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OPENING THE DOORS TO ACCESS: A PROPOSAL FOR ENFORCEMENT OF GEORGIA'S OPEN MEETINGS AND OPEN RECORDS LAWS

INTRODUCTION

The concept of open government is inherent in the American democratic process.1 Although "democracy is ... a representative form of government," it is the people who possess the power to govern.2

In order to maintain control over their governmental institutions, the people must be able to scrutinize those institutions. As James Wilson commented at the Constitutional Convention, "[t]he people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."3

The Georgia Supreme Court reiterated James Wilson's words more than two hundred years later when former Georgia Supreme Court Chief Justice Charles Weltner wrote that "[b]ecause public men and women are amenable 'at all times' to the people, they must conduct the public's business out in the open."4

As the belief in open government resonated throughout history, states began enacting open government access laws as early as 1898 by passing open meetings laws, known today as sunshine laws.5 Later, open records laws were enacted to provide the citizenry with greater information about the government.6

Although many states have open government access laws, few states, particularly Georgia, have effective means of

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3. Id. (quoting 2 THE FOUNDERS' CONSTITUTION 280-91 (Kurland & Lerner eds., 1987)).
5. See Assaf, supra note 2, at 229.
enforcement.⁷ Under Georgia’s access laws, the only recourse for citizens or entities seeking enforcement of these laws is to file a legal suit in the state’s superior courts.⁸ Unlike some states, Georgia’s access laws do not provide citizens with an administrative forum⁹ in which to air their grievances and receive a quick, inexpensive resolution to their complaints.¹⁰

For example, Minnesota enacted legislation providing an administrative remedy for citizens seeking to challenge an agency’s decision denying a person access to government data.¹¹ The availability of such an administrative remedy provides citizens with an inexpensive, accessible, and less complicated manner for redress because aggrieved persons are more likely to file administrative requests than legal suits, which require filing fees and attorneys’ fees.¹²

This Note examines various remedies available under access laws in different states and compares them to the limited options available under Georgia’s access laws. Part I traces the history of the nation’s open government laws as they developed under federal and state laws. Part II analyzes the judicial and administrative remedies that state legislatures have provided under state access laws. Part III discusses the enforcement options available under Georgia law. Finally, Part IV urges enactment of an enforcement mechanism under Georgia’s open government access laws and proposes a model administrative

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⁷ See Assaf, supra note 2, at 229-30; see also Interview with Hollie Manheimer, Executive Director, Georgia First Amendment Foundation, Atlanta, Georgia (Apr. 19, 1999) [hereinafter Manheimer Interview].

⁸ See O.C.G.A. § 50-18-73(a) (1998) (stating that the state’s superior courts have jurisdiction to enforce compliance with the open records law); see also id. § 50-14-5(a) (granting the state’s superior courts jurisdiction to enforce compliance with the open meetings law, including the right to grant injunctions or other equitable relief).

⁹ See Peter C. Canfield et al., The Reporters Committee For Freedom of the Press, Tapping Officials’ Secrets: The Door to Open Government in Georgia 12, 21 (1993).

¹⁰ See id. at 21, 22. Although Georgia does not provide an administrative forum that is authorized to issue rulings, the state Attorney General has the authority to issue opinions to agency heads or state legislators, upon request, concerning open meetings questions only. See id.

¹¹ See Minn. Stat. Ann. § 13.072(1) (West 1997) (granting authority to the Commissioner of the Minnesota Department of Administration to issue an opinion to “any person who disagrees with a determination regarding data practices made by a state agency, statewide system, or political subdivision [concerning] the person’s rights as a subject of government data or right to have access to government data”).

¹² See Manheimer Interview, supra note 7.
remedy that incorporates key aspects of systems already in place in other states.

I. HISTORY

Although the “right” to examine government processes by way of open meetings and open records is not a Constitutional guarantee,¹³ this “right” has become an integral part of constitutional law under the First Amendment.¹⁴ Famous commentators,¹⁵ espousing the benefits of open government, have argued that fluidity of information promotes intellectual debate and “cooperation between citizens and government.”¹⁶

Media efforts spawned much of the development of open meetings laws.¹⁷ Journalist organizations, such as the American Society of Newspaper Editors and Sigma Delta Chi, a national journalism fraternity, pressed for open meetings legislation at both the state and federal levels.¹⁸ Moreover, in the 1970s, Americans armed with an arsenal of disillusion and distrust that developed from the United States’ participation in the Vietnam War, as well as President Richard Nixon’s involvement in Watergate, pushed Congress to respond to their apprehensions

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¹⁵. See James H. Cawley, Sunshine Law Overexposure and the Demise of Independent Agency Collegiality, 1 WIDENER J. PUB. L. 43 (1992). “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Id. at 45 n.6 (quoting LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY 92 (1st ed. 1914)); see id. at n.8 (“It is by taking a share in legislation that the American learns to know the law, it is by governing that he becomes educated about the formalities of government. The great work of society is daily performed before his eyes, and so to say, under his hands.”) (quoting ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 280 (George Lawrence trans., J. P. Mayer & Max Lerner eds., 1966)).
¹⁶. Cawley, supra note 15, at 45 (quoting Common Cause v. NRC, 674 F.2d 921, 928 (D.C. Cir. 1982)).
¹⁸. See id.
with open meetings laws such as the Government in the Sunshine Act (Sunshine Act).\textsuperscript{19} 

