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To: House Health & Government Operations Committee

From: Rebecca Snyder, Executive Director, MDDC Press Association

Date: March 1, 2022

Re: **HB 523 - OPPOSE**

The Maryland-Delaware-District of Columbia Press Association represents a diverse membership of newspaper publications, from large metro dailies such as the Washington Post and the Baltimore Sun, to hometown newspapers such as the Star Democrat and Herald-Mail, to publications such as The Daily Record, Baltimore Jewish Times, and online-only publications such as Bethesda Beat, MarylandReporter.com and Baltimore Brew.

The Press Association urges the Committee to reject HB523. Public notices should be independent, accessible, verifiable, and reach the widest possible audience to ensure trust in the process and information. For public notices, or any advertising, to be most effective the audience for those notices should be quantified and verifiable.

Free newspapers that are dropped at various locations do not meet the high standards of the second class periodicals permit, which is a requirement of publications that may carry public notice. This permit ensures that publications, among other requirements, are issued regularly on a stated frequency, no more than 75% of the content as advertising, and have an established list of subscribers or requesters (from USPS, <https://faq.usps.com/s/article/What-is-Periodical-Class-Mail>).

The second class periodicals permit ensures there are certain standards for publications carrying public notices that requires them to be valuable to the public and proactively desired. Free newspapers do not have any of those guardrails, and although there are wonderful community focused free publications, this bill does not take into account "shoppers" or publications that may spring up from time to time without a commitment to the community.

St. Mary's County has a solid, established paper of record that covers the community with a verifiable audience and this bill would create an anomaly within the state that will not serve the public's right to know.

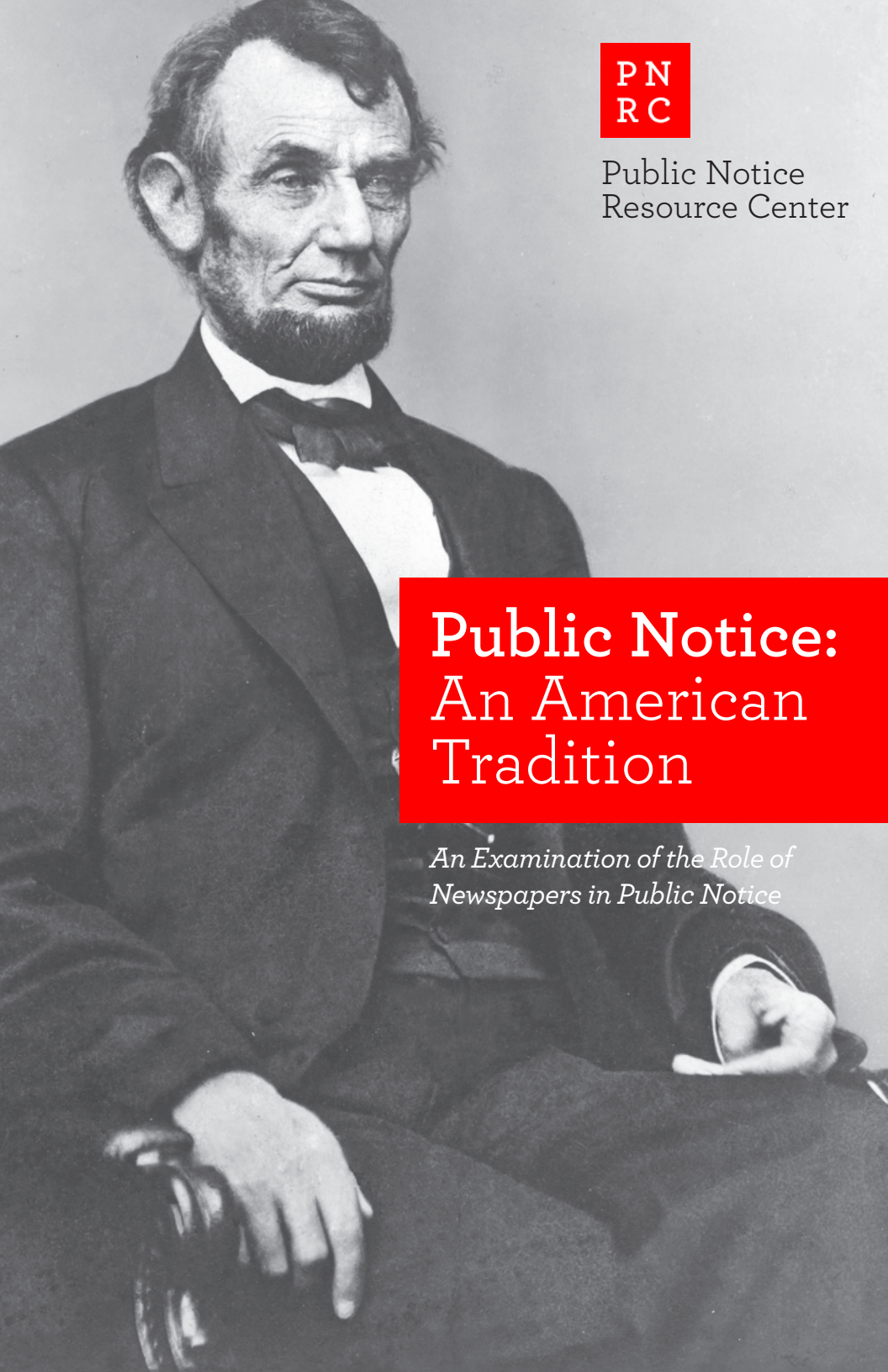
The purpose of public notice is to prevent official actions from occurring in secret. Since the first session of the U.S. Congress in 1789, public notice has supported the principles of democracy, transparency and open government. Best practices for public notice include stipulations that the notices be **published independently of government**, in the context of other news of interest to the community, and in an archivable and verifiable format. I've included a booklet, "Public Notice: An American Tradition," that outlines effective public notice, and why it is so important.

We urge an unfavorable report.



**We believe a strong news media is
central to a strong and open society.**

Read local news from around the region at www.mddcnews.com



PN
RC

Public Notice
Resource Center

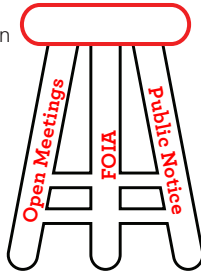
Public Notice: An American Tradition

*An Examination of the Role of
Newspapers in Public Notice*

Why Public Notice Should Remain in Newspapers

Along with open meeting and freedom of information laws, public notice is an essential element of the

three-legged stool of government transparency



Newspapers remain the primary vehicle for public notice in **all 50 states**



This is not about “newspapers vs the internet”.

