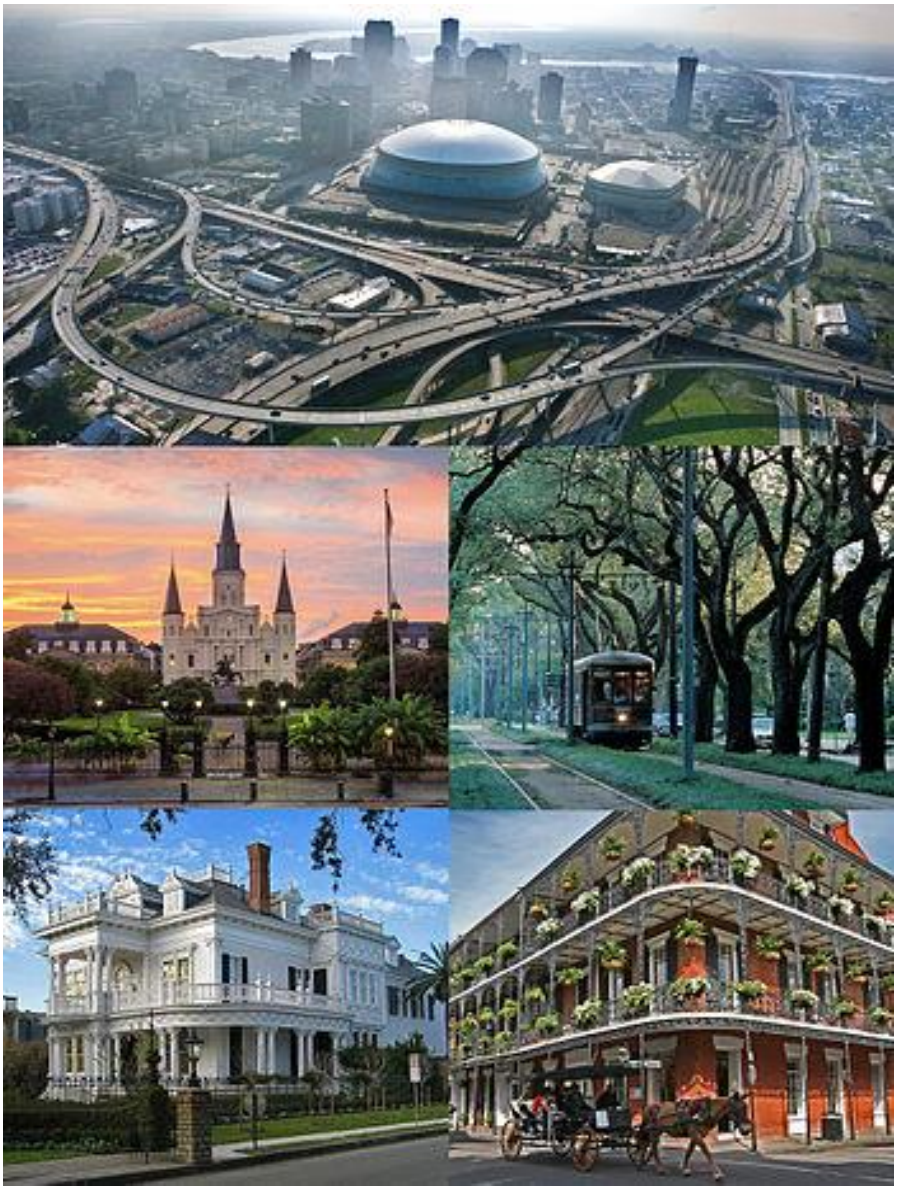
Freedom of Information Litigation and Legislation Update



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Freedom of Information
Litigation and Legislation Update

❖ Access to Law Enforcement Records

Despite the presumption that law enforcement records are public in most states, law enforcement agencies routinely claim that such records are exempt from disclosure and deny access. For instance, law enforcement agencies often withhold records on the grounds that disclosure of certain information would endanger public safety and security. Below are several examples where various courts and legislatures addressed the public's right to access law enforcement records such as police body-worn camera recordings, among others:

- ***Litigation:***

  - ***Arkansas:***
    Arkansas State Police, et. al. v. Daniel E. Wren
    (Docket No. CV-15-828, 2016 Ark. 188, Arkansas Supreme Court) (April 28, 2016):

    In a 5-2 decision, the Arkansas Supreme Court ruled that accident reports from the Arkansas State Police must be open to the public without redaction of personal information.

    The State Police contended that the federal Driver's Privacy Protection Act (DPPA) of 1994, which regulates the disclosure of personal information contained in the records of state motor-vehicle departments, required that personal identifying information be redacted from accident reports. However, the Supreme Court noted that "Congress did not intend 'information on vehicular accidents' to be included within the [DPPA's] prohibition of disclosure of 'personal information'…. [I]t is clear that a vehicle-accident report is not included in the definition of 'motor vehicle record,' regardless of whether, as a matter of convenience, some of the information included in an accident report may be taken from or verified by a database maintained by the Office of Motor Vehicles."