The federal Sunshine Act, enacted in 1976, set forth a presumption that government information should be open for public inspection,\textsuperscript{20} unless expressly excluded by provisions in the law.\textsuperscript{21} Congress enacted the Sunshine Act to provide the public with information concerning the decisionmaking processes of the federal government, "or in other words, [because] the 'government should conduct the public's business in public.'"\textsuperscript{22} 

The Sunshine Act requires that "[e]xcept as provided in subsection (c),\textsuperscript{23} every portion of every meeting of an agency\textsuperscript{24} 

\begin{itemize}
  \item \textsuperscript{20} See Bradley, \textit{supra} note 19, at 474.
  \item \textsuperscript{21} See 5 U.S.C. § 552(b) (1994).
  \item \textsuperscript{22} Bradley, \textit{supra} note 19, at 474 (quoting S. Rep. No. 94-354, at 1 (1975)). \textit{But see} Cawley, \textit{supra} note 15, at 118-17 (arguing that the sunshine laws have effectively "driven vital independent agency decisionmaking underground" and have destroyed opportunities for collegial debate and decisionmaking because requirements for open meetings hinder the free flow of ideas and force agency members to make a final decision before attending the meeting).
  \item \textsuperscript{23} 5 U.S.C. § 552b(c) (1994) provides for an exception to the open government law when an agency determines that any "portion[ ]of its meeting or the disclosure of such information [will] likely":
    \begin{itemize}
      \item (1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order; (2) relate solely to the internal personnel rules and practices of an agency; (3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) involve accusing any person of a crime, or formally censuring any person; (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; (7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement
shall be open to public observation." The Act further requires that governmental agencies publicly announce the time, place, and subject matter of all meetings at least one week in advance, regardless of whether the meeting will be open or closed. If an agency chooses to hold a closed meeting pursuant to the exemptions in the federal statute, the General Counsel or chief legal officer of the agency must publicly certify that the meeting warrants closure to the public, stating the relevant exemption. Furthermore, the agency must either electronically record the meeting or maintain clear and accurate transcripts of all occurrences during the meeting. Any actions filed for violations of these provisions fall within the jurisdiction of an authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (B) disclose investigative techniques and procedures, or (C) endanger the life or physical safety of law enforcement personnel; (D) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; (E) disclose information the premature disclosure of which would—(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or (I0) specifically concern the agency's issuance of a subpoena (sic), or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

24. See id. § 552(b)(a)(1) ("[The term 'agency' means any agency . . . headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate . . . "]).
25. Id. § 552(b).
26. See id. § 552(e)(1).
27. See id. § 552(f)(1).
28. See id.
United States district court. In claiming statutory exemption as a defense, the governmental agency bears the burden of proving that its action falls within the enumerated exemption. Upon adjudication, the court may assess the prevailing party's reasonable attorneys' fees and court costs against the opposing party. Additionally, the court may assess court costs against a plaintiff who files a frivolous suit.

In 1966, just a short time prior to the enactment of the Sunshine Act, the federal government passed the Freedom of Information Act (FOIA), "for the express purpose of increasing disclosure of government records." Under FOIA, each government agency must make available for public inspection and photocopying, documents such as rules of procedures, final adjudication opinions, policy statements adopted by the agency, or staff manuals. Generally, the fees that may be charged for document searches and copying are limited to "reasonable standard charges." For citizens who wish to challenge an agency's refusal to release documents, a federal district court may enjoin the agency from withholding documents. In such an action, the governmental agency bears the burden in defending its decision to withhold the records. Furthermore, a court may assess attorneys' fees against the United States if the complainant "substantially prevail[s]" in the matter.

Although Congress promulgated federal access laws, it did not initiate the open government movement in the United States.

29. See id. § 552b(h)(1).
32. See id.
33. Id. § 552; see Nowadzky, supra note 6, at 65.
34. Cox v. United States Dep't of Justice, 576 F.2d 1302, 1304 (8th Cir. 1978).
36. Id. § 552(a)(4)(A)(ii)(I).
Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Id. at § 552(a)(4)(A)(iii).
37. See id. § 552(a)(4)(B).
38. See id.
40. See Watkins, supra note 17, at 272.
Individual states began to open the doors to their local governments in 1898, long before the Sunshine Act was passed or state open records laws developed. 41 Today, all fifty states 42

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and the District of Columbia\textsuperscript{43} have passed comprehensive open government statutes.\textsuperscript{44}

