

MLRC - NFOIC Open Government Survey

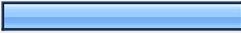
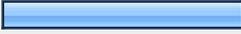
July 2009

In July 2009, MLRC sent the attorneys of its Defense Counsel Section – about 1,150 individual attorneys affiliated with 194 law firms – an electronic questionnaire developed in conjunction with the National Freedom of Information Coalition to collect information on the effect of the changes in journalism on the intensity of the battle for access to government records and proceedings.

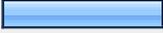
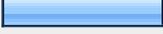
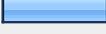
A total of 96 individuals completed the survey; their responses are reported below.

NFOIC Access Survey -- DCS Members

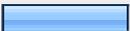
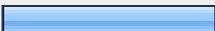
1. Over the past two to five years, do you believe the incidence of open records or proceedings violations in your jurisdiction has...

		Response Percent	Response Count
increased substantially		14.7%	14
increased slightly		36.8%	35
stayed about the same		36.8%	35
decreased slightly		0.0%	0
decreased substantially		2.1%	2
no opinion		9.5%	9
		<i>answered question</i>	95
		<i>skipped question</i>	1

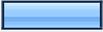
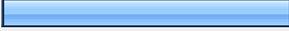
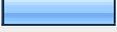
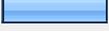
2. Over the past two to five years, do you believe that the number of professional reporters and journalists making open government requests in your jurisdiction has...

		Response Percent	Response Count
increased substantially		6.7%	6
increased slightly		24.4%	22
stayed about the same		24.4%	22
decreased slightly		16.7%	15
decreased substantially		15.6%	14
no opinion		12.2%	11
		<i>answered question</i>	90
		<i>skipped question</i>	6

3. Over the past two to five years, do you believe that the number of private citizen open government requests in your jurisdiction has...

		Response Percent	Response Count
increased substantially		19.1%	17
increased slightly		22.5%	20
stayed about the same		24.7%	22
decreased slightly		1.1%	1
decreased substantially		0.0%	0
no opinion		32.6%	29
		<i>answered question</i>	89
		<i>skipped question</i>	7

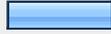
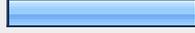
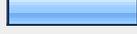
4. Over the past two to five years, do you believe that government officials' understanding of and voluntary compliance with open government requirements in your jurisdiction has...

		Response Percent	Response Count
increased substantially		3.4%	3
increased slightly		14.8%	13
stayed about the same		44.3%	39
decreased slightly		17.0%	15
decreased substantially		15.9%	14
no opinion		4.5%	4
		<i>answered question</i>	88
		<i>skipped question</i>	8

5. Over the past two to five years, do you believe that the resources devoted to seeking legal compliance with open government requirements in your jurisdiction have...

		Response Percent	Response Count
increased substantially		2.4%	2
increased slightly		12.0%	10
stayed about the same		22.9%	19
decreased slightly		18.1%	15
decreased substantially		34.9%	29
no opinion		9.6%	8
		<i>answered question</i>	83
		<i>skipped question</i>	13

6. Over the past two to five years, do you believe the number of instances in which your firm has intervened in an open government matter for media clients has...

		Response Percent	Response Count
increased substantially		3.9%	3
increased slightly		15.8%	12
stayed about the same		28.9%	22
decreased slightly		19.7%	15
decreased substantially		22.4%	17
no opinion		9.2%	7
		<i>answered question</i>	76
		<i>skipped question</i>	20

7. If you had to assign a percentage to the increase/decrease in the number of your firm's interventions in open government matters for media clients over the past two to five years, what percentage would you assign?

		Average	Median	Response Count
increased		22.89%	10.0%	19
decreased		35.90%	25.0%	31
			<i>answered question</i>	46
			<i>skipped question</i>	50

8. Over the past two to five years, do you believe the number of instances in which your firm has intervened in an open government matter for NON-MEDIA clients has...

