

**FREEDOM OF INFORMATION
STATE LITIGATION AND LEGISLATIVE UPDATE**



2021 COGEL VIRTUAL CONFERENCE

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**Prepared by
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INTRODUCTION

The following is an overview of action in state legislatures and courts around the country involving public access issues since the last COGEL conference in December 2020. The report is not an all-inclusive study. It should, however, provide a picture of where states are standing on issues of government transparency. This year's report features court decisions issued through August 2021, and legislation enacted through October 2021.

Sources for this report include: *Access Reports*, the website for *The National Freedom of Information Coalition*, the website for *The New England First Amendment Coalition*, the website for *The Reporters Committee for Freedom of the Press*, and local online news websites.

Attorneys Danielle McGee and Paula Pearlman, both counsel to the Connecticut Freedom of Information Commission, compiled and edited this year's report.

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Freedom of Information Litigation and Legislation Update

❖ What is a “Public Record”? What is a “Public Agency”?

Freedom of information laws generally provide access to “public records” filed with or kept by a “public agency.” Below are summaries of court decisions and an advisory opinion addressing whether and to what extent certain entities, and documents filed with or kept by a public agency, are subject to such laws:

➤ *Litigation:*

▪ *Illinois:*

Better Gov't Ass'n v. City of Chicago

(2020 IL App (1st) 190038, 2020 WL 4515997 (Aug. 5, 2020))

An appellate court affirmed an order directing the City of Chicago Office of the Mayor and Department of Public Health to search public officials’ personal text messages and email accounts for public records.

The Better Government Association (“BGA”) submitted two Freedom of Information (“FOI”) Act requests to the City of Chicago Office of the Mayor and Department of Public Health (the “City”) for records related to the discovery of lead in the drinking water at the Chicago Public Schools (“CPS”), including communications between certain named officials. The City produced some records, withheld others, but did not inquire into whether personal text messages and emails of the officials contained responsive records even when it was known that some of the officials had used their personal e-mail accounts to discuss the public’s business. The City maintained that it had no obligation or ability to search personal accounts for responsive records.

The BGA appealed. The ultimate issue before the appellate court was the adequacy of the City’s search for records. The BGA claimed that the City’s search was inadequate because, at least with respect to the named officials’ personal text messages and email accounts, the City had not performed any search. The City contended that they were not required to search their officials’ personal accounts because the communications in those accounts were not subject to the FOI Act.

To qualify as a “public record”, the record must pertain to public business rather than private affairs and must have been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body.

The City did not contest that their officials’ personal accounts contained records pertaining to the public’s business, nor did they dispute that the defendants are “public bodies” under the FOI Act. Instead, they argued that the individual public officials are

not themselves public bodies and their personal emails and text messages are not public records because they were not prepared for, used by, received by, possessed by, nor controlled by a public body. They argued that the emails and messages lack “the requisite nexus to a public body.”

The Court agreed with the City that the individual officials are not public bodies under FOI Act. However, the Court also noted that this does not mean that their communications about the public’s business cannot be a public record. “Instead, it is sufficient that the communications were either prepared for, used by, received by, or in the possession of a public body.” Because each official can *function* as a public body (e.g., the mayor or director of public health can make unilateral and binding decisions on their respective public bodies), the emails and texts from their personal accounts are “in the possession of” a public body within the meaning of FOI Act.

- ***Michigan:***
Susan Bisio v. City of the Village of Clarkston
(506 Mich. 37, 954 N.W.2d 95 (July 24, 2020))

The Michigan Supreme Court reversed the ruling of an appeals court finding that the city attorney for the City of the Village of Clarkston (“City”) was not a public official within the meaning of Michigan’s Freedom of Information (“FOI”) Act; and therefore, the attorney’s communications with a third party were not subject to the disclosure requirements of the Act. The Court held that the communications at issue were “public records” because the Office of the City Attorney is a “public body” subject to the FOI Act disclosure requirements.

The Plaintiff, Susan Bisio, filed a FOI Act request with the City seeking, inter alia, correspondence between the city attorney and a consulting firm pertaining to a development project and a vacant property within the city. The City denied the request with respect to records contained within the city attorney’s file, contending that the records belonging to the attorney were not “public records” because the attorney was not a “public body” within the meaning of the FOI Act. The attorney contended that the records were never received or in the possession of the public body (the City). Bisio appealed.

The trial court ruled that because there was no evidence the city attorney ever shared the records with the City, those records never became public records. An appeals court affirmed on separate grounds, stating that the city attorney is merely the agent of a public body, that the FOI Act does not encompass an agent of a public body, and records in the possession of such an agent do not meet the definition of public records. On appeal, the Supreme Court concluded that the city attorney is a public official because the Office of the City Attorney is an “other body” within the definition of “public body” under the FOI Act. The Act defines “public body”, in relevant part, as “any other body that is created by state or local authority or is primarily funded by or through a state or local authority...” According to the Court, since the “office of the city attorney” was created by City Charter, such office is a “public body” created by

local authority. Therefore, there was no need for the records at issue to be shared with any other public body, in order for them to become “public records.”

The Court summarized its position as follows: “[u]nder [the] FOIA, a ‘public record’ is ‘a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.’ We reiterated that such ‘public records’ must be ‘prepared, owned used, in the possession of, or retained by a *public body*’ and not by a private individual or entity. In the instant case, the office of the city attorney constitutes such a ‘public body’ because it is an ‘other body that is created by state or local authority’ pursuant to [the FOIA].”

- ***North Carolina:***

- **S. Env’t L. Ctr. v. N. Carolina R.R. Co.**

- (2020 NCBC 61, 2020 WL 5224259 (N.C. Super. Aug. 20, 2020))

Although the North Carolina Railroad Company (“NCR”) is a corporation that is owned 100% by the State of North Carolina and operates solely for the benefit of its residents, a court determined it is not a public body and therefore is not subject to the Public Records Act (“PRA”).

A public records request was made by the Southern Environmental Law Center to NCR’s president seeking to inspect records related to a certain rail project. NCR declined to respond on the basis that it is not subject to the PRA. The requester appealed.