  - ***Connecticut:***
    Commissioner, Department of Emergency Services and Public Protection v. Freedom of Information Commission
    (Docket No. CV15-6029797-S, Connecticut Superior Court, Judicial District of New Britain) (April 8, 2016), *appeal to the Appellate Court* filed on April 28, 2016:

    The Superior Court ruled that materials owned by the shooter in the December 14, 2012 murders at the Sandy Hook Elementary School, which were seized pursuant to search warrants by the state police during its investigation, were not public records subject to disclosure.

    The Court found that the Freedom of Information Act conflicts with those statutory provisions governing the return of property seized by warrant "by providing for

public disclosure of documents that were private property before seizure by the police and that a court would ordinarily order returned to the rightful owner by the end of a criminal case." The Court also indicated that "there are a myriad of [] circumstances in which the state will not disclose any particular item of seized evidence [*e.g.*, state decides not to prosecute, defendant enters diversionary program, defendant enters a guilty plea and there is no trial]…. In this context, the court, despite the commission's interpretation, ultimately has a mandatory, statutory duty to return the seized property, unless it is contraband or otherwise unlawful to possess, to the owner before anyone from the public will have an opportunity to see it. In these situations, the seizure statutes act as a shield from public disclosure." In addition, the Court noted that "[t]he better view is that the seizure statutes in Title 54 act as a shield from public disclosure of all seized property not used in a criminal prosecution…. In that way, there will be a consistent statutory scheme that does not render the state seizure statutes ineffective or meaningless."

- ***Louisiana*:**
  Emily H. Posner v. Sid J. Gautreaux, III
  (Docket No. 2015 CA 1196, Louisiana Court of Appeal, First Circuit)
  (March 3, 2016):

  The Court of Appeals ruled that the East Baton Rouge Sheriff's Office failed to prove that certain information redacted from a criminal report concerning a murder investigation was protected by the exception for "confidential sources" and not subject to disclosure.

  The Court found that "[w]hile Captain Morris testified that departmental policy provides that if a report is marked confidential that means the information contained in the report, including the name of the person providing the information, is to be kept confidential, he never testified that the designation is made pursuant to the express request of the informant to keep his or her identity confidential. Nor do we discern any such request from the redacted reports in the record before us…. [T]here must be some showing that in providing information, the informant requested that his or her identity be kept secret or confidential and such a showing may even be made by the law enforcement agency asserting the privilege…. However, short of such a showing, information otherwise designated as confidential by a law enforcement agency is not entitled to invoke the privilege provided under [the Louisiana Public Records Act] for non-disclosure."

- ***New Jersey:***
  North Jersey Media Group Inc., d/b/a Community News v. Bergen County Prosecutor's Officer, et. al.
  (Docket No. A-2393-13T3, New Jersey Superior Court, Appellate Division)
  (August 31, 2016):

  The Court held that "an agency may 'neither confirm nor deny' the existence of records in response to an [Open Public Records Act] request when the agency (1) relies upon an exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) presents a sufficient basis for the court to determine that the claimed exemption applies."

Here, a news organization submitted a request to a prosecutor's office for records relating to a person who was not charged with any crime. The prosecutor's office declined to confirm or deny the existence of records responsive to their request.

The Court concluded that "records relating to a person who has not been arrested or charged with an offense are entitled to confidentiality based upon long-established judicial precedent" and that "an exemption exists under OPRA that precludes a custodian of records from disclosing whether such records exist in response to an OPRA request." The Court noted that "[b]efore OPRA was enacted, judicial decisions recognized the need to maintain 'a high degree of confidentiality' for records regarding a person who has not been arrested or charged. The confidentiality accorded such information promotes both the integrity and effectiveness of law enforcement efforts for the benefit of the public at large. In addition, the grant of confidentiality protects the privacy interest of the individual who, lacking an opportunity to challenge allegations in court, would face irremediable public condemnation."

In addition, the Court concluded that the prosecutor's office "made a sufficient showing to avail itself of this exemption and that access is also properly denied under the common law right of access."

- ***New York:***
  <u>In re Michael Grabell v. New York City Police Department</u>
  (32 N.Y.S.3d 81, 139 A.D.3d 477, New York Supreme Court, Appellate Division, First Department) (May 10, 2016):

  Petitioner filed a records request with the New York Police Department (NYPD) seeking various documents pertaining to Z-backscatter vans. Such vans are mobile X-ray units that scan vehicles or buildings for evidence of explosives, drugs and other materials. The NYPD denied the request. On appeal, the New York County Supreme Court ordered the NYPD to produce certain records that did not relate to any ongoing investigations, among others. The NYPD appealed the lower court's decision.