		Response Percent	Response Count	
increased substantially		7.0%	5	
increased slightly		16.9%	12	
stayed about the same		42.3%	30	
decreased slightly		4.2%	3	
decreased substantially		1.4%	1	
no opinion		28.2%	20	
			<i>answered question</i>	71
			<i>skipped question</i>	25

9. If you had to assign a percentage to the increase/decrease in the number of your firm's interventions in open government matters for NON-MEDIA clients over the past two to five years, what percentage would you assign?

		Average	Median	Response Count
increased		26.25%	17.5%	24
decreased		13.89%	10.0%	9
			<i>answered question</i>	30
			<i>skipped question</i>	66

NFOIC Access Survey -- DCS Members

10. If you have seen a significant change in the number of your firm's interventions in open government matters over the past two to five years, to what do you primarily attribute the change?		
		Response Count
		42
<i>answered question</i>		42
<i>skipped question</i>		54

Response Text		
1	The expense associated with taking an open records/open meetings appeal through system.	Jul 20, 2009 5:10 PM
2	Lack of funds to pursue discretionary litigation.	Jul 20, 2009 5:19 PM
3	Media and newspapers have no money for this.	Jul 20, 2009 5:19 PM
4	Media budgetary restrictions.	Jul 20, 2009 5:23 PM
5	Economic problems for newspapers	Jul 20, 2009 5:33 PM
6	Private citizens are retaining our firm to pursue violations of public records and open government actions---its because our newspaper clients are not pursuing matters as aggressively as in the past.	Jul 20, 2009 5:34 PM
7	Increased efforts by government to "protect" both personnel and business information, efforts to protect privacy interests, especially involving medical-related information, and -- in the early stages of criminal proceedings -- increased weight on privacy/victims' rights/ criminal defendants' rights in the 911 tape and search warrant affidavit situations.	Jul 20, 2009 5:36 PM
8	Economics	Jul 20, 2009 5:43 PM
9	Dramatically slashed budgets at media companies -- both for the type of reporting that requires extensive use of the public records law and for spending money on lawyers to challenge denials of access to public records.	Jul 20, 2009 5:45 PM
10	More aggressive use of public records for (1) resale and (2) use for competitive purposes.	Jul 20, 2009 5:46 PM
11	Cuts in staff at media outlets where such staff might push for intervention, and cuts in media outlets' budgets that preclude paying for such intervention.	Jul 20, 2009 5:53 PM
12	Recently, it is simply a matter of newspaper/media economics.	Jul 20, 2009 6:09 PM
13	Lack of resources, which has led to substantial cut backs in news room staff and hesitance to dedicate resources to pursuing legal action against government agencies.	Jul 20, 2009 6:19 PM
14	Media entities (especially newspapers) less willing to spend money on legal counsel when faced with declining circulation and uncertain futures.	Jul 20, 2009 6:19 PM
15	we don't have a significant change per se, but the changes has been due to 1) change in our attorney general and the loss of focus during the administration change and while the former AG focused his attention on a gubernatorial race and 2) the lack of any strong sunshine law victories	Jul 20, 2009 6:23 PM
16	Client resources have shrunk	Jul 20, 2009 6:50 PM
17	Newspapers and broadcasters are spending substantially less on access issues.	Jul 20, 2009 7:14 PM