It’s newspapers and newspaper websites vs government websites

and newspaper websites have a much larger audience. Moving notice from newspapers to government websites would **reduce the presence of public notices on the internet**

Since the first U.S. Congress, public officials have understood that newspapers are the best medium to notify the public about official matters because they contain the

essential elements of public notice:



Accessibility



Independence

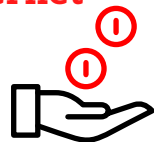


Verifiability



Archivability

Publishing notices on the internet is neither cheap nor free





Newsprint is inherently superior to the internet for public notice because reading a newspaper is a serendipitous process.

We find things in newspapers we weren't expecting to see. On the internet, we search for specific information and ignore everything else.



Citizens continue to learn about vital civic matters from newspaper notices.

Documented examples of people taking action and alerting their community after reading a newspaper notice are reported on a regular basis. (See page 10)

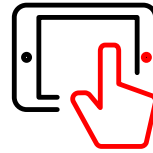
Verifying publication is difficult-to-impossible on the web.

That's why the courts subject digital evidence to far greater scrutiny than evidence published in newspapers



Significant numbers of people in rural areas still lack high-speed internet access.

Those who are older than 65 or who have lower incomes or lack high-school diplomas are also cut off from the internet in far higher numbers than the average.



Moreover, the real digital divide for public notice is growing

due to the massive migration to smartphones and other small-screen digital devices



Requiring independent, third-party newspapers to ensure that public notices run in accordance with the law helps

prevent government officials from hiding information

they would prefer the public not to see

Governments aren't very good at publishing information on the internet. Unlike newspaper publishers,

public officials aren't compelled by the free market to operate effective websites.



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About PNRC

The Public Notice Resource Center is a 501(c)(3) nonprofit organization that provides research and education in support of effective public notice.

Introduction

Most of us take public notices¹ for granted. Which is understandable. After all, they've been running in newspapers for hundreds of years. So we tend to forget about them.

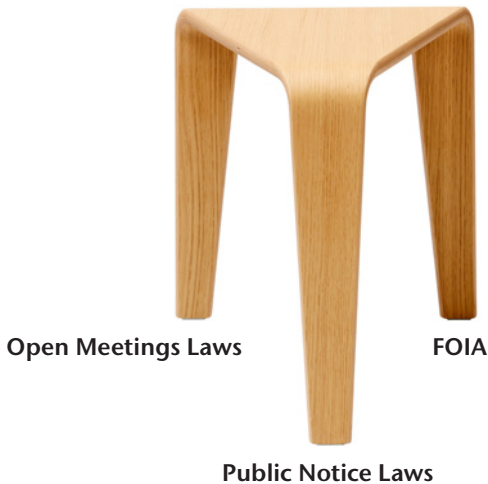
But when you really think about it they're kind of amazing. Federal and state governments actually passed laws requiring themselves—and politically powerful private interests—to disclose information about their plans and activities.

They represent the best of self-government. Along with open-meeting and freedom of information laws, they're an important part of the three-legged stool of government transparency. They ensure citizens have access to information they need to participate in the governance of their communities. They're an essential element of our fragile democracy.

Unfortunately, proposals that would drastically revise our public notice laws put their vital role in our democracy at risk.

This pamphlet will explore the origins, purpose and defining characteristics of public notice in the U.S., and will address the present threat and how we can avert it.

Three-legged stool of government transparency



Origins And Purpose Of Public Notice

The concept of public notice was conceived long before the emergence of newspapers, when early civilizations posted notices in public squares. This crude method was eventually refined with the publication of the first English language newspaper in 1665—a court newspaper called the *Oxford Gazette*. After it was renamed *The London Gazette*, the paper began carrying notices from the King’s Court and from public officials in London and outlying regions².



Federal Hall in New York City, site of the first two sessions of the U.S. Congress

Like many aspects of our legal system, public notice in America is modeled after the British system. State governments turned to newspapers to publish notices throughout colonial times³; in 1789, the newly created federal government followed suit. The Acts of the First Session of the First U.S. Congress required the Secretary of State to publish all “bills, orders, resolutions and congressional votes” in at least three publicly available newspapers⁴.

Democratic self-rule is based on the premise that information about the government must be accessible in order for the electorate to make well-informed decisions⁵. Public notice laws in the U.S. recognize that newspapers are the best means to provide that access. But not *all* newspapers. State statutes establish specific criteria for newspapers to qualify to carry notices—criteria designed to assure they could deliver meaningful accessibility, including paid circulation, a minimum percentage of news content and a local publishing address. Many public notice laws also require them to publish continuously for a minimum period of time to qualify as “official newspapers,” ensuring stability in the venue for notices so citizens know where to find them⁶.

Public notice laws are also based on the right to due process of law guaranteed by the federal and state constitutions. Due process protects Americans’ fundamental rights from arbitrary or wrongful violation and affords citizens with an opportunity to be heard before the state restricts those rights. Public notice plays a vital role in extending those protections by providing a window into government activity and notifying citizens so they can exercise their constitutional right to be heard. Importantly, notification not only informs the individual or entity most directly affected, but also the general public, which has an interest in knowing how public power is wielded.

Essential Elements Of A Public Notice

Federal and state public notice statutes generally establish four fundamental criteria for a public notice.

Each of these elements are critical aspects of the checks and balances that public notice was designed to foster.



1. Accessible

Every citizen in the jurisdiction affected by the notice must have a realistic opportunity to read it



2. Archivable

Notices must be capable of being archived in a secure and publicly available format for the use of the judicial system, researchers and historians



3. Independent

Notices must be published by organizations independent of the government body or corporation whose plans or actions are the subject of the notice



4. Verifiable

There must be a way to verify that each notice was actually published in accordance with the law

Types Of Public Notice

Generally speaking, there are three different types of public notice.

Citizen participation notices are issued by legislatures, administrative agencies and other public bodies, and inform the public about the plans and operations of the government in their community.

Commercial notices provide citizens with information about vital business activity and the disposition of private property.

Court notices are processed by officers of the court or non-governmental organizations to announce the outcome of civil legal proceedings that affect the community. The most common example are foreclosure notices, which may be authorized by court rulings or, in “non-judicial” states, by trustees or others exercising a power of sale stipulated in a deed of trust.