The court examined two prior court decisions analyzing whether private entities with “substantial relationships” with state government were subject to the PRA. Factors examined included, but were not limited to: “the level of ‘supervisory responsibility and control’ the government has over the entity”; whether, upon dissolution, the entity would transfer its assets to the government; whether all vacancies of the board of directors are subject to the government’s approval; whether any lease agreement provides that the entity occupy premises owned by the government under a lease for \$1 per year; whether the government conducts any supervisory audit of the entity’s books; whether the entity reports its charges and rates to the government; whether the entity was financed by government bond orders; whether revenue collected pursuant to the bond orders is revenue of the government; and whether the entity would not change its corporate existence or amend its articles of incorporation without the government’s written consent; and whether the entity performed a “public and government function, exercised for a public purpose.”

Here, the court focused on legislative history and concluded that the legislature did not intend to subject the NCR to the PRA, explicitly or implicitly. In fact, the court noted several instances in which the legislature seemingly expressed its intent that the NCR should not be considered an agency of the State, and therefore subject to the PRA. For example, the legislature enacted legislation that allowed the NCR’s Board of Directors to request liability coverage under the State’s liability insurance policy for

its officers, directors, and employees. In the legislation, the legislature declared that such coverage “shall not be construed as defining the [NCRR] as a public body or as defining its officers, directors, or employees as public officials or employees for any other purpose.” The court also pointed out that the legislature required the NCRR to comply with more public reporting requirements than other private entities.

- ***Washington:***
Beauregard v. Washington State Bar Ass'n
(197 Wash. 2d 67, 2021 WL 503316 (Feb. 11, 2021))

The Supreme Court ruled that the Washington State Bar Association (“WSBA”) is not a public agency subject to the Open Public Meetings Act (“OPMA”).

A member of the WSBA alleged that the WSBA’s executive director was terminated during an illegal executive session in violation of the OPMA and moved the court for an order reinstating the executive director.

The Supreme Court concluded that the WSBA is not a public agency subject to OPMA because it existed as a voluntary association before the passage of the Washington State Bar Act, and therefore, was not “created by or pursuant to statute.” The OPMA defines “public agency” as “[a]ny state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature.”

The Court reasoned that the WSBA existed and was formed as a voluntary association in the late 1800s. In 1933, the State Bar Act was adopted, requiring membership for anyone who was licensed to practice law in the state. However, the WSBA is not a creature of statute and was not created by or pursuant to statute. Additionally, the Court found that WSBA does not function “pursuant to” statute, but instead “pursuant to the court’s authority to regulate the practice of law.”

➤ ***Advisory Opinion:***

- ***New Mexico:***
Attorney General, Inspection of Public Records Act Complaint – Robert Trapp
(December 2, 2020)

The Office of the Attorney General (“OAG”) opined that when the Office of the Medical Investigator (“OMI”) acts as a contractor for tribal and federal agencies, the records of those services are “public business” and subject to the Inspection of Public Records Act (“IPRA”).

In April 2019, a complaint was submitted to the OAG alleging that the OMI violated the IPRA by failing to provide records responsive to a records request. The OMI acknowledged that records relating to the work that it conducts on state land is “public business.” However, OMI claimed that records relating to the work that it performs

on tribal and federal land did not constitute “public business” for the purposes of IPRA.

After consideration of the following factors, the OAG concluded that OMI’s work on tribal or federal land is “public business”: “OMI is a statutorily-created state agency...[and although]... OMI must receive financial compensation from tribal or federal governments for performing work on their lands, it is also indisputable that some amount of state resources is still being used when performing such services [i.e., time and dedication of state employees].” In addition, OMI “engages in its work on tribal and federal land only when being reimbursed pursuant to ‘a legal contract or...agreement.’... These contracts and agreements, to which OMI is a party, are certainly public records given that they inherently involve public expenditures and receipts.”

❖ **Access to Public Meetings**

Public access to meetings of governmental bodies is essential to the preservation of a democratic society. Open meeting laws help to protect transparency in government and preserve the public's right to access such meetings, with exceptions (e.g., executive sessions). Below are some examples of situations where various courts and legislatures addressed the public's right to access public meetings:

➤ ***Litigation:***

▪ ***Connecticut:***

City of Meriden v. Freedom of Information Commission

(191 Conn. App. 648 (August 6, 2019), *affirmed* 338 Conn. 310 (March 12, 2001))

The Supreme Court affirmed the decision of an appellate court that a gathering of four political leaders of a city council (i.e., the leadership group) with the city's mayor and the retiring city manager, to discuss the search for a new city manager, did not constitute a "meeting" under the Freedom of Information ("FOI") Act and therefore did not violate the open meetings requirements under the Act.

After gathering with the mayor and city manager, the leadership group agreed to submit a resolution for action by the full city council to create a city manager search committee. The group drafted a resolution, which included the names of people to be appointed and detailed the duties of the committee. The leadership later introduced the resolution at a city council meeting, which was placed on the council's consent calendar, and adopted without discussion or change.

The Court agreed with the appellate court in that a gathering of the city council's four-member leadership group with the mayor and then-city manager was not a "hearing or other proceeding" and therefore was not a "meeting" within the meaning of the FOI Act. Under the FOI Act, "hearing or other proceeding" connotes a formal process by which official business is authorized to be conducted. In this case, the Court emphasized that the mayor and retiring city manager had no authority to create the city manager search committee and that the leadership group was not formed with any official resolution of the city council and had no independent, express authority to take action regarding the formation of a search committee. The Court also concluded that there was no statute, ordinance, bylaw, or other legal source of power granting the group any authority to act, as a group or on behalf of the city council. Consequently, because the gathering did not constitute a "hearing or other proceeding of a public agency," it was not a meeting under the FOI Act.