Q10 Response Text, cont.		
18	Our news media clients no longer have the financial resources to commit to access matters. The access matters we have handled most recently have either been contingency-fee engagements, where my firm has undertaken the risk of the litigation (at no out-of-pocket expense to the client), or where a coalition of news media entities have joined together to spread the burden of the financial expense.	Jul 20, 2009 8:03 PM
19	Client resource issues	Jul 20, 2009 8:30 PM
20	Not applicable.	Jul 20, 2009 9:20 PM
21	Decline in news media revenue.	Jul 20, 2009 10:37 PM
22	Main change is the nature of the client on whose behalf we have been intervening. There has been a decrease in our intervention on behalf of traditional media clients, mainly due to tighter budgets. However, there has been an increase in our intervention on behalf of non-traditional media clients ([SPECIFIC EXAMPLE]) and public interests organizations (in our case, the [STATE FIRST AMENDMENT ORGANIZATION]) who are recognizing the lack of enforcement by traditional media organizations and are increasingly seeking to pick up the slack.	Jul 21, 2009 5:18 PM
23	Too many government officials do not believe that openness is the presumption, not the exception.	Jul 21, 2009 6:47 PM
24	My firm has never handled one of these matters.	Jul 21, 2009 8:23 PM
25	The economics affecting newspapers, particularly over the last 12 to 18 months.	Jul 22, 2009 1:05 PM
26	Decrease in staffing for records custodians or decrease in qualified applicants for positions at records custodians.	Jul 23, 2009 1:45 PM
27	Brazen government officials. They know no one, as a practical matter, will sue them. They also know that there is little public outrage for open-government violations. They pay the litigation costs and fines with public money--there is no downside to withholding records, in the minds of most public officials.	Jul 23, 2009 8:23 PM
28	revisions in [STATE]'s laws providing greater rights (substantive and procedural) for citizens challenging secrecy in government	Jul 27, 2009 5:13 PM
29	the corresponding increase in lack of openness by government agencies in our jurisdiction.	Jul 29, 2009 9:42 PM
30	Budgets.	Jul 29, 2009 9:47 PM
31	Few papers willing to spend resources to pursue open records claims.	Jul 29, 2009 9:59 PM
32	Not where the clients want to spend the resources	Jul 29, 2009 10:03 PM
33	Client budgets for this kind of activity is down. Many simply stand by while others show interest in the efforts of others, but won't support it financially.	Jul 30, 2009 12:26 PM
34	claims of more transparency, but no real action	Jul 30, 2009 1:34 PM
35	substantial reductions in newsroom budgets and personnel; degradation in the experience and quality of senior and frontline editors	Jul 30, 2009 2:16 PM
36	Local police departments seem to have become more protective of juveniles (declining to release information), even those charged with felonies.	Jul 30, 2009 2:42 PM
37	more awareness	Jul 30, 2009 4:47 PM
38	Media clients have less money to spend on litigating these issues.	Jul 30, 2009 9:10 PM
39	These matters fall within media client's discretionary budgets, which just are not what they use to be. That bottom line is hampering the media's ability to be aggressive on the access front. Public entities and courts also realize that their non disclosure/sealing orders or access decisions are less likely to be challenged by the media. Amici efforts are also down.	Jul 31, 2009 1:12 AM
40	The Government being reluctant to release material and using every argument possible.	Jul 31, 2009 6:25 AM
41	Newspapers do not have the money to engage in the legal equivalent of "elective surgery." They are preserving their resources to fight subpoenas and defamation suits.	Jul 31, 2009 5:45 PM

Q10 Response Text, cont.

42	Lack of media client resources for investigative journalism and related litigation.	Aug 1, 2009 3:57 PM
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11. Can you describe a circumstance from your area that illustrates how the open government landscape has changed.		
		Response Count
		32
<i>answered question</i>		32
<i>skipped question</i>		64