Citizen Participation Notices



Government Meetings and Hearings



Meeting Minutes or Summaries



Agency Proposals



Legislation and Resolutions



Financial Reports



Proposed Budgets and Tax Rates



Land and Water Use



Property Tax Assessments



State Employee Salaries



Creation of Special Tax Districts



Election Dates and Polling Places



School District Reports



Zoning, Annexation and Land Use Changes



Capital Improvement Plans



Commercial Notices



Formation and Dissolution of Corporations



Unclaimed Property, Banks or Governments



Debtor Property Auctions (e.g., Self-Storage)



Delinquent Tax Lists, Tax Deed Sales



Government Construction, Service Contract Bids



Government Property Sales



Special Government Funds



Permit and License Applications



Condemnation Orders (i.e., Eminent Domain)



Criminal Property Forfeitures



Court Notices



Mortgage Foreclosures



Name Changes



Probate Rulings



Divorces



Adoptions



Orders to Appear in Court

Why Public Notice Should Remain In Newspapers

Public notices have been running in local newspapers for well over 100 years and they remain the primary means to disseminate notice in all 50 states. But longevity and tradition don't preclude the need for change. So it is only natural that with the advent of the internet, policymakers have started asking whether newspapers are still the best venue for public notice.

Many who haven't considered the issue deeply assume that newspapers have out-served their usefulness as the primary source of public notice. The tendency to make this assumption is especially prevalent among elite quarters of society. College-educated professionals who work in large metro areas and spend much of their day on desktop computers, tablets and smartphones often shortcut consideration of important issues and conclude that public notice should be moved exclusively to the web.

Scratch the surface of those flimsy assumptions, however, and it becomes clear that local newspapers are still the best distribution system for public notice. In the remainder of this pamphlet, we will explain why.

It's not about newspapers versus the internet

Most newspapers supplement their print notices by publishing them on their own websites. Many others post notices on statewide public notice websites operated by their state press associations⁷. In fact, laws have been passed in 13 states specifically requiring newspapers to supplement the print versions of their notices by posting them on their own sites or their state press associations' aggregated site, or both⁸. There are also two national websites that index newspaper notices by state and allow for site-wide searches⁹.

So the proper framework within which to consider this issue doesn't pit newspapers versus the internet. The only relevant question is whether public notices should be published in newspapers *and* on their websites, or exclusively on government websites. The answer is clear

Newspapers already post notices on their websites free of charge; laws in 13 states require them to do so

if not self-evident. The print and electronic versions of newspapers draw far larger audiences than government websites. That is true both collectively on a national level, and locally in comparisons between specific newspapers and the government bodies within their distribution areas.

At the national level, more than 169 million people in the U.S. recently reported reading a newspaper at least once a month in print, on a website or via mobile app¹⁰. That's roughly 69 percent of the U.S. adult population. By contrast, only about one-third of U.S. adults reported using the web or an app to access state government websites over a much-lengthier twelve-month period¹¹.

It is even more illuminating to completely discount the print versions of local newspapers and focus solely on their websites. The traffic to those sites invariably dwarfs the size of the audience that visits websites associated with the city and county governments they cover. Space doesn't permit an exhaustive comparison, but contrasting the audience ranks of a random selection of websites operated by newspapers and governments located in varying urban, suburban and rural locales [in state] across the U.S. provides a useful demonstration.

Moving notices to government websites would significantly *reduce* the presence of public notice on the internet

As the chart on the inside back cover makes clear, eliminating newspaper notice and moving it to government websites would significantly *reduce* the presence of public notices on the internet.

Of course, there's no reason to discount the print versions of local newspapers. Although the public conversation about newspapers tends to focus on the shift to digital, over 80 percent of their readers continue to read a print version of the paper¹². Moreover, local newspaper readership in small communities is commonly recognized to be stronger than in metro areas¹³.

Newspaper readers are also more civically engaged than average Americans, so they're more likely to pass on to others the information they read in notices. Individuals who always vote in local elections are 27 percent more likely to read a daily newspaper than a typical adult¹⁴. Seven in 10 of those regular voters read newspaper

media in print, online or on mobile devices in a typical week, and nearly eight in 10 contribute money to political organizations¹⁵.

Policymakers have long understood this dynamic. It's one of the reasons they've passed laws limiting the publications that qualify to run public notices to those that report local or general news¹⁶.

It's hardly surprising that far more people read the print and electronic versions of newspapers than visit government websites. Newspapers' business model demands readers; without enough of them their very existence is threatened. So they're published on a daily or weekly basis, and most newspaper websites are updated continuously. They include a wide range of news and information produced

by professional reporters and writers, which is carefully edited for accuracy and readability. They're designed to direct attention and capture eyeballs. And they're marketed to enhance their presence in a competitive marketplace.

By contrast, operating a website is merely incidental to the primary purposes of government. Many government units don't even have a website and others have bad ones but pay no price for their mediocrity as publishers. So their websites are designed for only occasional use. They are primarily utilized for transactional business, like permit applications, licenses, and tax payments, and for seeking information about government operations and facilities¹⁷.

Could it be any clearer that eliminating notice published in newspapers and on their websites would significantly diminish citizen input and participation in our democracy?

Newsprint is inherently superior to the internet for disseminating public notice

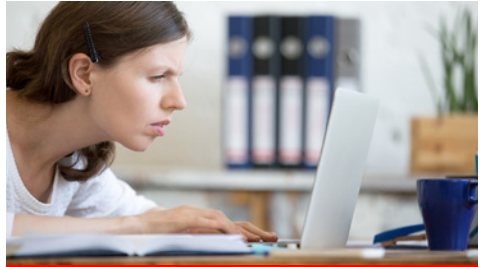
Although web publication of notices should be encouraged—more notice is always better notice—intrinsic differences between the print and online experiences make newsprint a superior medium to the internet as a source of public notice.



Reading a newspaper, people discover things they didn't expect to see

When we read a newspaper, the tactile, contemplative experience and the size of its pages encourage us to find information we didn't expect to see¹⁸. That serendipitous process guarantees that public notices in local newspapers will be seen by many people in the community who didn't pick up the paper intending to read them¹⁹.

We behave differently on the internet. We tend to be goal-oriented, visiting websites for a particular reason. Although digital interfaces at their best encourage serendipity, it tends to be unidirectional²⁰ and is often focused on the sensational²¹. Public notices don't stand a chance in that environment; they get lost and are easily hidden. Moreover, the massive migration from desktop computers to small-screen mobile devices has exacerbated the problem.



People search for specific information on the internet and tend to ignore what they aren't looking for

Two recent examples highlight the danger of publishing notice only on government websites.

Nestle Waters North America controversy in Michigan

Over the past decade, the Environmental Protection Agency ("EPA") and its state affiliates have moved some of their public notices from newspapers to the internet. As a result of those changes, in September 2016, the Michigan Department of Environmental Quality ("MDEQ") was allowed to post exclusive notice on its website of its draft approval of a proposal to allow Nestle Waters to significantly increase the volume of groundwater it extracts for its Ice Mountain bottling plant in the state.