II. REMEDIES AVAILABLE UNDER THE SUNSHINE LAWS

Most state laws provide for civil and criminal relief against agencies or public officials that violate the state’s sunshine laws.\textsuperscript{45} These remedies include writs of mandamus, declaratory judgments, injunctions, invalidation, and fines.\textsuperscript{46}

Under the federal Sunshine Act, the most a district court may do in an action for an improperly closed meeting is to compel an agency to release transcripts from the meeting.\textsuperscript{47} As a result, the only remedy the citizen receives is the knowledge of what transpired during the meeting.\textsuperscript{48} The remedial relief provided does not satisfy the aggrieved citizen who seeks invalidation of an action taken at an illegal meeting.\textsuperscript{49} A federal court whose jurisdiction rests solely on the Sunshine Act does not have the authority to “set aside, enjoin, or invalidate any agency action . . . taken or discussed at any agency meeting out of which the violation . . . arose.”\textsuperscript{50} Therefore, a court, under the federal Sunshine Act, can only provide the aggrieved citizen with a transcript of what occurred. “[I]t is easy to see why many individuals would not bring an action against an agency. It would be costly and the only real benefit available to plaintiffs will be viewing the information from the meeting.”\textsuperscript{51}

However, in dealing with open records violations, federal courts may not only enjoin an agency from withholding documents from a citizen,\textsuperscript{52} but may also assess attorneys’ fees incurred as a result of the litigation against the agency;\textsuperscript{53} thus giving citizens further incentive to prosecute violations of

\textsuperscript{44} See Watkins, supra note 17, at 288.
\textsuperscript{45} See Davis et al., supra note 13, at 43-57.
\textsuperscript{46} See id.
\textsuperscript{47} See Bradley, supra note 19, at 479 (citing 5 U.S.C. § 552b(h)(1) (1994)).
\textsuperscript{48} See id.
\textsuperscript{49} See id.
\textsuperscript{50} Id. (quoting 5 U.S.C. § 552b(b)(2) (1994)).
\textsuperscript{51} Id.
\textsuperscript{53} See id. § 552(a)(4)(E).
FOIA. Furthermore, a few states’ sunshine laws, such as New Hampshire’s, provide that courts must grant an expedited review of an open government access action that seeks immediate injunctive relief, as long as probable cause of a violation exists. Aggrieved citizens, district attorneys, attorneys general, or a commission created to enforce the sunshine laws may seek the various remedies provided under the state and federal versions of these laws.

A. Writs of Mandamus

A writ of mandamus issued to an agency restores a right to a citizen that has been illegally deprived of such right. Violating the writ could place the agency in civil contempt. The power of the writ may command compliance in future meetings or may work immediately to stop illegal meetings that would otherwise continue.

B. Injunctions

The efficacy of an injunction is lost in situations in which a meeting has already taken place. However, an injunction may stop a pending meeting from taking place, thereby forcing the agency to conduct its business openly, or it may enjoin an agency from denying access to documents.

C. Invalidation

Many state sunshine laws provide for another remedial measure—invalidation. This remedy protects citizens from decisions made during secret meetings and forces the agency to
re-examine the issue in the open.\textsuperscript{65} If an action is taken during a meeting that violates the sunshine law, granting an invalidation will nullify that decision or action.\textsuperscript{66} Some states provide for automatic invalidation for any violation of the sunshine laws, while other states require a showing of the agency’s willfulness in violating the law.\textsuperscript{67}

D. Criminal and Civil Penalties

Criminal and civil penalties may be issued for violations of state sunshine laws.\textsuperscript{68} States are often forgiving towards “‘good faith’ violators”\textsuperscript{69} by requiring evidence of “willful and knowing violations” before imposing civil penalties or fines.\textsuperscript{70} Further, in states where criminal penalties are available, often a misdemeanor charge\textsuperscript{71} and the option of a short jail sentence or fine is imposed for violations of the access laws.\textsuperscript{72}

E. Administrative Remedies

States that provide administrative remedies may do so through independent administrative commissions created to “adjudicate” issues concerning open government access laws.\textsuperscript{73} Although the opinions issued generally do not legally bind the violating entity,\textsuperscript{74} the rulings are likely to bring some relief to the average citizen, as well as enhance enforcement of the

\textsuperscript{65} See id. at 50.
\textsuperscript{66} See id. at 49-54.
\textsuperscript{67} See id.
\textsuperscript{68} See id. at 54-55.
\textsuperscript{69} Id. at 54. “In 1994, seventeen states provided for fines ranging from $2,000 for a second violation in Michigan, to not more than $100 in Kentucky for violations of the sunshine law.” Id. (citations omitted).
\textsuperscript{70} Id. (citing KY. REV. STAT. ANN. § 61.991(1) (Michie 1995)); see VA. CODE ANN. § 2.1-3.46.1 (Michie 1995) (“[T]he court, if it finds that a violation was willfully and knowingly made, shall impose . . . a civil penalty.”).
\textsuperscript{71} See O.C.G.A. § 50-14-6 (1998) (“Any person knowingly and willfully conducting or participating in a meeting in violation of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $500.00.”); see also CANFIELD ET AL., supra note 9, at 14 (“The 1992 amendments repealed § 50-18-74, which had provided that willful refusal to provide records in accordance with the provisions of the Act was a misdemeanor.”).
\textsuperscript{72} See Davis et al., supra note 13, at 55.
\textsuperscript{73} See id. at 44.
\textsuperscript{74} See, e.g., MINN. STAT. ANN. § 13.072(2) (West 1997).
access laws.\textsuperscript{75} Three states that have created such administrative bodies are Minnesota, Utah, and New York.\textsuperscript{76}