➤ **Legislation:**

▪ **Colorado:**

House Bill 21-1025, *An Act Concerning a Clarification Under the Colorado Open Meetings Law of the Requirement Governing Communication by Electronic Mail that Does Not Relate to the Substance of Public Business.*

The bill clarifies that the following electronic communications shall not be considered a “meeting”: electronic communications between elected officials that does not relate to the merits or substance of pending legislation or other public business, including electronic communications regarding scheduling and availability or electronic communications that are sent by an elected official for the purpose of forwarding information, responding to an inquiry from an individual who is not a member of the state or local public body, or posing a question for later discussion by the public body.

House Bill 21-1278, *An Act Concerning Meeting Requirements for the Boards of Special Districts.*

The bill allows boards of special districts to hold meetings in person, telephonically, electronically or in “other virtual place, or combination of such means.” The bill also requires that the meeting notice of all board meetings that are held telephonically, electronically or by other means (not including in person), must include the method or procedure (including the conference number or link), by which members of the public can attend the meeting.

▪ **Connecticut:**

Public Act No. 21-2 (June Special Session), *An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023.*

Section 149 of Public Act No. 21-2 authorizes public agencies to hold public meetings solely or in part using electronic equipment until April 30, 2022 and establishes requirements and procedures for holding such meetings. Among other requirements, the bill requires that a public agency post meeting notices and agendas that include instructions for the public to attend and provide comment or otherwise participate in the meeting, if permitted. If a public agency intends to hold a regular meeting solely using electronic equipment, the agency must provide any member of the public, upon request, with a physical location and any electronic equipment necessary to attend the meeting in real-time and must record or transcribe such meeting (except for executive sessions).

▪ **Maine:**

Chapter 290 Public Law (S.P. 40 - L.D. 32), *An Act Regarding Remote Participation in Public Proceedings.*

The bill allows certain public bodies to participate in a public proceeding using remote methods only under specific delineated conditions including, but not limited to: agency must first adopt a written policy governing participation in public proceedings held by remote methods; the policy adopted must provide that members are expected to be physically present for public proceedings except if not practicable (e.g., emergency or urgent issue, illness, temporary absence outside of jurisdiction, must travel significant distance, geography impedes or slows travel); agency must provide the public a meaningful opportunity to attend; all votes taken must be taken by roll call vote that can be seen and heard if using video technology, and heard if using only audio technology; all documents and other materials considered by the public body must be made available, electronically or otherwise, to the public to the same extent customarily available to members of the public who attend in person, as long as additional costs are not incurred. In addition, the bill specifically prohibits agencies from conducting public proceedings by text-only means such as e-mail, text messages or chat functions.

- ***New York:***
Senate Bill 1150A (Chapter 481), An Act to Amend the Public Officers Law, in Relation to Making Certain Documents Available for Open Meetings.

The bill requires that certain records be made available to the public prior to a public meeting. Under the bill, agency records available to the public, as well as any proposed resolution, law, rule, regulation, policy, or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting must be made available, upon request, to the extent practicable at least 24 hours prior to the meeting during which the records will be discussed. If the agency maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records must be posted on the website to the extent practicable at least 24 hours prior to the meeting.

Senate Bill 4704A, An Act to Amend the Public Officers Law, in Relation to Requiring that Minutes of Meetings of a Public Body be Posted on its Website.

The bill requires public bodies that maintain a regularly and routinely updated website and utilize a high-speed internet connection to make meeting minutes available on the public body's website within two weeks of such meeting. Unabridged video recordings, unabridged audio recordings, or unabridged written transcripts may be posted in lieu of minutes. Nothing in the bill requires the public body to create minutes if such public body would not otherwise take them.

➤ ***Local Ordinance:***

- ***Philadelphia:***
Bill No. 200541, An Ordinance Amending Chapter 21-1500 of the Philadelphia Code, entitled “Boards and Commissions – Public Deliberations”....

The Council of the City of Philadelphia passed an ordinance requiring all boards and commissions to make a recording or prepare a transcript of any meeting that is otherwise open to the public, and to promptly make such recordings and transcriptions available to the public within 10 days, without charge, on a City website associated with the board or commission.

❖ **Access to Records Pertaining to Police and Correctional Officer Conduct:**

Below are summaries of court decisions and legislation concerning access to records pertaining to police misconduct:

➤ ***Litigation:***

▪ ***New Hampshire:***

New Hampshire Ctr. for Pub. Interest Journalism, et al., v. New Hampshire Dep't of Justice (173 N.H. 648m, 247 A.3d 383 (October 30, 2020))

The New Hampshire Supreme Court held that the Exculpatory Evidence Schedule (“EES”), a list of police officers who have engaged in misconduct reflecting negatively on their credibility or trustworthiness, is not exempt from disclosure under New Hampshire’s Right-to-Know Law (“RTKL”) as either an “internal personnel practice” or a “personnel file”. Nonetheless, the Court vacated the lower court’s denial of the New Hampshire Department of Justice’s (“DOJ”) motion to dismiss and remanded for the trial court to consider, in the first instance, whether the EES is an “other file[] whose disclosure would constitute an invasion of privacy.”

Media outlets filed a RTKL request to the DOJ for the then-most recent list, and the DOJ provided a version which was redacted to exclude any personally identifying information. The EES is a spreadsheet containing officer name; department; date of incident; date of notification; and category of behavior resulting in being placed on the list. The EES does not physically reside in any one officer’s personnel file.

The Plaintiff brought action seeking a declaration that the EES should be made public pursuant to the RTKL, excluding only officers with pending challenges to their listing. The trial court denied the DOJ’s motion to dismiss, rejecting the claim that the EES is barred from disclosure under the RTKL on the basis that it relates to “internal personnel practices” or because it constitutes a “personnel” or “other file[] whose disclosure would constitute an invasion of privacy.

On appeal, the Supreme Court agreed that disclosure of the EES is not prohibited. The Court stated: “[b]y its express terms, [the RTKL exemption] pertains only to information maintained *in a police officer’s personnel file.*” Because the EES is a list of multiple officers that does not physically reside in any specific police officer’s personnel file and is not even maintained by police staff, it cannot be considered part of the personnel file. The court further clarified that the focus of the exemption is on information maintained in the personnel file of a specific police officer. The EES is maintained by the DOJ, not the individual law enforcement agency. Had the legislature intended it to apply more broadly to personnel *information*, regardless of where it is maintained, it would have said so. The Supreme Court rejected the DOJ’s argument that the EES is exempt from disclosure because it pertains to “internal personnel practices,” as relying on bad caselaw that the Court directly overruled.