The notice had been published on the website for 41 days before a reporter from the Grand Rapids Press discovered it and wrote a story about the proposal²². For those 41 days of exclusive government-



Nobody knew about Nestle's proposal to pump more groundwater because the only notice was posted on a government website

website notice, the proposal attracted no public attention or comment—not even from an environmental organization that had previously fought Nestle in court to limit the amount of groundwater the company can withdraw from Michigan wells. Within the first three days after the newspaper story was published the agency received 3,000 comments. The flood of citizen input forced MDEQ to extend the comment period on three separate occasions and schedule a public hearing. The proposal eventually received 80,945 public comments²³ and the agency’s director admitted the notice posted on its website was insufficient²⁴.



Citizens in Arkansas exploded when they learned a government agency approved a hog farm near their homes

Buffalo National River hog farm in Arkansas

In August 2012, the Arkansas Department of Environmental Quality (“ADEQ”) approved a general permit to allow Cargill and a group of local farmers to build a Concentrated Animal Feeding Operation in rural Newton County on the banks of the Buffalo National River²⁵. New public notice rules approved by EPA allowed ADEQ to provide exclusive notice of the permit filing on its website. Although it was posted for 30 days on the ADEQ site, the agency didn’t receive any comments, but the lack of response wasn’t the result of local apathy²⁶. We know that because citizens in Newton County exploded when they discovered later that year that a hog farm was being built near their homes²⁷.

Hundreds of thousands of dollars have been spent defending and settling lawsuits filed over the hog farm²⁸. The experience turned many local citizens into activists intent on protecting the environment²⁹. If ADEQ had spent a few hundred dollars publishing notices in a local newspaper, people living near the farm would have had an opportunity to weigh in on the proposal and much of the conflict may have been avoided.

In an ironic twist, when the hog farmers’ application to continue

operating their CAFO was denied earlier this year, they filed a lawsuit arguing the order was invalid, in part, because ADEQ failed to publish a newspaper notice about its proposal to deny the permit.³⁰

By contrast, examples of the continuing power of newspaper notice to inform the public are legion. Here are several we discovered in the month immediately preceding the publication of this pamphlet:

- In Randolph County, Ga., a proposal to close seven of the county's nine polling places was discovered by an activist reading the notices in *The Southern Tribune*, a 1,200-circulation weekly based in the county seat of Cuthbert³¹.
- Wapallo County, Iowa, saved "tens of thousands" of dollars per year after a notice in the 6,800-circulation daily *Ottumwa Courier* allowed a local pharmacist to determine that CVS Caremark was massively overcharging the county for medication it was selling to the local jail system³².
- Ford County, Ill., saved significant money on a generator for its local jail after receiving several bids solicited via a notice it published in the 2,200-circulation weekly *Ford Country Reporter*. The generator was also larger than the one



Pharmacist Mark Frahm helped Wapallo Co., Iowa save tens of thousands of dollars annually due to information he read in a newspaper notice. (photo courtesy of the Ottumwa Courier)

initially rejected by the county commission after it had been noticed exclusively on the county website³³.

- In northwest New Mexico, residents learned from notices published in the *Farmington Daily Times* and the *Rio Grande Sun* that a privately held oil company had petitioned a state commission to change the drilling rules governing a local gas pool³⁴.
- In Sandwich, Mass., the new fire chief on Cape Cod was inundated with offers for a broken-down used fire truck after he published a bid notice in the weekly *Sandwich Enterprise*³⁵.

These are merely the examples we found during this period that were reported. Notices published in newspapers drive public awareness of vital governmental and private activity on a daily basis. Their effectiveness is one of the major reasons many surveys have shown that the public overwhelmingly prefers to read notices in newspapers rather than on government websites³⁶.

The digital divide for public notice is growing

The gap between those who have access to digital information and communications and those who don't hasn't gone away. In fact, it's getting worse in terms of its impact on the usefulness of the internet as a distribution channel for public notice. Publishing notices exclusively on the web also disadvantages our most vulnerable citizens, who are cut off from the internet in far higher numbers than other, more privileged Americans, as the graphic below shows.

The latest figures indicate that 11 percent of American adults still don't use the internet³⁷. Although that figure has remained relatively static over the last several years despite continuing

government and social service programs to promote internet adoption in underserved areas³⁸, at first glance it still seems impressively low. But dig deeper into the numbers and you find that recent developments in *how* people access the internet are degrading its potential as an exclusive source of public notice.

Most significantly, a growing number of Americans can only get to the internet via smartphone. The latest figures show that over one-third of the population does not have broadband internet access at home³⁹. That number is the same as it was in 2012, and home broadband figures have actually dropped eight percentage points in the last two years. Moreover, those figures don't even address the increased propensity for those

Who's not online?

% of U.S. adults who don't use the internet (2018)*



11%

of all American adults



34%

of those over age 65



35%

of individuals who didn't graduate from high school



19%

of population with annual income under \$30,000



22%

of rural population

*Pew Research Center

who have home broadband to spend less time there as their preferred method to access the internet increasingly shifts to mobile devices.

That’s a real problem because smartphones aren’t an acceptable alternative to newsprint for the dissemination of public notice. In fact, mobile connectivity wasn’t even included in the most recent Digital Divide Index compiled by Mississippi State University (“MSU”)⁴⁰, primarily because data caps and small screen sizes limit meaningful access to the kinds of applications that concern policymakers frustrated with the digital divide. “It is much harder to complete a job application or complete a homework assignment using a smartphone that also has limited data,” said Dr. Roberto Gallardo, the author of the MSU report⁴¹.

Data scarcity and tiny screens also present significant impediments to searching for and reading public notices, which rely in large part on the serendipitous process of discovery encouraged by newsprint. It isn’t reasonable to expect people to “discover” public notices on their smartphones, and it borders on the ludicrous to assume they will search for notices on their mobile devices despite the extra cost and sheer physical difficulty of doing so.