1. Minnesota

Minnesota’s Government Data Practices Act\textsuperscript{77} (MGDPA) grants authority to the state’s Commissioner of Administration to issue two types of opinions concerning the state’s open records law.\textsuperscript{78} The Commissioner may issue, upon the request of a governmental agency, interpretive decisions on issues concerning access, rights of data subjects, or classification of data.\textsuperscript{79} Additionally, individual citizens may request adjudicative opinions concerning their rights as a subject of data or their right to access governmental data.\textsuperscript{80}

Although the opinions are not binding, the statute prescribes that the court give the opinions deference in proceedings concerning the governmental data.\textsuperscript{81} The amount of deference a court will give the decision depends on the nature of the decision.\textsuperscript{82} Interpretive decisions receive little deference since interpretation of statutes is generally reserved for the courts.\textsuperscript{83} Courts give much greater deference to administrative determinations that are adjudicative in nature, since they require an application of the law rather than an interpretation of the law’s meaning.\textsuperscript{84} However, if “the decision ‘reflects an error of law, is arbitrary and capricious, or is unsupported by

\begin{enumerate}
\item \textsuperscript{75} See Manheimer Interview, supra note 7.
\item \textsuperscript{77} MINN. STAT. ANN. § 13.072(1)(a) (West 1997).
\item \textsuperscript{78} See id.
\item Upon request of a state agency, \ldots the commissioner may give a written opinion on any question relating to public access to government data \ldots
\item Upon request of any person who disagrees with a determination regarding data practices made by a state agency \ldots the commissioner may give a written opinion regarding the person’s rights as a subject of government data or right to have access to government data.
\item Id. \textsuperscript{79} See Westin, supra note 76, at 869.
\item \textsuperscript{80} See id.
\item \textsuperscript{81} See MINN. STAT. ANN. § 13.072(2) (West 1997).
\item \textsuperscript{82} See Westin, supra note 76, at 875.
\item \textsuperscript{83} See id.
\item \textsuperscript{84} See id. at 875-76.
\end{enumerate}
substantial evidence,’" the court is not obligated to give it any deference or weight whatsoever. Written opinions from the Minnesota Attorney General take precedence over opinions issued by the Commissioner, and a citizen may file a court action in lieu of exploring any administrative remedies.

To cover the costs of providing the administrative opinion, the statute requires "[a] state agency, statewide system, or political subdivision that requests an opinion [to] pay a fee of $200 for each request." Note, however, that citizens are not required to pay any fee.

2. Utah

In Utah, any individual aggrieved by a government agency's denial of access must first appeal to the chief administrative officer of that agency. Upon the chief administrative officer's affirmation of the denial of access, the individual may file an appeal either to the district court or to the State Records Committee. The state's Government Records Access and Management Act established the State Records Committee to hear appeals from agency determinations concerning open records issues. The enabling statute allows for nominal compensation to be paid to the Committee members. Acting with the advice and consent of the state senate, Utah's governor

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85. Id. at 876 (quoting Cable Communications Bd. v. Nor-West Cable Communications Partnership, 366 N.W.2d 668, 669 (Minn. 1984); In reKokesch, 411 N.W.2d 559, 562 (Minn. Ct. App. 1987)).
86. See id.
87. See MINN. STAT. ANN. § 13.072(1)(c) (West 1997).
88. See id § 13.08.
89. Id. § 13.072(3).
90. See id.
91. See UTAH CODE ANN. § 63-2-401(1)(a) (1997); see also id. § 63-2-205.
92. See id. § 63-2-402.
93. Id. §§ 63-2-101 to -909; see id. § 63-2-501(1).
94. See Westin, supra note 78, at 892.
95. See UTAH CODE ANN. § 63-2-501(5)(a)(i) (1997) ("Members who are not government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-108 and 63A-3-107.").
appoints the committee members,\textsuperscript{96} who collectively represent both private and public interests.\textsuperscript{97}

When the Records Committee receives an appeal, it must schedule a hearing for the appeal no later than forty-five days after the filing of notice.\textsuperscript{98} However, the Committee may provide for an expedited hearing upon the petitioner's request and a showing of "good cause."\textsuperscript{99} At the hearing, the petitioner and any other interested persons may testify and present evidence to the extent allowed by the Committee.\textsuperscript{100}

The standard of review by which the Records Committee examines the agency's determination is de novo.\textsuperscript{101} Upon completion of its review, the Committee may order disclosure of the withheld information\textsuperscript{102} or deny the petitioner's request.\textsuperscript{103} If the Committee fails to issue a decision within thirty-five days of the appeal's filing date, the appeal will be deemed denied.\textsuperscript{104}

If the appeal to the Records Committee results in an affirmation of the chief administrative officer's denial of access, the petitioner may seek judicial review by the district court.\textsuperscript{105} The petitioner must file the appeal to the court within thirty

\textsuperscript{96} See id. § 63-2-501(2).