However, for the first time, the DOJ alternatively argued that the EES constitutes an “other file[] whose disclosure would constitute an invasion of privacy” and asserted disclosure would constitute such invasion of privacy under the Court’s customary balancing test. Because this issue was not ruled upon by the trial court, the Supreme Court remanded the issue to be litigated.

- ***New York:***

- **New York C.L. Union v. City of Syracuse**

- (72 Misc. 3d 458, 148 N.Y.S.3d 866 (N.Y. Sup. Ct. May 5, 2021))

A trial court ruled that the City of Syracuse and its Police Department (“City”) properly responded to a request from the New York Civil Liberties Union (“NYCLU”) for police department disciplinary records.

The NYCLU requested several records from the Syracuse Police Department, including disciplinary records. The City refused to disclose disciplinary records related to complaints not yet substantiated.

The NYCLU appealed, alleging that the denial was unlawful and in contravention of the recent repeal of Civil Rights Law (“CRL”) section 50-a, which they argued requires disclosure of all disciplinary records regardless of status or disposition. Under section 50-a, an agency could deny FOI Law requests which sought personnel records of police officers, which included documents related to misconduct or rule violations.

The City contended that the records were exempt from disclosure pursuant to the Freedom of Information (“FOI”) Law privacy exemption. The City also asserted that the repeal of section 50-a did not result in a change of the FOI Law “resulting in police officers being treated less favorably than other public employees.” The court agreed with the City in that the legislature did not change the already existing exemption for invasion of privacy. Relying on precedent, the court concluded that the release of unsubstantiated claims has been found to be prohibited by existing law as an unwarranted invasion of privacy. According to the Court, “the public interest in the release of unsubstantiated claims do[es] not outweigh the privacy concerns of individual officers.”

➤ ***Legislation:***

- ***California:***

- ***Senate Bill 16 (Chapter 402), An Act to Amend...the Penal Code, Relating to Peace Officers.***

The bill expands the categories of police personnel records that must be made available for public inspection pursuant to the California Public Records Act. Such records include, but are not limited to, a record relating to (1) the report, investigation, or findings of an incident involving the discharge of a firearm at a person by an officer; (2) the report, investigation, or findings of an incident involving the use of

force by an officer that resulted in death or great bodily injury; (3) a sustained finding involving a complaint that alleges unreasonable or excessive force; (4) an incident in which a sustained finding was made involving dishonesty by an officer directly relating to the reporting, investigation or prosecution of a crime; and (5) an incident in which a sustained finding was made that the officer made an unlawful arrest or conducted an unlawful search.

The bill requires agencies to redact certain information such as (1) personal data (e.g., officer's home address, telephone numbers, identities of family members); (2) the identity of whistleblowers, complainants, victims and witnesses; (3) medical, financial or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by officers; and (4) where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the officer, or another person.

The bill also permits an agency to redact a record (1) where the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information and (2) of an incident that is the subject of an active criminal or administrative investigation. In addition, the bill does not prohibit the public entity from claiming another exemption pursuant to any other federal or state law.

- ***Colorado:***
Senate Bill 21-174, An Act Concerning Adoption of Written Policies by Law Enforcement Agencies for Constitutionally Required Peace Officer Credibility Disclosure Notifications.

The bill requires the state's Peace Officers Standards and Training Board to create and maintain a database, in searchable format to be published on its website, concerning peace officers who are subject to credibility disclosure notifications (i.e., credibility has been called into question).

❖ **Records Maintained by a Law Enforcement Agency or Department of Corrections**

Below are summaries of court decisions and legislation concerning records maintained by a law enforcement agency or correctional facility:

➤ ***Litigation:***

▪ ***Connecticut:***

Drumm v. Freedom of Information Commission

(No. HHB-CV-21-60603380S, 2021 WL 4047111 (Aug. 13, 2021))

A court upheld the Final Decision of the Freedom of Information (“FOI”) Commission ordering that the Madison, CT Police Department disclose the investigative file for a decade-old unsolved murder of a local woman.

In 2010, a woman was found dead outside her home in Madison, CT. Her death was declared a homicide and to date her murder remains unsolved. Ten years later, a records request was filed on behalf of the deceased woman’s son. The police department denied the request and the requesters appealed to the FOI Commission.

At the hearing, the police department claimed that the entire investigative file was exempt from disclosure as records of a law enforcement agency not otherwise available to the public which were compiled in connection with the investigation of a crime. The police department contended that the disclosure of such records would not be in the public interest because it would be prejudicial to a prospective law enforcement action. However, the FOI Commission found that the police department failed to meet its burden of proof. The Commission found that the department could not identify a “prospective law enforcement action” and could only speculate that any law enforcement action would occur. The police department appealed.

The court affirmed, examining the question: How probable must a prospective law enforcement action be to satisfy the exemption? The court concluded that the exemption requires that a prospective law enforcement action be at least a “reasonable possibility,” not a mere theoretical possibility. The court offered several factors to consider (non-exhaustive and no single factor being determinative): the length of time that has elapsed since the commission of the crime; the length of time that has elapsed since the law enforcement agency last obtained significant new evidence or leads; whether the agency classified the investigation as a cold case or the functional equivalent thereof; the number of investigators currently assigned to the investigation; the amount of time investigators currently commit to the investigation; whether the agency has a suspect and, if so, whether the agency’s suspicion is supported by more than speculation; and whether advances in science or technology, such as advances in DNA analysis, may lead to new evidence or permit the fruitful reexamination of existing evidence. The police department has appealed the lower court decision.

