of handbooks and newsletters on public access matters for the public are another way ombuds programs can build knowledge about freedom of information laws.

6. Periodically evaluate the program

Costantino and Merchant recommend that dispute systems build in a mechanism for regularly evaluating their effectiveness and performance, thus allowing modifications as circumstances demand over time. Each of the public access ombuds programs reviewed in this study generates annual reports detailing the activity of the office from the prior year, but no other formal mechanisms to evaluate effectiveness are in place.

Outside investigations such as compliance audits typically conducted by news media organizations also provide an alternate route for evaluation of a program’s effectiveness. In Iowa, Arizona and Virginia, people in the ombuds office admitted to keeping a close eye on these audits and using them to gauge effectiveness of the office. However, while these independent investigations have value, they are more relevant to understanding how public officials apply freedom of information laws rather than the function of the ombuds office in particular. Regular surveys of public access ombuds program users, similar to one reviewing

110 Costantino & Merchant, supra note 20 at 168.
Indiana’s Public Access Counselor in 2006 conducted by the Indiana Coalition for Open Government and the Indiana University School of Journalism,\(^\text{111}\) would help programs understand the interests and needs of users.

By following the six aforementioned recommended best practices for creating a public access ombuds program, jurisdictions can move closer to creating a flexible and impartial office that serves the interests of all stakeholders – citizens, government, and news media – who in turn would be more likely to use, promote and support the program. A program with this kind of support can build its reputation over time, establishing itself as the authority for people to turn to when questions about freedom of information matters arise. Such an office would not necessarily serve as an alternative to litigation, but it could help to create a culture of knowledge and trust among sunshine law disputants. Conflict may be avoided through effective training of potential disputants, and the destructive elements evident in the conflict among parties in public access matters could be addressed in a more constructive manner.

Transforming the long-standing conflict between people seeking access to information and those who control information is a difficult challenge that requires long-term commitments by all parties, and improvement of public access dispute resolution systems is one important step in the right direction. Public access ombuds programs are just one avenue for jurisdictions to consider, and as the states examined in this study have shown, if designed, implemented and administered properly, they have great potential to serve the needs of disputants and improve the culture of conflict.

\(^\text{111}\) Yunjuan Lao & Anthony L. Fargo, \textit{Measuring Attitudes About the Indiana Public Counselor’s Office: An Empirical Study} (2008), indianacog.org/files/PAC_final2.pdf. In the survey of 120 people who had used the program, 68.3 percent rated their experience with the office as “excellent” or “good,” and more than 90 percent said they wanted the Public Access Counselor to have enforcement powers.
Appendix A: Sources Interviewed for the Case Studies

Iowa


Mary Gannon, counsel for Iowa Association of School Boards – Feb. 17, 2009


Terry Timmins, general counsel for the Iowa League of Cities – March 5, 2009

Confidential Source #1, attorney working with local government entities – Feb. 3, 2009, and Feb. 6, 2009

Confidential Source #2, source working with local government entities – Feb. 5, 2009

Confidential Source #3, attorney working with local government entities – Feb. 13, 2009

Virginia


John W. Jones, the executive director of the Virginia Sheriffs Association – Feb. 19, 2009


Leo W. Rodgers, county attorney for James City County – Feb. 26, 2009


Ginger Stanley, counsel to the Virginia Press Association – Feb. 6, 2009

Roger C. Wiley, current council member of Virginia Freedom of Information Advisory Council and attorney for several local government entities – Feb. 9, 2009
Arizona

Daniel C. Barr, media law attorney, partner at Perkins Coie – Feb. 24, 2009

Paula Bickett, assistant attorney general and member of the Public Records Task Force – Feb. 24, 2009

David Cuillier, assistant professor, University of Arizona School of Journalism, and national chairman of the Freedom of Information committee of the Society of Professional Journalists – Jan. 30, 2009

John Fearing, deputy executive director, Arizona Newspapers Association – Feb. 11, 2009

Elizabeth Hill, assistant ombudsman for public access, Arizona Ombudsman-Citizens’ Aide – Feb. 4, 2009

David Merkel, general counsel for Arizona League of Cities and Towns – Feb. 11, 2009

Chris Munns, assistant attorney general and member of the Open Meetings Law Enforcement Team – Feb. 24, 2009


Chris Thomas, director of legal services and general counsel for the Arizona School Boards Association – Feb. 18, 2009
Appendix B: Who makes inquiries of the FOI ombuds offices?

Table 1 – Sources of Inquiries Made to the Virginia Freedom of Information Advisory Council

<table>
<thead>
<tr>
<th>Year</th>
<th>Public</th>
<th>Government</th>
<th>News Media</th>
<th>Other*</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>54 (38%)</td>
<td>54 (38%)</td>
<td>33 (23%)</td>
<td>0 (0%)</td>
<td>141</td>
</tr>
<tr>
<td>2001</td>
<td>365 (44%)</td>
<td>295 (35%)</td>
<td>179 (21%)</td>
<td>0 (0%)</td>
<td>840</td>
</tr>
<tr>
<td>2002</td>
<td>339 (34%)</td>
<td>465 (47%)</td>
<td>165 (17%)</td>
<td>21 (2%)</td>
<td>990</td>
</tr>
<tr>
<td>2003</td>
<td>313 (31%)</td>
<td>472 (47%)</td>
<td>198 (20%)</td>
<td>18 (2%)</td>
<td>1001</td>
</tr>
<tr>
<td>2004</td>
<td>397 (33%)</td>
<td>616 (52%)</td>
<td>145 (12%)</td>
<td>32 (3%)</td>
<td>1190</td>
</tr>
<tr>
<td>2005</td>
<td>627 (38%)</td>
<td>756 (46%)</td>
<td>209 (13%)</td>
<td>60 (4%)</td>
<td>1652</td>
</tr>
<tr>
<td>2006</td>
<td>611 (35%)</td>
<td>845 (49%)</td>
<td>232 (13%)</td>
<td>53 (3%)</td>
<td>1741</td>
</tr>
<tr>
<td>2007</td>
<td>628 (37%)</td>
<td>854 (50%)</td>
<td>167 (10%)</td>
<td>46 (3%)</td>
<td>1695</td>
</tr>
<tr>
<td>2008</td>
<td>649 (39%)</td>
<td>828 (49%)</td>
<td>208 (12%)</td>
<td>0 (0%)</td>
<td>1685</td>
</tr>
<tr>
<td>TOTAL</td>
<td>3983 (36%)</td>
<td>5185 (47%)</td>
<td>1536 (14%)</td>
<td>230 (2%)</td>
<td>1004</td>
</tr>
</tbody>
</table>

* Other includes out-of-state contacts, which were included as a separate category in annual reports from 2002 to 2007

Source: Annual Reports of the Virginia Freedom of Information Advisory Council

Table 2 – Public Access Inquiries to Arizona Ombudsman-Citizens’ Aide

<table>
<thead>
<tr>
<th>Year</th>
<th>Government (pct)</th>
<th>Citizens (pct)</th>
<th>Media (pct)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>138 (38%)</td>
<td>198 (54%)</td>
<td>32 (9%)</td>
<td>368</td>
</tr>
<tr>
<td>2008</td>
<td>231 (36%)</td>
<td>351 (55%)</td>
<td>54 (9%)</td>
<td>636</td>
</tr>
<tr>
<td>TOTAL</td>
<td>369 (37%)</td>
<td>549 (55%)</td>
<td>86 (9%)</td>
<td>1,004</td>
</tr>
</tbody>
</table>