For public notice, smartphones aren’t an acceptable alternative to newsprint

The digital divide also remains an especially significant hurdle for certain segments of society—those who live outside of metropolitan areas, the population aged 65 and older, and younger adults who have less education and lower incomes. Here are the most recent numbers, which actually understate the problem because they include the one-in-five American adults who are smartphone-only internet users⁴²:

Another recent study suggests the problem in rural America is even worse than those numbers suggest. According to the study, almost six-in-ten rural Americans believe lack of access to high speed internet is a problem in their area, and almost 25 percent call it a “major problem.”⁴³ The severity of the problem is no accident. Rural areas are less likely to be wired for broadband services and generally have slower internet connections than the



Moving public notice to government websites would be like hiring foxes to guard the henhouses

rest of the country.⁴⁴ There are also fewer broadband providers operating in rural areas so consumers there tend to have limited options when subscribing to high-speed services.⁴⁵

“(Internet access) is essentially the gateway for participation in the 21st century economy in the United States,” said Phillip Berenbrock, senior policy counsel for the nonprofit Public Knowledge.⁴⁶ It is also a gateway to civic engagement; moving public notices exclusively to the internet would increase the barriers to community participation already faced by the most-vulnerable Americans.

Newspaper notice keeps foxes away from the henhouses

Why did our forefathers originally decide to enact public notice laws in the first place? After all, *they were* the government. Why didn't they just publish the information they considered vital for citizens to know and be done with it?

The answer is obvious: Because they knew it wasn't wise simply to trust those who work for the government—neither the living nor future generations—to always provide that information unless there was a legal sanction for failing to do so. They understood that men and women are fallible, and that public notice laws would be required to ensure that government officials act in a manner that serves the public and not their own interests.

As Ronald Reagan was fond of saying: “Trust, but verify.”

Requiring independent, third-party newspapers with a financial and civic interest in ensuring that public notices run in accordance with the law was our legislative ancestors' way of verifying. Giving government officials the means to hide public notice information that may be embarrassing, or that simply doesn't suit their interests, is a surefire way to guarantee they're going to do it. It doesn't mean they're bad people; it's simply human nature to seek to avoid embarrassment or criticism.

The inescapable truth is there are too many ways for public officials to hide information on websites under their exclusive control. And removing newspapers from the public notice process would eliminate an important check on that

tendency and exponentially increase the risk that vital civic matters will be hidden from the public.

Newspapers also routinely report on many of the notices they publish⁴⁷. Moving those notices to government websites would increase the likelihood that reporters won't see them and that the public won't benefit from the increased exposure notices receive when the information they contain also appears in news stories.

Verifying publication is difficult-to-impossible on the web

The adequacy of public notice is often challenged, especially when important civic matters or large sums of money are at stake. For instance, failure to run proper notice has recently resulted in foreclosure reversals, nullification of legislation⁴⁸ and regulations⁴⁹, invalidation of zoning changes⁵⁰, road waivers⁵¹ and election results⁵², and threats to city budgets⁵³ and utility rate increases⁵⁴. That's one of the fundamental reasons public notice statutes have always required newspaper publication: It provides a simple, fail-safe means to verify that notices were run in accordance with the law. Publication on the internet is still incapable of providing that assurance.

Digital notices are fraught with the potential for modification so they're less reliable than print

Notices rendered in ink in a newspaper cannot be altered once they are published. By contrast, notices that are digitally published are fraught with the potential for modification. Websites can be hacked and altered; government sites are especially vulnerable⁵⁵. They can be taken off-line through normal service disruptions, extended power outages, denial-of-service attacks⁵⁶ or ransomware demands⁵⁷. Public notices on websites can even be fabricated to cover up the fact they were never published.

The distinction between the durability of paper and the impermanence of digital documents is clearly manifested in how they are treated as evidence in courts of law. Paper documents—including notices published in a newspaper—are self-authenticating under federal⁵⁸ and state rules of evidence, so they can be admitted into evidence at trial without additional proof to support the claim the documents are legitimate. Digital documents require a much higher standard of

proof⁵⁹. Some courts have even “expressed deep skepticism about the underlying reliability of digital evidence and subjected it to far greater scrutiny than applied to non-digital evidence when deciding whether to admit.”⁶⁰

The shortcomings of digital notice are especially hazardous in the case of foreclosures, where due process concerns are heightened. Hundreds of court cases in non-judicial foreclosure states have recognized publication in a newspaper as valid service of process⁶¹, while no cases we are aware of have ever endowed publication of a foreclosure notice on a website with equal weight. Moreover, federal law controlling HUD loans requires notice be published in a newspaper. Publishing foreclosure notices exclusively on the internet has the potential to jeopardize the validity of the entire foreclosure process.

Governments aren’t prepared to publish notice

There is ample evidence demonstrating that state and local governments simply can’t be trusted with the exclusive responsibility to publish notices on their websites. In fact, we already have examples of government agencies that consistently fail

to publish electronic notices in jurisdictions where they are legislatively mandated to do so⁶², even though there’s little incentive for anyone to track it. Moreover, many state and local bodies find it challenging even to publish the notices they’re required to run in newspapers; there are multiple news reports every month about official meetings that must be rescheduled because newspaper notices weren’t published, or because they were published too late or neglected vital information required by statute. The problem would be exponentially worse if newspapers—which have a civic and financial incentive to ensure that notices are run—were removed from the process.

Government websites also tend to be slow, insecure and difficult to navigate. A recent study found that “(s)tate governments clearly need to improve their websites to provide the public with easy and secure access to e-government services and information.”⁶³ The study assessed 400 U.S. state government websites and tested them for best practices relating to four different criteria. “Virtually every site—99 percent of all tested websites—failed at least one of the tests.”⁶⁴

Moving public notice to government websites would be another example of the state usurping matters better left to the private sector

As the study suggests, governments struggle with their websites; it's not their core competency. By contrast, the free market demands that newspapers operate their websites well; those that don't suffer financially. So making government the exclusive distributor of notice would represent another example of the state usurping matters better left to the private sector.

Website notices leave no historical trace

Newsprint properly preserved remains usable for decades;⁶⁵ stored on microfilm, old newspapers presumably can last for centuries.⁶⁶ The relative inviolability of newspapers has long been an essential element of their historical role as messengers of public notice; it helps to ensure published notices will be available for future use by the judicial system, researchers and historians.

The great majority of websites don't enjoy such longevity. Although digital documents are intrinsically capable of being preserved forever, a bare

fraction survive for longer than a few years. "Digital data lasts forever, or five years, whichever comes first," said RAND Corporation computer scientist Jeff Rothenberg.⁶⁷ "(O)ur digital documents are far more fragile than paper. In fact, the record of the entire present period of history is in jeopardy."⁶⁸

Documents on government websites are especially vulnerable to evanescence. The problem is so acute independent researchers have convened conferences to address it.⁶⁹ "The internet is a terribly unstable way to keep information available," said a researcher who attended one of the conferences. "A huge number of references to websites no longer work."⁷⁰ In fact, those reading this

“ Digital data lasts forever, or five years, whichever comes first. ”

—RAND Corporation Computer Scientist, Jeff Rothenberg

Publishing accurate notices that people actually read entails substantial cost

document in digital form two years or more after it was published will be likely to find that most of the website addresses included in the footnotes will be obsolete. Probably not this one⁷¹, though.