- ***New Jersey:***
In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6
(246 N.J. 462, 252 A.3d 135 (June 7, 2021))

The New Jersey Supreme Court upheld an appellate court’s ruling that the New Jersey Attorney General had the authority to issue two directives that call for the release of the names of law enforcement officers who commit disciplinary violations that result in the imposition of “major discipline”, together with a summary of the misconduct and the sanction imposed. “Major discipline” is defined as termination, demotion, or suspension of more than five days.

After the killing of George Floyd on May 25, 2020 by a Minneapolis police officer, the Attorney General enacted two directives aimed at greater transparency in law enforcement disciplinary proceedings. Directive 2020-5 applies to all law enforcement agencies in New Jersey, including local police departments, while Directive 2020-6 applies to the State Police. Both directives encompass all findings of major discipline after January 1, 2020; however, Directive 2020-6 also applies to major discipline violations dating back twenty years.

Five groups representing state and local officers challenged the directives on multiple grounds in court, including that the directives conflict with the Open Public Records Act (“OPRA”) exemption that protects the confidentiality of personnel records. An appellate court rejected these arguments and found that the Attorney General had the authority to enact both directives.

The Supreme Court agreed, finding that the Attorney General has broad authority over the general supervision of criminal justice in the state. This authority permits the Attorney General to issue the directives for current and prospective violations that result in major discipline. Additionally, the Court ruled that the exemption from disclosure of personnel records in the OPRA does not apply here because OPRA contains an exception to that exemption when personnel records are “required to be disclosed by another law...” Consequently, these records were required to be disclosed by another law and not exempt under the OPRA.

The Court remanded the case to consider whether the doctrine of promissory estoppel should preclude the disclosure of disciplinary records for cases that resolved up to twenty years before the directives were issued. Certain officers had argued that they relied on the promise their names would not be publicly released in resolving past disciplinary accusations.

➤ ***Legislation:***

- ***Virginia:***
House Bill 2004 (Chapter 483), An Act...Relating to the Virginia Freedom of Information Act; Law-enforcement Criminal Incident Information; Criminal Investigative Files.

Among other provisions, the bill adds “criminal investigative files” relating to a criminal investigation or proceeding that is not ongoing to the types of law-enforcement and criminal records required to be disclosed (with certain exceptions). Specifically, the bill provides that:

All public bodies engaged in criminal law-enforcement activities shall provide the following records and information when requested in accordance with the provisions of this chapter... Criminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, initial incident reports, filings through any incident-based reporting system, diagrams, maps, photographs, correspondence, reports, witness statements, or evidence, relating to a criminal investigation or proceeding that is not ongoing.

"Ongoing" is defined as “a case in which the prosecution has not been finally adjudicated, the investigation continues to gather evidence for a possible future criminal case, and such case would be jeopardized by the premature release of evidence.”

❖ Access to Education Records

Below are summaries of two court decisions concerning access to records maintained by public educational institutions:

➤ *Litigation:*

▪ *Ohio:*

State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools et al. ((163 Ohio St.3d 314, 2020-Ohio-5149, 170 N.E.3d 748) (Nov. 5, 2020))

The Ohio Supreme Court held that the Ohio Student Privacy Act (“OSPA”), which precludes the release of information concerning any student attending a public school, applied to protect student records of adult former students, even posthumously.

The plaintiffs, seven local and national media organizations, petitioned for a writ of mandamus, seeking to compel the disclosure of certain school records, including disciplinary records, pertaining to Connor Betts under the Public Records Act (“PRA”). Connor Betts was an adult former student of Bellbrook High School who killed nine people and injured twenty-seven others in a mass shooting in Dayton, Ohio, before being shot and killed by police at the scene. The trial court denied the writ, ruling that the OSPA clearly prohibits the release of public-school records about adult former students without their consent, which makes such records exempt under the PRA.

Ohio’s Supreme Court agreed with the lower court, noting that the OSPA must protect information of former students because it was enacted to bring Ohio’s public schools into compliance with the Family Educational Rights and Privacy Act (“FERPA”). FERPA’s definition of “student” includes any person with respect to whom the educational institution maintains education records or personally identifiable information. The Court stated that “[b]ecause an educational institution may maintain information on former students no longer attending the educational agency or institution, such former students fall under FERPA’s protections.”

The Court went on to say that because the legislature did not carve out a specific exception to the requirement that an adult student must provide written consent for release of personally identifiable information, the OSPA necessarily prohibits disclosure of such information after the death of an adult student.

▪ *Texas:*

Franklin Ctr. for Gov’t v. Univ. of Texas System

(No. 03-19-00362-CV, 2020 WL 7640146 (Tex. App. Dec. 22, 2020))

A Texas court of appeals declined to reach the issue of whether a lower court improperly relied on a claim that the Family Educational Rights and Privacy Act

(“FERPA”) permitted nondisclosure of records pertaining to an independent investigation into the University of Texas System (“UT System”).

The Franklin Center for Government and Public Integrity appealed a lower court’s summary judgment ruling in favor of the UT System that information requested by the Franklin Center related to an independent investigation into the UT System’s admissions policies was exempt from disclosure under the Public Information Act (“PIA”). The appeals court reversed and rendered judgment that some of the requested documents are not exempt from disclosure.

In declining to consider the issue of whether any of the information at issue was exempt from disclosure under FERPA, the court reasoned that there was no issue for it to review. When the UT System submitted the records at issue to the Attorney General, it redacted all information it asserted was related to or identified students, in reliance on FERPA.

The appeals court noted that the U.S. Department of Education Family Policy Compliance Office advised the Attorney General that FERPA does not permit state and local educational authorities to disclose to its office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of its review in the open records ruling process under the PIA. The appeals court noted that it had previously held that determinations about disclosure of FERPA-protected information must be made by the institute from whom it is requested, “neither this Court, nor the trial court, nor the Office of the Attorney General of Texas is the proper entity” to interpret FERPA’s application to an educational institution’s records.

Because the records at issue were provided to the lower court with redactions to FERPA protected information, the court could not have made any determination about whether such information constituted information covered by FERPA. Because it was apparent that the trial court did not base its ruling on the applicability of FERPA, there was no issue for the appellate court to review.