\textsuperscript{97} See id. § 63-2-501(1).

\textsuperscript{98} [T]he State Records Committee ... consist[s] of ... seven individuals: (a) an individual in the private sector whose profession requires him to create or manage records that if created by a governmental entity would be private or controlled; (b) the state auditor or the auditor's designee; (c) the director of the Division of State History; (d) the governor or the governor's designee; (e) one citizen member; (f) one elected official representing political subdivisions; and (g) one individual representing the news media.

\textsuperscript{99} Id. However, the statute does not define "good cause." See id.

\textsuperscript{100} See id. § 63-2-403(8).

\textsuperscript{101} See id. § 63-2-403(10)(b).

\textsuperscript{102} See id. § 63-2-403(11)(b) ("The records committee may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the public interest favoring access outweighs the interest favoring restriction of access."); id § 63-2-403(11)(c) ("In making a determination ..., the records committee shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect privacy interests in the case of private or controlled records, business confidentiality interests ... and privacy interests or the public interest in the case of other protected records.").

\textsuperscript{103} See id. § 63-2-403(11)(a).

\textsuperscript{104} See id. § 63-2-403(13).

\textsuperscript{105} See id. § 63-2-404(1)(a).
days of the Records Committee's order.\textsuperscript{106} The court reviews the Committee's decision de novo, but allows a showing of evidence presented during the Records Committee hearing.\textsuperscript{107} The court, as with the Records Committee, is authorized to order disclosure of information, but additionally may limit the petitioner's use and further disclosure of the record so as to protect privacy interests.\textsuperscript{108}

3. New York

Like Utah and Minnesota, New York's administrative remedies are limited to violations of its open records law.\textsuperscript{109} New York's open records law provides for a Committee on Open Government,\textsuperscript{110} which issues advisory opinions to agencies and individuals.\textsuperscript{111} The Committee\textsuperscript{112} issues informal advisory opinions to citizens and formal advisory guidelines or opinions to any agency requesting them.\textsuperscript{113} The opinions are not binding, and the Committee has held that the opinions are "intended to be educational and persuasive, and it is [the Committee's] hope that they serve to resolve issues and avoid the need to litigate."\textsuperscript{114} However, courts ruling on issues that have come

\begin{itemize}
  \item \textsuperscript{106} See id. § 63-2-404(1)(b).
  \item \textsuperscript{107} See id. § 63-2-404(1)(a).
  \item \textsuperscript{108} See id. § 63-2-404(7)(a).
  \item \textsuperscript{109} See N.Y. PUB. OFF. LAW § 89 (McKinney 1988).
  \item \textsuperscript{110} See id. § 89(1)(a).
  \item \textsuperscript{111} See Westin, supra note 76, at 819-22.
  \item \textsuperscript{112} New York law provides that the Committee:

  shall consist of the lieutenant governor or [that officer's designee], the secretary of state [or that officer's designee], whose office shall act as secretariat for the committee, the commissioner of the office of general services or [that officer's designee], the director of the budget [or that officer's designee], and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly.

  N.Y. PUB. OFF. LAW § 89(1)(a) (McKinney 1988).
  \item \textsuperscript{113} See id. § 89(1).
  \item \textsuperscript{114} Westin, supra note 76, at 822 (quoting STATE OF N.Y., DEPARTMENT OF STATE, COMMITTEE ON OPEN GOVERNMENT, 1985 REPORT TO THE GOVERNOR AND THE LEGISLATURE FROM THE COMMITTEE ON OPEN GOVERNMENT, Dec. 1985, at 6).
\end{itemize}
before the Committee often accord the opinions significant weight.\textsuperscript{115} The statute does not comment as to whether the courts should give any deference to the Committee’s determinations;\textsuperscript{116} however, an individual seeking judicial review of an agency’s denial of access must first exhaust all the available administrative remedies.\textsuperscript{117}

III. GEORGIA’S SUNSHINE LAWS

Georgia’s sunshine laws do not provide for an administrative body to hear issues concerning violations of open government.\textsuperscript{118} Under Georgia’s Open Records Act,\textsuperscript{119} one must submit requests to view records to the document’s custodian, who then must determine within three days of the request whether the records should be produced.\textsuperscript{120} The Act does not provide for any administrative appeal of that custodian’s refusal to disclose the requested documents.\textsuperscript{121} Rather, the only means available to a complainant\textsuperscript{122} to enforce compliance is to file a suit in a Georgia superior court.\textsuperscript{123} In bringing such a suit, the individual may

\textsuperscript{115} See, e.g., Capital Newspapers, Div. of Hearst Corp. v. Whalen, 483 N.Y.S. 2d 635, 638 (1984) (“[T]he bi-partisan New York State Committee on Open Government . . . determined that ‘the “Corning Papers” are, in their entirety, subject to the rights of access granted by the Freedom of Information Law.’ This determination should be given deference and great weight.”); see also Whitehead v. Morgenthau, 552 N.Y.S. 2d 518, 519 (1990) (stating that an opinion written by the committee empowered to address such issues “is entitled to great weight and, if not irrational or unreasonable, should be upheld” (quoting In re Gannett Co. v. James, 108 Misc. 2d 862 (1981), aff’d, 86 A.D.2d 744 (1982))).