Publishing notices on the internet is “cheap” only if it’s done poorly

Every time a bill moving public notice from newspapers to government websites is introduced, proponents make unsupported claims that the change would make public notice “free” or “cheap,” or that it would “save money.” Those claims are either ill-informed or disingenuous, because publishing notices—and doing it correctly—entails substantial cost. Newspapers spend time and money proofing the text of notices; working with clients who may not understand underlying statutory requirements; scheduling notices for publication; posting them on their websites; and issuing affidavits verifying their publication. They also expend resources on website security and data

backup, and on marketing to promote readership. Those recurring operational costs won’t magically disappear if the notices were shifted to government websites.

Governmental units statutorily required for the first time to publish notices on their websites would also entail substantial front-end, capital expenses for software, website design and development, hiring and training personnel and, perhaps most significantly, marketing. After all, the public is accustomed to finding notices in their newspapers. Retraining citizens to look for them instead on government websites would only be inexpensive if public officials decided not to concern themselves with whether the notices are actually read.

The smaller the government body, the more painful those expenses would be. When New Jersey recently considered and rejected legislation that would have moved public notice from newspapers to government websites, the Republican mayor of a small town in the state explained why he opposed the measure. “This is a bill we did not ask for,” said Nicolas Platt, mayor of Harding Township, population 3,838⁷². “We don’t manage our web sites that well. It makes sense to rely on newspapers for the small amount we get charged for this service.”⁷³

Proposals to eliminate newspaper notice focus on the wrong goals

Legislative or bureaucratic initiatives to move notices exclusively to government websites are never a response to grassroots, citizen input. In fact, as we previously noted, when the public is polled on the issue they state a preference for newspaper notice.

So called “e-notice” proposals are invariably prompted by elected officials, government employees or narrow corporate interests. The public policy arguments they make in support of the change are always revealing. It is *never* about increasing transparency in government. Elected officials generally cite cost or ill-examined assumptions about the decline of newspapers and the inevitability of the internet. Government employees and corporate executives often speak in the language of efficiency—e.g., how it would be quicker and easier if they could post notices on their own websites rather than having to deal with newspapers.

For instance, here are some of the reasons cited by the Indiana Department of Environmental Management (“IDEM”) in its recent proposal⁷⁴ to move notice of air proposals from newspapers to its own, infrequently visited⁷⁵ website: “E-notice is becoming a much more convenient, cost-effective, and expedient method of communicating important agency notices and actions than newspaper publications. ... IDEM anticipates that converting to e-notice as the primary method of public notice will enable permitting authorities to communicate permitting and other affected actions to the public more quickly and efficiently.”

The IDEM proposal never once bothers to discuss whether the changes will lead to increases in government transparency or public participation in the permitting process. Nevertheless, it includes all of the arguments typical of those advanced by government employees in support of similar proposals in other states.

Government transparency, not bureaucratic efficiency, is the goal of public notice laws

Conclusion

Newspapers in the U.S. have a long and rich tradition of serving the public by keeping government transparent and accountable. They have played a vital role in the development and sustenance of our democracy not only by reporting on community news and public affairs, but through their role as stewards of statutorily mandated public notice. Our forefathers selected newspapers for that role due to their accessibility and independence from the government, and because they provide a verifiable and archivable means of disseminating official announcements.

However, ill-considered assumptions and fascination with the internet have given rise to legislative proposals in which government websites serve that role instead of newspapers. These proposals make little sense when one considers that newspapers already publish public notices on their websites, and their websites are better and attract significantly more eyeballs than the sites operated by state and local governments. Moving notices to government websites would also eliminate them from the newsprint editions of local papers, which are inherently superior to websites for notifying citizens about official matters. Exclusive notice

via the internet would also disenfranchise residents of rural areas as well as our poorest and least educated citizens. Governments simply aren't prepared to be the exclusive publishers of official notice—a role that has been handled ably for decades by private-sector newspapers.

Lawmakers should be encouraged to enact statutes requiring governments to publish public notices on their websites, but as a supplement to—not a replacement for—newspapers and their websites.

Endnotes

¹ They're also often called "legal ads" or "legals". We prefer the term "public notice," which conveys their scope and purpose more accurately, and avoids confusion with advertisements that promote legal services.

² Charles Allen, *A Series of Articles on Public Notice* (1947).

³ See generally Shannon E. Martin, *State Governments, Freedom of Information Laws and the World Wide Web at the Beginning of the 21st Century* (on file with author).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Shannon E. Martin, *Newspapers, Official Advertisements, and the Intentions of Public Notice Laws*, 5 N.J.J.Comm. 104, 106.

⁷ Hyperlinked list of 42 statewide public notice websites, PNRC website, <http://www.pnrc.net/find-a-notice/state-press-associations/>

⁸ State statutes requiring web posting of public notices, PNRC website, <http://www.pnrc.net/subscribers/statutes-comparative-by-state/statutes-requiring-web-posting/>

⁹ See mypublicnotices.com and publicnoticeads.com

¹⁰ Nielsen Scarborough USA study, 2016, <https://www.nielsen.com/us/en/insights/news/2016/newspapers-deliver-across-the-ages.html>

¹¹ John B. Horrigan and Lee Rainie, "Connecting with Government or Government Data" (Pew Research Center), published April 21, 2015, <http://www.pewinternet.org/2015/04/21/connecting-with-government-or-government-data/>.