❖ Access to Records Pertaining to Predecisional Deliberations

Below are summaries of two court decisions from Pennsylvania concerning access to records maintained by public agencies wherein it was claimed that such records were exempt from mandatory disclosure by virtue of the predecisional deliberations exemption:

➤ *Litigation*

▪ *Pennsylvania:*

Payne v. Pennsylvania Dep't of Health

(240 A.3d 221, Pa. Commw. Ct. 2020 (Sept. 15, 2020))

A court reversed a final decision of the Office of Open Records (“OOR”) that affirmed the decision of the Pennsylvania Department of Health (“Department”) to deny a request for the scores given by the Department’s Office of Medical Marijuana (“MM Office”) to an application for a medical marijuana grower-processor permit submitted by BC12, LLC (“BC12”). The court concluded that the records were not exempt, as concluded by the OOR, from mandatory disclosure under the “predecisional deliberations exemption” to the Right-to-Know Law (“RTKL”).

Matthew Scott Payne, an attorney for BC12, requested the scores. The Department denied Payne’s request, claiming the requested records were “predecisional deliberations” exempt from disclosure under the RTKL. Payne appealed to the OOR and subsequently to the court.

The court reversed the OOR, stating that the Department failed to meet its burden of establishing the records exemption. To establish the applicability of the predecisional exception to disclosure of the records, “an agency is required to show that the information is: (1) internal; (2) prior to agency decision or course of action; and (3) deliberative in character.” The court concluded that the affidavit submitted to establish the applicability of the exemption failed to establish the required elements of the exemption. Only confidential deliberations are protected as “deliberative”, and the Department had released many score sheets and final scores of successful and unsuccessful applications. Thus, the court was troubled by the claim that the scores were confidential. The court also found that the Department failed to show that a score or scores, as opposed to the evaluation committee’s notes or comments, reveal the MM Office’s deliberation or deliberative process.

The court ordered disclosure of the records and reminded the Department that if there are portions of the requested records that are exempt, such as notes or comments in addition to the scores, the proper remedy would be to release the records and redact those portions that contain exempt information.

- **Office of General Counsel v. Bumsted**
(247 A.3d 71, Pa. Commw. Ct. (Feb. 23, 2021))

The Commonwealth Court of Pennsylvania upheld a decision by the Pennsylvania OOR, ruling that the unsuccessful applications submitted to the Office of General Counsel (“OGC”) for a vacancy on the Commonwealth Court are not necessarily exempt from disclosure under the RTKL.

The LNP Media Group, Inc., and one of its employees (“LNP”) appealed the OGC’s denial of a request for the applications of unsuccessful applicants for appointment to the Commonwealth Court. The OGC denied the request claiming that the applications of applicants not hired by an agency are exempt under the RTKL, and also that the OGC would not disclose records that reveal “the internal, predecisional deliberations of an agency, its officials or employees, or records used in such deliberations.”

The court upheld the OOR, finding that the OGC failed to meet its burden. The court determined the plain language of the RTKL’s exemption for applicants not hired is ambiguous as to whether it refers to judicial appointments. The court reviewed the definitions of “employee”, “appointee”, and “appointment”, and determined that based on the common approved usage of those words, “the individuals who submitted applications for gubernatorial appointment are neither agency employees nor are they individuals who were not hired by an agency.” As such, the exemption from disclosure for applicants not hired by an agency did not apply to such applicants.

Next, the court examined the RTKL’s predecisional deliberations exception. According to the RTKL, an agency must establish three things in order to meet its burden under this exemption: (1) the information is internal to the agency; (2) the information is deliberative in character; and (3) the information is prior to a related decision, and therefore “predecisional.” The agency must explain how the withheld information reflects or shows the deliberative process in which an agency engages during its decision-making.

The court noted that neither party contested that the applications at issue were reviewed and used prior to a related decision, and therefore the third prong of the exemption was satisfied. The court then ruled that these applications could be considered internal to the agency because although they were submitted by third-party applicants, the “OGC maintained the applications with [the] OGC and its designees.” Since the applications were maintained internally by the OGC, it met its burden in satisfying the first prong of the test. Last, the court looked at whether the information was “deliberative in character.” Upon review, the court agreed with LNP that applications are generally “factual in nature, not deliberative” and ruled that the OGC failed to establish its burden under the second prong.

❖ Other Noteworthy Litigation and Legislation

The following cases, executive orders, and legislative proposals highlight noteworthy freedom of information successes, as well as restrictions to access:

➤ *Executive Orders:*

- In response to the COVID-19 pandemic, governors and local officials promulgated executive orders which impacted public records and open meetings laws. The Reporters Committee for Freedom of the Press (www.rcfp.org/covid19) has summarized such measures: <https://docs.google.com/spreadsheets/u/1/d/e/2PACX-1vTyXoIXI2whyI9akO7WT5tL9dzUdwOfFJZC9K-DHu1C7JhmD-R5QM4EMe2k9gmBrY5c3-P08qhs8ijW/pubhtml>.

➤ *Access to Public Records when Agency Impacted by a Catastrophe:*

- *Texas:*
Senate Bill 1225, An Act Relating to the Authority of a Governmental Body Impacted by a Catastrophe to Temporarily Suspend the Requirements of the Public Information Law.

The bill allows a governmental body impacted by a catastrophe to suspend the requirements of the Public Information Law. A “catastrophe” is defined as “a condition or occurrence that directly interferes with the ability of a governmental body to comply with the requirements of [the Public Information Law]. . . .”

➤ *Adequacy of Search Conducted to Identify Responsive Records and Format of Public Record:*

- *Illinois:*
Sherrod v. City of Kankakee
(2020 IL App (3d) 190374-U, 2020 WL 4346851 (July 29, 2020))

A public agency complies with a Freedom of Information (“FOI”) Act request when it demonstrates that it conducted a search reasonably calculated to discover responsive records and when it provides a copy of the requested record in the format available to the agency.