\textsuperscript{116} See N.Y. PUB. OFF. LAW § 89 (McKinney 1988).

\textsuperscript{117} See Reubens v. Murray, 599 N.Y.S. 2d 580 (1993) (affirming decision to dismiss petitioner’s action to compel public entity to release information requested under state’s Freedom of Information Law, because the court found that petitioner failed to exhaust administrative remedies).

\textsuperscript{118} See O.C.G.A. §§ 50-14-1 to -6, 50-18-70 to -76 (1998).

\textsuperscript{119} Id. § 50-18-70. “The Georgia Open Records Act provides that public records shall be open for a personal inspection by ‘any citizen of this state.’” CANFIELD ET AL., supra note 9, at 2 (quoting O.C.G.A. § 50-18-70(b) (1998)).

\textsuperscript{120} See O.C.G.A. § 50-18-70(f) (1998). There are several statutory exceptions under which records are not disclosed. See id. § 50-18-72. Such exceptions often focus on records concerning privacy invasions, law enforcement investigations, criminal prosecutions, and government employees. See id.

\textsuperscript{121} See CANFIELD ET AL., supra note 9, at 12.

\textsuperscript{122} See O.C.G.A. § 50-18-73 (1998) (“Such actions may be brought by any person, firm, corporation, or other entity.”).

\textsuperscript{123} See id.
proceed pro se, although the statute does provide for attorneys' fees to be paid to the prevailing party under certain circumstances.\textsuperscript{124} Upon a determination that a violation has occurred, the court may impose legal and equitable remedies.\textsuperscript{125} Although the Act does not explicitly provide for fines, the court may impose fines under the exercise of its equitable authority.\textsuperscript{126} The Act further provides that the Georgia Attorney General may bring a civil or criminal action to enforce compliance with the Act.\textsuperscript{127}

Likewise, individuals seeking to assert their rights under Georgia's Open Meetings Act\textsuperscript{128} do not have an administrative forum in which to appeal any denials of access.\textsuperscript{129} Even though the Georgia Attorney General issues opinions concerning open meetings, such opinions are only issued to "the heads of state governmental agencies and members of the Georgia legislature who request such opinions."\textsuperscript{130} Individuals seeking to invalidate an official agency action under the state law must file a suit in a Georgia superior court\textsuperscript{131} within ninety days of the contested action.\textsuperscript{132} However, the Act does not provide time limitations on filing a suit that seeks to make public an agency's minutes or agendas.\textsuperscript{133} Under the Open Meetings Act, an individual may seek an injunction, an order opening previously closed

\begin{enumerate}
\item[124.] See Canfield et al., \textit{supra} note 9, at 13.
\item[125.] See O.C.G.A. § 50-18-73(b) (1998).
\item[126.] See Canfield et al., \textit{supra} note 9, at 14.
\item[127.] See O.C.G.A. § 50-18-73(a) (1998). \textit{But see} Canfield et al., \textit{supra} note 9, at 14 ("The 1992 amendments repealed § 50-18-74, which had provided that willful refusal to provide records in accordance with the provisions of the Act was a misdemeanor.").
\item[128.] See O.C.G.A. §§ 50-14-1 to -6 (1998).
\item[129.] See id. § 50-14-5; Canfield et al., \textit{supra} note 9, at 21.
\item[130.] Canfield et al., \textit{supra} note 9, at 22.
\item[132.] See id. § 50-14-1(b).
\item[133.] See Canfield et al., \textit{supra} note 9, at 22.
\end{enumerate}
meetings, or an order making public the transcript of an improperly closed meeting.\textsuperscript{134} Furthermore, the court may invalidate any official action taken during the improperly closed meeting.\textsuperscript{135}

The Open Meetings Act also provides for criminal penalties.\textsuperscript{136} Any person who engages in a “knowing and willful” violation of the Act commits a misdemeanor punishable by a fine of up to $500.\textsuperscript{137} Any appeals from superior court decisions must be filed directly with the Georgia Supreme Court within thirty days from the date of the judgment.\textsuperscript{138}

IV. A PROPOSAL FOR EFFECTIVE ENFORCEMENT OF GEORGIA ACCESS LAWS

As noted, Georgia is unlike states such as Minnesota, Utah, and New York, in that a Georgia citizen may only obtain relief for violations of the state’s access laws by filing a court action.\textsuperscript{139} As a result, Georgia’s open government access laws remain essentially unenforced. For example, when a citizen is overcharged\textsuperscript{140} for photocopying public documents\textsuperscript{141} (and, as a result, possibly deterred from copying the documents), that individual is not likely to file a complaint in a state superior court to dispute the agency’s overcharge.\textsuperscript{142} However, if the Georgia legislature were to create a commission to hear and “adjudicate” these issues, similar to those created in Utah and New York, the law would then have effective enforcement power.