¹² See Nielsen Scarborough study above

¹³ Damian Radcliffe and Christopher Ali, "Small-market newspapers in the digital age," Tow Center for Digital Journalism, Columbia University, 2017, <https://academiccommons.columbia.edu/catalog/ac:2rbnz57h54>

¹⁴ Nielsen Scarborough 2014 Newspaper Penetration Report, Feb. 18, 2014, <http://www.scarborough.com/reports/scarborough-newspaper-penetration-report.html>

¹⁵ *Ibid.*

¹⁶ Shannon E. Martin, *Newspapers, Official Advertisements, and the Intentions of Public Notice Laws*, 5 N.J.J. Comm. 104, 106

¹⁷ "Americans' Views on Open Government Data," Pew Research Center, April 21, 2015, <http://www.pewInternet.org/2015/04/21/open-government-data/>

¹⁸ Jack Shafer, “Why Print News Still Rules,” Politico Magazine, Sept. 10, 2016, <https://www.politico.com/magazine/story/2016/09/newspapers-print-news-online-journalism-214238>

¹⁹ See, e.g., Mary Duan, “A 99-year-old Carmel woman fights to keep her home from Wells Fargo,” Monterey County Weekly, Nov. 9, 2017, http://www.montereycountyweekly.com/opinion/local_spin/a--year-old-carmel-woman-fights-to-keep-her/article_b087ef96-c4e3-11e7-a43c-4fcb78f80f09.html

²⁰ See Shafer above

²¹ See e.g., Clickbait, Wikipedia, <https://en.wikipedia.org/wiki/Clickbait>

²² Garrett Ellison, “Nestle bottled water plant upgrade driving more groundwater extraction,” Grand Rapids Press, Oct. 31, 2016, http://www.mlive.com/news/index.ssf/2016/10/nestle_groundwater_pumping_exp.html

²³ NPR.org, “Michigan OKs Nestlé Water Extraction, Despite 80K+ Public Comments Against It,” April 3, 2018, <https://www.npr.org/sections/thetwo-way/2018/04/03/599207550/michigan-oks-nestl-water-extraction-despite-over-80k-public-comments-against-it>

²⁴ “Public wasn’t adequately notified of Nestle water request, says DEQ director,” MLive.com, Dec. 5, 2016, https://www.mlive.com/news/index.ssf/2016/12/deq_nestle_grether_public_comm.html

²⁵ Letter from ADEQ Director Teresa Marks to the National Park Service, Jan. 3, 2013, https://www.adeq.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/ARG590001_Letter to National Park Service_20130103.pdf

²⁶ Ibid. pg. 2

²⁷ David Ramsey, “Hog farm near the Buffalo River stirs controversy,” Arkansas Times, Aug. 15, 2013, <https://www.arktimes.com/arkansas/hog-farm-near-buffalo-river-raises-concerns-for-watershed-and-community/Content?oid=3013811>

²⁸ Google search on “Buffalo National River lawsuits,” https://www.google.com/search?as_q=buffalo+national+river+lawsuits&as_epq=&as_oq=&as_eq=&as_nlo=&as_nhi=&lr=&cr=&as_qdr=all&as_sitesearch=&as_occt=any&safe=active&as_filetype=&as_rights=

²⁹ Website, Buffalo River Watershed Alliance, <http://buffaloriveralliance.org/>

³⁰ “Arkansas hog farm argues agency erred in decision process,” Arkansas Democrat-Gazette, June 7, 2018, <https://www.nwaonline.com/news/2018/jun/07/c-h-says-air-permit-in-public-20180607/>

³¹ “How newspaper notice is supposed to work,” Public Notice Resource Center, Aug. 29, 2018, <https://www.pnrc.net/2018/08/29/how-newspaper-notice-is-supposed-to-work/>

³² “The Secret Drug Pricing System Middlemen Use to Rake in Millions,” Bloomberg News, Sept. 11, 2018, <https://www.bloomberg.com/graphics/2018-drug-spread-pricing/>, and “Jail benefits from drug deal,” Ottumwa Courier, Sept. 13, 2018, http://www.ottumwacourier.com/news/jail-benefits-from-drug-deal/article_944d1b5a-b6d5-11e8-98bd-37fedbba308d.html

³³ “Commissioner wants to ensure competitiveness, legality in bidding process,” Ford County Reporter, Sept. 28, 2018, <http://www.paxtonrecord.net/news/2018-09-28/commissioner-wants-ensure-competitiveness-legality-bidding-process.html>

³⁴ “Drilling company pushes for more wells in NW New Mexico,” Santa Fe New Mexican, Sept. 10, 2018, http://www.santafenewmexican.com/news/local_news/drilling-company-pushes-for-more-wells-in-nw-new-mexico/article_966a2783-5bd4-5d87-a1e8-31392db11d7b.html

³⁵ “Fire Truck Sale In Sandwich Creates Buzz,” Sandwich Enterprise, Aug. 29, 2018, https://www.capenews.net/sandwich/news/fire-truck-sale-in-sandwich-creates-buzz/article_8d48ca63-ff1a-5d83-97cf-6ed263a3d3f8.html

³⁶ Pulse of America Survey, Pulse Research, Feb. 2017, <https://www.pnrc.net/wp-content/uploads/2017/10/2017-POA-National-Survey-Results.pdf>

³⁷ “11% of Americans don’t use the internet. Who are they?,” Pew Research Center, March 5, 2018, <http://www.pewresearch.org/fact-tank/2018/03/05/some-americans-dont-use-the-internet-who-are-they/>

³⁸ Ibid.

³⁹ Internet/Broadband Fact, Pew Research Center, 2018, <http://www.pewinternet.org/fact-sheet/internet-broadband/>

⁴⁰ Digital Divide Index 2015, Intelligent Community Institute, Mississippi State Univ., March, 2017, http://ici.msucare.com/sites/ici.msucare.com/files/2015_ddi.pdf

⁴¹ Ibid., p. 4

⁴² See “11% of Americans don’t use the internet. Who are they?” above

⁴³ “About a quarter of rural Americans say access to high-speed internet is a major problem,” Pew Research Center, Sept. 10, 2018, <http://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/>

⁴⁴ FCC 2018 Broadband Deployment Report, <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>

⁴⁵ Broadband Deployment and Broadband Competition, Brookings Institute, 2017, <https://www.brookings.edu/blog/techtank/2017/03/15/better-together-broadband-deployment-and-broadband-competition/>

⁴⁶ “The harsh realities of living in Long Beach without the internet,” Long Beach Press-Telegram, Nov. 2, 2017, <https://www.presstelegram.com/2017/10/24/the-harsh-realities-of-living-in-long-beach-without-the-internet/>

⁴⁷ Contest Winners, Public Notice Resource Center Annual Journalism Award, <https://www.pnrc.net/contest/previous-winners/>

⁴⁸ “Hempstead official: Errors mean legislation must be rewritten,” Newsday, Oct. 25, 2017, <https://www.newsday.com/long-island/politics/hempstead-official-errors-mean-legislation-must-be-rewritten-1.14620240>

⁴⁹ “DHS to appeal ban on formula; algorithm pared home-based care,” Arkansas Democrat-Gazette, June 12, 2018, <https://www.arkansasonline.com/news/2018/jun/12/dhs-to-appeal-ban-on-formula-20180612-1/>

⁵⁰ “Lawsuit challenges Baltimore County rezoning decisions,” Baltimore Sun, Oct. 2, 2016, <https://www.baltimoresun.com/news/maryland/baltimore-county/bs-md-co-zoning-challenge-20161002-story.html>