The requester, Antonio Sherrod, was found guilty and received two consecutive life sentences in a murder case. While incarcerated, Sherrod filed several FOI requests seeking records related to the case, including certain video surveillance footage. The City identified and provided records responsive to some of the requests, including certain video footage. The City notified Sherrod that the video, on a VHS tape, would be converted to a DVD. Mr. Sherrod requested the footage be sent on VHS. The City declined and sent Sherrod the DVD.

Sherrod filed a complaint seeking declaratory relief. Sherrod argued that the City failed to adequately search for and provide all responsive records; and that the City failed to properly respond to his request for a copy of the video by providing it to him in DVD format rather than VHS.

On a motion to dismiss, the City argued that it “performed a reasonable search” and that the claim that the City failed to provide the video footage was moot in that it had provided such video via DVD. The court granted the motion to dismiss on the basis that the City provided all responsive records, and that the City conducted an adequate search. Sherrod appealed.

The appellate court affirmed. The question before the court was “whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant...Mere speculation that uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” The court highlighted the affidavit submitted in support of the motion which detailed the departments search for responsive records. The court also noted that no counter affidavit had been submitted by Sherrod.

In addition, the appellate court noted that the City demonstrated it could not copy the video to VHS and that Sherrod did not submit any counter affidavit. Moreover, the City provided the record requested in the format available, thereby complying with the requirements of the FOI Act.

➤ ***Attorney-Client Privilege Exemption:***

▪ ***Maryland:***

Gov't Accountability & Oversight, P.C. v. Frosh

(No. 2602, Sept. Term, 2019, 2021 WL 785797 (Md. Ct. Spec. App. Mar. 1, 2021))

The court ruled that portions of an application for legal services submitted by the Office of the Attorney General for the state of Maryland (the “OAG”) to the State Energy and Environmental Impact Center at the New York University School of Law (the “Impact Center”), are exempt from disclosure pursuant to the attorney-client privilege.

A public interest organization submitted a Public Information Act (“PIA”) request to the OAG for communications between the OAG and the Impact Center. The OAG provided much of the requested records, albeit with redactions. The OAG claimed that the redacted information was exempt from disclosure pursuant to the attorney-client privilege.

Among the records provided was a redacted copy of an application submitted by the OAG to the Impact Center. The Impact Center offers direct legal assistance to

state attorneys general, and funding to recruit and hire New York University fellows to work as special assistant attorneys general. The Impact Center instructed interested attorneys general to prepare an application that described the needs of their respective offices and how additional support would advance their work on behalf of their constituents. The OAG of the State of Maryland applied and was selected for a fellow. The Impact Center also undertook to provide pro bono counsel to the OAG.

The OAG explained that the redacted portions related to professional advice and to the subject-matter about which advice was sought, as well as information about the OAG's litigation strategy. It added that, although it "did not yet have an attorney-client relationship with the Impact Center at the time [of the application], the attorney-client privilege extends, under Maryland law, to confidential preliminary discussions before the attorney-client relationship is formed concerning the subject matter about which legal advice is sought."

The public interest organization appealed the partial denial. The lower court agreed with the OAG that the redacted information was protected by the attorney-client privilege, concluding that the attorney-client privilege applied because the redacted portions related to the OAG's reasons for seeking legal assistance, dealt with the nature of potential services to be provided, and strategies to be implemented. The court also agreed that the attorney-client privilege may apply to communications that occur prior to the establishment of a formal attorney-client relationship.

The appellate court affirmed, concluding that the redacted portions are privileged in that they are "preliminary communications made between a client and its prospective counsel while seeking legal assistance." The court concluded that the OAG and Impact Center met the requirements for an attorney-client relationship in that the OAG clearly sought legal advice and assistance from the Impact Center. The court noted that in the application the OAG explained its interest in retaining the Impact Center with respect to environmental protections and that it sought legal advice from attorneys with such professional competence. Moreover, the OAG did not consent to any waiver of the privilege (by disclosing a redacted copy) and asserting the privilege. Additionally, the court found that the redacted information contained in the application pertained to legal advice or assistance and was made with the intention of confidentiality, including potential legal strategies, reasons for seeking legal assistance, and potential claims the OAG would pursue with the resources available.

➤ *Legislative Records:*

- *Kentucky:*
Chapter 160 (House Bill 312), *An Act Relating to Public Records.*

The bill limits access to certain records in the custody of the Legislative Research Commission or the General Assembly. Under the bill, if a request for such records is “made to the director of the Legislative Research Commission, those records shall not be subject to disclosure. A request for review of the denial of the disclosure shall be made to the Legislative Research Commission, which shall issue its decision.... That decision shall be final and unappealable.”

➤ ***Metropolitan Transportation Open Data Act:***

- ***New York:***
Chap. 482 (S.4625-A/A.1442-B), *An Act to Amend the Public Authorities Law, in Relation to Enacting the Metropolitan Transportation Authority Open Data Act.*

The bill enacts the Metropolitan Transportation Authority (“MTA”) Open Data Act and establishes requirements for the reporting of MTA data online. “Data” is defined in the bill as:

final versions of statistical or factual information that (i) are in alphanumeric form reflected in a list, table, graph, chart or other non-narrative form, that can be digitally transmitted or processed; (ii) are regularly created or maintained by or on behalf of the metropolitan transportation authority, its subsidiaries and affiliates and are controlled by such entities; and (iii) record a measurement, transaction or determination related to the mission of the metropolitan transportation authority, its subsidiaries and affiliates. The term "data" shall not include image files, such as designs, drawings, photos, or scanned copies of original documents; provided, however, that the term "data" shall include statistical or factual information about image files and geographic information system data.

➤ ***Record Retention:***

- ***South Carolina:***
Ballard v. Newberry County
(854 S.E.2d 848 (S.C. Ct. App. 2021) (Jan. 13, 2021))

A court of appeals held that there is no private right of action for a citizen to bring a civil lawsuit against a public body under the Public Records Act (“PRA”) for inadvertently destroying public records, and the Freedom of Information (“FOI”) Act is not violated when a public agency fails to retain public records.