None of the three state laws discussed in this Note—New York, Minnesota, or Utah—provide for administrative review of

\begin{footnotes}
\item[134] See id.
\item[135] See O.C.G.A. § 50-14-1(b) (1998).
\item[136] See id. § 50-14-6.
\item[137] See id. ("Any person knowingly and willfully conducting or participating in a meeting in violation of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed $500.00.").
\item[138] See id. § 5-6-38; CANFIELD ET AL., supra note 9, at 23.
\item[140] For example, the agency may attempt to incorporate employee wages into the cost of the photocopy. See CANFIELD ET AL., supra note 9, at 4.
\item[141] See O.C.G.A. § 50-18-71(c) (1998) ("Where no fee is otherwise provided by law, the agency may charge and collect a uniform copying fee not to exceed 25¢ per page.").
\end{footnotes}
open meetings violations.  

Each of the three states’ administrative procedures relate only to denial of access to agency documents or records.  

In order to give full effect to the democratic process, Georgia’s administrative remedy should apply to both open meetings and open records laws; otherwise, citizens will not be equipped with the full gamut of knowledge necessary to properly govern.

Opponents may argue that allowing immediate administrative review of any agency’s decision to close a meeting would cause great delays. These opponents likely would assert that agency meetings would have to be postponed until the administrative body issued an opinion, thus hindering the agency from doing its work efficiently. However, in anticipation of such a problem, legislators could arm the administrative body with the power to: (1) order the agency to make available transcripts of the illegal meeting, or (2) invalidate any actions the agency took during the illegally closed meetings. Such a remedy would mirror those available in similar instances under the federal Sunshine Act and several states’ laws.

A. Minnesota’s Offerings: Dual Opinions and Judicial Deference

In developing an answer to Georgia’s need for an administrative body to handle issues of access, Georgia should look at the positive aspects of Minnesota’s Government Data Practices Act.  

Similar to Minnesota’s method, Georgia should create an administrative body with the power to issue two types of administrative opinions—interpretive rulings to the agencies and adjudicative rulings to individuals. Nonbinding interpretive rulings issued at an agency’s request would assist
the agency in making the decision whether to release documents to the public or close a meeting.  

Unlike the interpretive decisions, adjudicative rulings to citizens concerning access issues should receive judicial deference. In Minnesota, courts give deference to these rulings because the decisions are based upon fact-finding rather than interpretations of the law. The courts are more willing to relinquish a fact-finding role to administrative bodies because their findings must be supported by the record. However, interpretations of statutory law are reserved to the courts because such decisions are "based on legal rather than factual considerations [and courts] need not defer to agency expertise."  

B. Utah's Offerings: An Objective Administrative Body, Strict Deadlines, and the Presentation of Evidence  

Rather than appointing a commissioner to administer opinions concerning access laws, as in Minnesota, Georgia should follow Utah's lead in developing a committee to work in tandem with other administrative procedures. Under Utah's law, aggrieved citizens must first appeal to the chief administrative officer of the agency that denied them access. By appealing to the chief administrative officer, the citizen gives the agency's highest administrator an opportunity to evaluate the request and possibly reverse the agency's earlier determination.  

If the citizen's request is denied by the chief administrative officer, the individual then may seek judicial review. But, if the citizen still does not want to take the matter to court, under Utah's law, the citizen may elect to proceed to another level of

150. See Westin, supra note 76, at 869-80.  
151. See MINN. STAT. ANN. § 13.072(1) (West 1997); Westin, supra note 76, at 875-76.  
152. See Westin, supra note 76, at 875-76.  
153. See id.  
154. See id. at 875-77.  
155. Id. at 876.  
156. See MINN. STAT. ANN. § 13.072 (West 1997).  
158. See id. § 63-2-401(1)(a).  
159. See Westin, supra note 76, at 893.  
160. See id.
administrative appeal. At this second tier of the appeals process, aggrieved Georgians could make their plea before a committee appointed by the Governor and composed of fellow citizens as well as other governmental officials. A citizen may believe that a diverse panel of reviewers offers a more objective determination of the issue. The effect of having one’s peers agree with the governmental officials on the committee might carry significant weight with a citizen, who may end the process at that point.