Response Text		
1	A recent decision from the circuit court located at the state's capital has assigned costs and attorney fees to an open records appeal where the agency challenges an Attorney General opinion and loses.	Jul 20, 2009 5:11 PM
2	In [STATE], we have a new open records act that makes more records public and makes it easier for every day citizens to seek access.	Jul 20, 2009 5:11 PM
3	A prisoner files papers in a criminal proceeding contending that he clandestinely tape recorded his lawyer, a prominent criminal defense lawyer, advising him to flee from prosecution. The government moves to seal the pleadings on the ground that the recording was made in violation of state law. No media opposes the motion. The prisoner is left to defend the motion to seal himself.	Jul 20, 2009 5:26 PM
4	We receive more resistance to providing information from local government, particularly the Sheriff's Office. This comes in the form of not producing the information, or attempting to assess outrageous charges for it.	Jul 20, 2009 5:46 PM
5	Recent amendments to [STATE LAW] that liberalize access to electronic records, but that courts and agencies are still interpreting narrowly	Jul 20, 2009 5:46 PM
6	In the past the media has been selective in it's requests in hopes of setting good precedent. Now the opposition (government entities) are picking where to fight with the same goal of setting precedent they like. Interesting dymnamic.	Jul 20, 2009 6:06 PM
7	There are now far more bloggers who, although not formally members of the media, seek a lot of public records and, if denied, write stridently about any denial of access. It may be that the folks who read those blogs most consistently are the people from whom public records are sought but the complaints about any denial of access seem to have an effect.	Jul 20, 2009 6:21 PM
8	a significant sunshine law case in [CITY] had to be dismissed when the non-media (private pay) client ran out of funds -- the defendant public body outspent the private citizen by 10fold and exhausted his funds. other cases across the state resulted in defeats for private citizens bringing sunshine law cases which are now up on appeal.	Jul 20, 2009 6:26 PM
9	Our state courts historically were willing to disclose 911 tapes and search warrant affidavit and return information in most cases; now the district attorneys win many of these fights. Public officials, worried about their liability under strict personnel privacy statutes and other privacy protections doctrines, will not venture into the grey area where the statutes are unclear. One client struggled recently to obtain block specific details of emergency medical treatment calls and responses -- for an article about response times -- because the agency took the position that there could be blocks with only one single family dwelling and this would result in "identifying" the recipient of medical care.	Jul 20, 2009 6:36 PM

Q11 Response Text, cont.		
10	The good news is that our state has passed amendments to the Open Records Act which are pro openness. The bad news is that our Supreme Court has issued two opinions that have greatly limited accessibility to records generated by government contractors. Our Supreme Court has also limited access to court records.	Jul 20, 2009 6:52 PM
11	Enactment of new Right to Know Law	Jul 20, 2009 7:02 PM
12	As a result of a very broad interpretation of a 2004 ruling by the [STATE] Supreme Court, local public bodies are now refusing to release email communications between public employees where those email messages demonstrate improper conduct, on the strength of the earlier ruling that email messages between two public employees about their romantic relationship did not concern their public employment, and thus were not public records. In the more receive cases, a school district and a police department refused to produce the email messages at issue even though those email messages were the reason why the public employees were disciplined. In both instances, the media entities that requested these records -- and were denied -- did not pursue litigation to try to challenge the denials.	Jul 20, 2009 8:07 PM
13	[STATE]'s Attorney General has an open government mediation service and its stewards have reported an increase in the frequency of open government violations.	Jul 20, 2009 8:32 PM
14	[STATE] has just started an Ombudsman for open records	Jul 20, 2009 8:59 PM
15	The Open Public Records Act (OPRA) was enacted in [YEAR] as the great legal pancea that would open the doors of government. Hardly. It provides for easy access by private unrepresented citizens to an ADR process through the Government Records Council (GRC). The GRC is not an independent agency (answerable directly to the Governor and AG) and its track record does not favor access. Worse, the GRC and the courts have been flooded with gad-fly requests of unrepresented citizens whose denials of access enjoy a high rate of affirmance because their requests are admittedly so outlandish. Unlike journalists, who knew what fights to pick, these gad-flies are not competent watchdogs and are doing far more harm than good. The media is so financially strapped that even OPRA's fee-shifting's provision offers no incentive to intelligently prosecute. The courts do not understand the law, regularly citing the GRC as precedent contrary to OPRA's express limitation of the GRC's work as advisory. As a result, there is a growing critical mass of caselaw and administrative decisions that regularly deny access, some for the right reasons but many others for the wrong reasons. The fight today is being waged at a very low level, e.g., often municipalities, by players who are shooting blanks. We are a suffering serious intellectual deficit on the part of both the requestors and the courts/GRC, the end effect of which is to eviscerate OPRA and not to advance open government. The public suffers.	Jul 20, 2009 9:43 PM
16	Even large newspapers are passing on bringing valid enforcement actions while having to cut news staff.	Jul 20, 2009 10:39 PM
17	The big overriding issue is the emergence of electronic records, which has caused a large number of new and sometimes unexpected access issues both in the court records and agency records arenas.	Jul 21, 2009 5:19 PM
18	We just finished winning a two year old case on appeal involving a municipality which refused to turn over all applications for candidates for the position of City Manager. The City in a consistent 3-2 vote, with the Mayor casting the deciding vote, refused to turn over the applications, refused to do so after the trial court made its decision and only recently decided not to seek certiorari of the Court of Appeals decision. After paying our firm statutory attorney fees in the amount of \$90,000 the City is attempting to pass a resolution to ask the [STATE] Municipal League to propose legislation to revise the [STATE] Public Records Act.	Jul 21, 2009 6:52 PM
19	One example in our state is the former Governor's policies concerning retention (or nonretention) of government emails. The policies were made public about 18 months ago. The new governor has pledged change.	Jul 21, 2009 9:59 PM