After the filing of a FOI Act request, it was discovered that a local county had inadvertently destroyed emails and text messages as a result of a computer crash. The requester filed suit and alleged that the county violated the PRA and FOI Act

for failing to retain some public records. A lower court found that a private citizen, however, could not bring a civil suit claiming a violation of the PRA, but that the failure to retain the records at issue did constitute a violation of the FOI Act.

The appellate court agreed that there is no civil cause of action for violating the PRA but disagreed that a public agency violates the FOI Act when it fails to retain public records. The court noted that the PRA contains criminal enforcement provisions (e.g., making it a crime to remove, deface, or destroy a record), but the PRA grants no interested party the right to enforce the Act by bringing a civil action. Moreover, no such right is implied either. The court cited precedent wherein the courts have refused to recognize implied rights of action in statutes that describe the government's basic structure and operation. The court also recognized that it is the PRA and not the FOI Act that requires public bodies to manage (e.g., archive and maintain) their public records; and therefore, the requester's claim that the FOI Act was violated by failing to retain the records at issue failed.

➤ ***Records Relating to Applicants for Public Employment:***

▪ ***Colorado:***

Prairie Mountain Publ'g Co., LLP v. Regents of Univ. of Colorado

(2021 COA 26, 2021 WL 822011 (Mar. 4, 2021))

A lower court erred in interpreting the Colorado Open Records Act ("ORA") and the Open Meeting Act to require disclosure of records pertaining to six finalists interviewed by the University of Colorado Board of Regents ("Regents") in its search to replace the University's president, concluding that the Regents was within its right to only disclose records pertaining to the single individual it publicly identified as a "finalist" and ultimately voted to appoint as the president.

After the president announced his retirement, the Regents engaged an outside firm to vet hundreds of applications. The firm vetted the applications and narrowed the list of potential candidates for interviews by the Regents. The Regents interviewed six candidates, and publicly announced one finalist. The one finalist was further vetted, and ultimately the Regents voted to appoint the candidate as president.

A newspaper requested the names and application records of the six candidates interviewed. The University refused to provide responsive records, and the newspaper sued. The lower court ordered disclosure. The University appealed and the appellate court reversed.

On appeal, there was agreement between the parties that disclosure is required only with respect to finalists. However, the issue before the court was who constituted a "finalist" under the ORA. The ORA defines a "finalist" as "an applicant or candidate for an executive position as the chief executive officer of a

state agency, institution, or political subdivision or agency thereof *who is a member of the final group of applicants or candidates made public* pursuant to [statute], and if only three or fewer applicants or candidates for the chief executive officer position possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists” (emphasis added). The court concluded, that by the statute’s plain language, a finalist is “a person who is disclosed by the appointing entity as a finalist— who is ‘made public’.”

The appellate court called this language “confusing and perhaps circular” in that the statute allows the agency “to structure its appointment process to require disclosure of only the single person [it] intends to appoint.” However, the appellate court advised that it is not the job of the courts to “step in and write what some may consider to be better statutes more attuned to concepts of open government.”

Therefore, the appellate court held that the lower court “overstepped its bounds in re-writing the ORA to provide that the [Board of Regents] had a mandatory legal duty to disclose the records of the six interviewees.” The court concluded that only one individual was a finalist and therefore the university acted within its right to decline to disclose records pertaining to the other interviewees.

House Bill 21-1051, An Act Concerning Publicly Available Information About Applicants for Public Employment.

The bill provides that records submitted by or on behalf of an applicant or candidate for an executive officer position who is not a finalist, as defined by statute, is exempt from disclosure. The bill, however, requires that the public agency allow public inspection of the demographic data of a candidate who was interviewed by the agency, or search committee for an executive position, but is not named as a finalist.

➤ ***Residency Requirement:***

- ***Kentucky:***
Chapter 160 (House Bill 312), *An Act Relating to Public Records.*

Under the bill, access to public records is limited to a “resident of the Commonwealth” of Kentucky, defined as: “(a) An individual residing in the Commonwealth; (b) A domestic business entity with a location in the Commonwealth; (c) A foreign business entity registered with the Secretary of State; (d) An individual that is employed and works at a location or locations within the Commonwealth; (e) An individual or business entity that owns real property within the Commonwealth; (f) Any individual or business entity that has been authorized to act on behalf of an individual or business entity...or (g) A news-gathering organization....”

➤ *Adequacy of the Complaint:*

▪ *Maryland:*

Martin v. Baltimore Police Dep't

(No. 24-C-18-001804, 2020 WL 6707650 (Md. App. Nov. 16, 2020))

An appeals court upheld a lower court's ruling that the Baltimore Police Department ("Department") properly responded to a Public Information Act ("PIA") request from the plaintiff, Randall Martin, seeking the "Standard Procedures for the Baltimore City Police Department Protocols for 911 Emergency Calls."

In its written response, the Department provided Martin with two responsive records: (1) the Department's "General Order G-1"; and (2) the Department's "Amendment of General Order G-1." The documents purported to address the "Departmental Radio Communications System – Emergency Response" but did not specifically mention 911 emergency calls. Martin filed a complaint seeking judicial review, contending that the specific records provided by the Department were insufficient. He also clarified that he was only seeking the "standard procedures for the Baltimore City Police Department Protocols for 911 Emergency Calls." The Department filed a motion to dismiss for failure to identify any denial of records that were responsive to his request" and the court granted the motion.

The appellate court agreed because Martin failed to sufficiently allege that the Department had "denied inspection of a public record" as required by the PIA. The court noted that "Mr. Martin's petition for judicial review did not set forth with sufficient particularity that the Department's record production was nonresponsive to his MPIA request, nor did it clarify which documents he specifically sought from the Department. His petition did not specifically allege that the Department's response was deficient because the records produced did not mention 911. This contention was raised for the first time in Mr. Martin's motion for reconsideration."

The court went on to say: "[b]ecause Mr. Martin's motion for reconsideration did not address the sufficiency of the information actually contained in his petition for judicial review, the court did not abuse its discretion in denying the motion."