Under Utah’s statute, the committee must adhere to strict deadlines. If Georgia adopted a similar statute, Georgia’s citizens could have the benefit of receiving some form of early ruling, rather than having to wait a significant amount of time while filing legal action. Under Utah law, the committee must contact an individual within three business days of receiving notice of the appeal and the committee must schedule a hearing for that appeal no later than forty-five days after it is filed. Under such a scenario, a Georgia resident would wait no longer than forty-five days for a ruling, and if he or she could show good cause for an expedited hearing, the ruling could come sooner.

Another aspect of the Utah law that should be implemented in Georgia is the statute’s provision allowing the plaintiff to testify and present evidence during his or her appeal to the committee. Utah’s statute also allows the testimony of other interested persons, subject to the committee’s approval. Under such a provision, an interested party, such as the Georgia First Amendment Foundation, could lend weight to the citizen’s cause, as well as provide persuasive arguments and informed counsel.

162. See, e.g., id. § 63-2-501(1).
163. See id. § 63-2-403.
164. See id.
165. See id. § 63-2-403(4).
166. See id. § 63-2-403(4)(a).
167. See id. § 63-2-403(b).
168. See id.
169. The Georgia First Amendment Foundation is a watch-dog organization that monitors the development of and changes in the state’s sunshine laws. Upon a vote by the Foundation’s legal committee, the Foundation often either writes or signs onto amicus briefs on behalf of plaintiffs charging violations of the sunshine laws. The
OPENING THE DOORS TO ACCESS

If plaintiffs lose their appeal to the committee, Utah allows them to proceed to the district court.\textsuperscript{170} Utah also allows plaintiffs to bypass the committee and proceed to the court directly, following the denial by the agency's chief administrative officer.\textsuperscript{171} The court reviews the appeal from the agency's chief administrative officer and the committee de novo.\textsuperscript{172} Unfortunately, the statute does not provide for deference to the committee's findings, but instead specifies that the court shall allow the introduction of any evidence presented to the committee.\textsuperscript{173}

C. New York's Offerings: Exhausting Administrative Remedies

New York's common law requires that an individual explore all administrative options before seeking judicial review.\textsuperscript{174} Likewise, Georgia should statutorily institute such a requirement to ensure that access problems are remedied for all parties by the most cost-effective means. New York's Committee on Open Government issues opinions similar to those issued by Minnesota's Commissioner.\textsuperscript{175} However, unlike Minnesota's law, New York's law does not expressly give any deference to the opinions issued to either individuals or agencies;\textsuperscript{176} though, in practice, New York's courts give the opinions significant deference as long as the opinions are not "irrational or unreasonable."\textsuperscript{177} Without the assurance of this deference, however, individuals may not be willing to devote time and effort merely to achieve the Committee's objectives of education

\begin{footnotesize}
\begin{enumerate}
\item See id. § 63-2-404(2)(a).
\item See id. § 63-2-404(7)(a).
\item See id.
\item See supra note 117 and accompanying text.
\item See id. § 89.
\end{enumerate}
\end{footnotesize}
and persuasion. Without such deference, Georgia citizens are likely to continue to refrain from seeking redress for violations of the law.

CONCLUSION

If the Georgia legislature adopted all the positive aspects of the three administrative processes discussed above, along with the remedies provided by the federal Sunshine Act for open meetings violations, Georgia's administrative procedure for disputes concerning its government access laws would better serve the citizens' "right" to an open government.

First and foremost, unlike any of the other state laws discussed, Georgia's administrative procedure should apply to all open government violations, including meetings and records. The procedure would allow an aggrieved citizen seeking an injunction, the invalidation of an action, or civil or criminal penalties to appeal first to the chief administrative officer of the agency denying access. The chief administrative officer would have a strict time frame in which to grant or deny the requested access. If the officer denies the request, the individual may appeal either to the courts or to a committee established to hear such appeals.

The committee would consist equally of private citizens and governmental officials. Upon receipt of an appeal, the committee would hold a hearing and issue an opinion within a specific time frame. At the hearing, the committee would be required to allow presentations of evidence and testimony as necessary to decide the issue. The committee would have the power to order an agency to provide the requested access, but would not have the authority to invalidate a decision made or an

178. See supra note 114 and accompanying text.
181. See id.
182. See, e.g., id. § 63-2-402.
183. See, e.g., id. § 63-2-501.
184. See, e.g., id. § 63-2-403.
185. See, e.g., id. § 63-2-403(8).
action taken during an improperly closed meeting. The committee should have the authority to make a preliminary factual determination that carries significant weight with the courts, but the power to invalidate agency actions should be left to the judiciary.

In the event the committee rules against the individual, he or she would have the option to appeal to the courts. However, the enabling statute would require the individual to exhaust all administrative remedies before filing a lawsuit. At the judicial level, the court would not be bound by decisions issued by the committee. However, the court would be required by the statute to give the individual opinions deference with regard to factual determinations, but not on issues of legal interpretation.

Under such a process, an aggrieved individual may seek an administrative remedy that carries some weight with the courts without incurring the time and cost requirements of filing an action in the state's superior courts. If individuals have reasonable opportunities to obtain remedies, the pursuit of such remedies would, at last, result in the enforcement of Georgia's open government access laws.

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