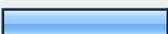
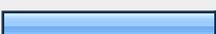
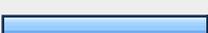
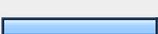
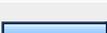
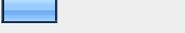
Q 11 Response Text, cont.		
20	Three of my regular newspaper clients call much less frequently to discuss access issues.	Jul 22, 2009 1:06 PM
21	Have had to referee a government versus government battle recently under the open records act, dealing with privileged materials and a "superior" body throwing its weight around.	Jul 27, 2009 1:31 AM
22	We have litigated several cases, successfully, challenging closed-door meetings of public bodies where the topic of the executive session was not properly announced, rendering the recording of the meeting an open record.	Jul 27, 2009 5:14 PM
23	Public bodies are increasingly asserting amorphous "public policy" exceptions to the [STATE] Public Records Act. Also, some public bodies have begun suing requesting parties for declaratory judgments to the effect that they need not produce records.	Jul 27, 2009 6:49 PM
24	Cost considerations are now a larger factor in decision-making about whether to pursue records and challenge governments.	Jul 29, 2009 9:50 PM
25	Local citizens suing county government in [COUNTY, STATE] where two local papers support them but would not participate as parties due to budgetary constraints.	Jul 29, 2009 10:00 PM
26	We have a bad case in our jurisdiction that says if a public body grants the request but tells you it will cost a lot to search and separate exempt from non-exempt and make copies--that you do not recover attorney fees if you challenge the fee amount because you only get fees if the request is denied and you prevail in recovering the records. So you see a lot more public bodies trying that trick--we will grant the FOIA request but it will cost you \$x. they you have a decision--pay the fee or sue to challenge it but know you are unlikely to recover attorney fees for doing so. And in our tough economic times, public bodies know that there is a good chance the matter will just be dropped. In addition, you still see the challenges being brought in the high profile matters, but not the run of the mill day to day school board type issues.	Jul 29, 2009 10:08 PM
27	I don't think it really has. I think the claims of transparency are all smoke and mirrors. The same bureaucrats are in office.	Jul 30, 2009 1:35 PM
28	Passive response of state media to Virginia Tech shootings.	Jul 30, 2009 2:17 PM
29	Same as above. Also, local officials seem to be using delaying tactics more frequently to avoid releasing documents until after the news value of a story has subsided. Not especially new.	Jul 30, 2009 2:44 PM
30	a [STATE] court of appeal case has awarded large defense legal fees to a government entity which has a chilling effect on access plaintiff litigation	Jul 30, 2009 4:49 PM
31	Gag orders are being issued fairly routinely and are rarely challenged; public records act requests are sometimes being ignored (not just denied) and denied unless there is a credible threat of a lawsuit. We recently represented a paper seeking access to credit card statements from college board trustees. The district denied access in its written response and denied access in follow up discussions with us; it wasn't until we could say with some creibility that the paper would move in court under the public records act that the district submitted the matter to full board vote and we got the statements unredacted. Warrant materials, though supposedly a public records after 10 days, are maintained by court's under seal because the procedural mechanism to trigger the end of the sealing isn't in place. Making in incumbant on any person or paper to move to unseal what should not be sealed.	Jul 31, 2009 1:12 AM
32	Governments talk about relaxing FOI rules , but the opposite occurs in practice.	Jul 31, 2009 6:26 AM