⁵¹ “Editorial: Hamburg’s zoning subterfuge blocked,” The Buffalo News, July 26, 2017, <https://buffalonews.com/2017/07/06/editorial-hamburgs-zoning-subterfuge-blocked/>

⁵² “Boynton to conduct meeting to elect trustees,” Muskogee Phoenix, May 24, 2017, http://www.muskogee phoenix.com/news/local_news/boynton-to-conduct-meeting-to-elect-trustees/article_1a0e9bf5-d3c3-57fe-b37a-d5692bb22a41.html

⁵³ “Daytona’s historic oceanfront Bandshell getting \$1M overhaul,” The Daytona Beach News-Journal, Nov. 15, 2017, <http://www.news-journalonline.com/news/20171115/daytonas-historic-oceanfront-bandshell-getting-1m-overhaul>

⁵⁴ “AEP admits failing to publish notice of hearings on rate proposal, proposes additional hearing,” Columbus Dispatch, Jan. 2, 2018, <http://www.dispatch.com/news/20180102/aep-admits-failing-to-publish-notice-of-hearings-on-rate-proposal-proposes-additional-hearing>

⁵⁵ 2017 U.S. State and Federal Government Cybersecurity Report, Security Scorecard, Aug. 24, 2017, <https://cdn2.hubspot.net/hubfs/533449/Images/SecurityScorecard%202017%20Govt%20Cybersecurity%20Report.pdf>

⁵⁶ “Online Denial of Service Attacks Are a Growing Concern,” Government Technology, March 19, 2017, <http://www.govtech.com/blogs/lohrmann-on-cybersecurity/online-denial-of-service-attacks-a-growing-concern.html>

⁵⁷ “Ransom Demands and Frozen Computers: Hackers Hit Towns Across the U.S.,” Wall Street Journal, June 24, 2018, <https://www.wsj.com/articles/ransom-demands-and-frozen-computers-hackers-hit-towns-across-the-u-s-1529838001>

⁵⁸ Federal Rules of Evidence, Article IX, Rule 902(6) <https://www.rulesofevidence.org/article-ix/rule-902/>

⁵⁹ *Ibid.*, see Rule 902(14)

⁶⁰ U.S. District Judge Paul W. Grimm, “Authenticating Digital Evidence,” GP Solo – American Bar Association, Vol. 31 No. 5, Sept./Oct. 2014, https://www.americanbar.org/publications/gp_solo/2014/september-october/authenticating_digital_evidence.html

⁶¹ Daniel Taylor, Esq., “When Can You Serve Someone via Publication in a Newspaper?”, Feb. 3, 2015, Law and Daily Life, FindLaw, https://blogs.findlaw.com/law_and_life/2015/02/when-can-you-serve-someone-via-publication-in-a-newspaper.html

⁶² “Open meetings laws broken by board considering ATVs on Antelope Island,” Standard-Examiner, Nov. 26, 2017, https://www.standard.net/lifestyle/recreation/open-meetings-laws-broken-by-board-considering-atvs-on-antelope/article_43e4af6e-e30a-57e2-acba-b1c39bac491a.html

⁶³ Daniel Castro and Michael McLaughlin, “Benchmarking State Government Websites,” Information Technology and Innovation Foundation, p. 3

⁶⁴ *Ibid.*

⁶⁵ Dava Aiken Tobey, “Preserving history: Here’s how to keep that historic newspaper for years to come,” New York Times Regional Newspapers, http://www.mnhs.org/preserve/conservation/reports/nytimes_preserving.pdf

⁶⁶ Preservation Measures for Newspapers, Library of Congress, <http://www.loc.gov/preservation/care/newspap.html>

⁶⁷ Jeff Rothenberg, “Ensuring the Longevity of Digital Documents,” Scientific American, Jan. 1995 (Vol. 272, Number 1, pp. 42-7)

⁶⁸ *Ibid.*, expanded version published Feb. 22, 1999, <https://www.clir.org/wp-content/uploads/sites/6/ensuring.pdf>

⁶⁹ “Researchers rush to preserve environmental data they believe to be threatened by Trump,” StateImpact Pennsylvania, Jan. 19, 2017, <https://stateimpact.npr.org/pennsylvania/2017/01/19/researchers-rush-to-preserve-environmental-data-they-believe-to-be-threatened-by-trump/>

⁷⁰ Ibid.

⁷¹ “The growing problem of Internet ‘link rot’ and best practices for media and online publishers,” Journalist’s Resource, Oct. 9, 2015, <https://journalistsresource.org/studies/society/internet/website-linking-best-practices-media-online-publishers>

⁷² 2010 U.S. Census, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>

⁷³ Tom Moran, “Christie & Dem bosses get public spanking they deserve,” The Star-Ledger, Dec. 20, 2016, https://www.nj.com/opinion/index.ssf/2016/12/a_stinging_loss_for_a_bitter_governor_-_and_hopef.html

⁷⁴ IDEM Proposal soliciting public comment concerning amendments to legal notice provisions for permits issued under the New Source Review (NSR) and Title V permit programs, Sept. 6, 2017, Indiana LSA Document #17-395, <https://www.pnrc.net/wp-content/uploads/2017/11/Indiana-IDEM-Proposal.pdf>

⁷⁵ Comment to IDEM Proposal, filed by Hoosier State Press Association, p. 1, October 6, 2017, https://www.pnrc.net/wp-content/uploads/2017/11/HSPA_IDEM_Comments.pdf

Far More People Visit Newspaper Websites Than Government Sites

Site	Average Monthly Visits
Anderson Herald Bulletin (Indiana)	329,419
City of Anderson	43,791
Madison County	9,312
Citizen Tribune (Tennessee)	247,343
City of Morristown	9,829
Hamblen County	9,265
Dallas Morning News (Texas)	11,650,000
City of Dallas	460,307
Dallas County	600,389
Detroit Free Press (Michigan)	13,850,000
City of Detroit	328,728
Wayne County	155,589
Daily Iberian (Louisiana)	96,362
City of New Iberia	5,203
Iberia Parish	<5,000
Houston Herald (Missouri weekly)	82,075
City of Houston	<5,000
Texas County	6,639
Omaha World-Herald (Nebraska)	3,253,000
City of Omaha	113,847
Douglas County	55,965
The Randolph Leader (Alabama weekly)	25,725
City of Roanoke	<5,000
Randolph County	<5,000
Valdosta Daily Times (Georgia)	239,941
City of Valdosta	26,543
Lowndes County	33,157
Vicksburg Post (Mississippi)	130,406
City of Vicksburg	8,118
Warren County	6,677

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