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12. Any other comments?		
		Response Count
		12
<i>answered question</i>		12
<i>skipped question</i>		84

Response Text		
1	Legal rights are like muscles. If you don't exercise them, they atrophy. That is what I fear is happening to public access laws around the country.	Jul 20, 2009 5:46 PM
2	Interesting poll. Will you publish the results for the membership ?	Jul 20, 2009 6:06 PM
3	also, the economic realities hitting the newspaper industry across the state has caused a diminishment of funds available for such litigation.	Jul 20, 2009 6:26 PM
4	I believe that other than in states with effective private attorney-general fee-shifting statutes, the only way the news media will be able to avoid local and state officials taking advantage of the obvious lack of resources for the news media to pursue access litigation is to develop coalitions and consortiums to pursue such litigation jointly and to reduce the expense of such litigation for each individual entity.	Jul 20, 2009 8:09 PM
5	I think that says it all.	Jul 20, 2009 9:43 PM
6	Sorry, I'm not very helpful, as the last time I did an access case was in 2004.	Jul 21, 2009 8:23 PM
7	No.	Jul 22, 2009 1:07 PM
8	Government is getting bigger and bigger; they are getting away with more and more, and open-government violations are a prime example.	Jul 23, 2009 8:23 PM
9	Thanks for allowing the opportunity to participate in this survey.	Jul 29, 2009 9:50 PM
10	government is becoming increasingly emboldened as they realize that the institutional press is becoming toothless and that bloggers and Twitterers are lightweights without deep pockets to push for access	Jul 30, 2009 2:18 PM
11	We at [FIRM] see this as a continuing problem that is probably not going to get better anytime soon. Strong bench bar media organizations in your communities are an option to open the dialogue with the courts; advocacy (legal and educational) through press organizations or non-profit access organizations (NFOIC/FAC, to name a few) will be of increasing importance as well.	Jul 31, 2009 1:12 AM
12	Governments of whatever persuasion , seek to limit access to any material that could embarrass them.	Jul 31, 2009 6:27 AM

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13. What kind of media and nonmedia clients has your firm represented in open government matters? (Check all those that apply.)			Response Percent	Response Count
newspaper			85.9%	55
local television			71.9%	46
radio			25.0%	16
internet			32.8%	21
network			26.6%	17
wire or other news service			31.3%	20
magazine			23.4%	15
production company			7.8%	5
documentarian			15.6%	10
individual journalist or writer in any medium			43.8%	28
newsletter			7.8%	5
Other:			28.1%	18
			answered question	64
			skipped question	32

Other:		
1	construction company client	Jul 20, 2009 5:12 PM
2	Private Citizens	Jul 20, 2009 5:15 PM
3	private citizens, law firms	Jul 20, 2009 5:23 PM
4	Citizen, union, non-profit organization	Jul 20, 2009 5:35 PM
5	architecture and engineer firm	Jul 20, 2009 5:47 PM
6	Publisher of real estate information	Jul 20, 2009 5:47 PM
7	businesses who buy public records	Jul 20, 2009 6:27 PM
8	telemarketers	Jul 20, 2009 9:00 PM
9	blog	Jul 20, 2009 10:36 PM
10	[STATE FIRST AMENDMENT ORGANIZATION] (public interest org)	Jul 21, 2009 5:20 PM
11	Non media.	Jul 21, 2009 6:53 PM

Q 13 Other, cont.:		
12	None	Jul 21, 2009 8:24 PM
13	hospital	Jul 27, 2009 6:50 PM
14	interested citizens	Jul 29, 2009 9:42 PM
15	city council member	Jul 29, 2009 10:09 PM
16	commercial businesses	Jul 30, 2009 4:49 PM
17	drivers license	Jul 30, 2009 6:36 PM
18	companies and businesses interested in obtaining access to government records or in keeping information confidential (e.g., in competitive bid situations)	Aug 1, 2009 3:58 PM