  The Appeals Court found that the lower court "properly directed NYPD to disclose tests or reports regarding the radiation dose or other health and safety effects of the vans." The Court noted that "information about the safety risks of backscatter technology is already widely available to the public" and found that "release of NYPD's records containing health information about the vans would neither reveal nonroutine investigatory techniques or procedures, nor endanger public safety."

  However, the Appeals Court found that the lower court "erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of vans. These materials are exempt from disclosure under FOIL's law enforcement and public safety exemptions...." The Court found that NYPD "articulated a 'particularized and specific justification for not disclosing these records…." The NYPD's Deputy Commissioner of Counterterrorism explained that "in light of the ongoing threat of terrorism, releasing information describing the strategies, operational tactics, uses and numbers of the vans would undermine their

deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack…. [D]isclosing information about the locations in which NYPD has used the vans in the past, as well as the times and frequency of their deployment, would allow terrorists to infer the inverse, namely, locations and times when NYPD does not use them, and would permit a terrorist to conform his or her conduct accordingly."

- ***New York:***
  In re Talib W. Abdur-Rashid v. New York City Police Department, et. al.
  (New York Supreme Court, Appellant Division, First Department) (June 2, 2016):

  A second court of appeals affirmed the New York City Police Department (NYPD)'s use of the *Glomar* response to deny access to records relating to the surveillance of activities of certain Muslim activists.

  The Court noted that the Freedom of Information Law (FOIL) "does not prohibit respondents from giving a Glomar response to a FOIL request – that is, a response 'refus[ing] to confirm or deny the existence of records' where, as here, respondents have shown that such confirmation or denial would cause harm cognizable under a FOIL exception…." The Court also found that the respondents had met their burden to "'articulate particularized and specific justification' for declining to confirm or deny the existence of the requested records, which sought information related to NYPD investigations and surveillance activities…. In particular, respondents showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions…. The affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts."

  The Court further noted that "[b]y this decision, we do not suggest that any FOIL request for NYPD records would justify a Glomar response…." However, "[i]n view of the heightened law enforcement and public safety concerns identified in the affidavits of NYPD's intelligence chief, Glomar responses were appropriate here."

- ***Rhode Island:***
  Providence Journal Company, et. al. v. Rhode Island Department of Public Safety
  (Docket No. 2014-182-Appeal, Rhode Island Supreme Court) (April 11, 2016):

  The Supreme Court, affirming a Superior Court judgment, held that the disclosure of certain law enforcement records constituted an unwarranted invasion of personal privacy.

  The records related to an investigation of an underage drinking incident at property owned by then-Governor, Lincoln Chafee. At the conclusion of the investigation, the governor's son, Caleb Chafee, was charged with furnishing or procurement of alcoholic beverages for underage persons, to which he pled nolo contendere, and received a $500 civil penalty. In its request, the Journal noted that it's in the public

interest to know how the situation was handled regarding the governor's son. The Court found, however, that "here, Caleb's privacy interest created a barrier that the public interests in disclosure as asserted by the Journal could not overcome."

The Court noted that "[w]hen the release of sensitive personal information is at stake and the alleged public interest is rooted in government wrongdoing, we do not deal in potentialities-rather, the seeker of information must provide some evidence that government negligence or impropriety was afoot. Because the Journal failed to provide any such evidence, the public interest can, at best, be characterized merely as an uncorroborated possibility of governmental negligence or impropriety. Such a tenuous 'public interest' is insufficient to mandate disclosure under the Favish standard that we today adopt and thereby imbue upon the [Rhode Island Access to Public Records Act]." The Court also observed that "[w]hile the media coverage [of the incident] may have made known to the public the existence of the charge, it certainly did not reveal the intimate details underlying the charge. The privacy at stake flows not from the widespread knowledge of the fact that Caleb was charged, but, instead, from the information and personal details that may have been discovered from the police investigation."

- ***Washington:***
  John Does 1 through 15, et, al. v. King County, et. al.
  (Docket No. 72159-3-I, Washington Court of Appeals, Division I)
  (December 28, 2015):

  A Washington Court of Appeals ruled that video surveillance footage related to the tragic shootings on the Seattle Pacific University campus in June 2014 must be disclosed under the Public Records Act.

  After the shootings, news media organizations and an individual made records requests in which they sought copies of the University's surveillance footage that was in the possession of the Seattle Police Department and the King County Prosecuting Attorney's Office. The City and the County intended to release the footage with the students' faces pixelated in order to redact their identities. Several unnamed students who were victims and witnesses in the surveillance footage, along with the University, objected to disclosure and filed suit to prevent the release of the footage.

  The University argued that, because the majority of the surveillance footage did not show any government action, the videos were not public records. The Court disagreed, noting that here "a government agency obtained privately generated information for the purpose of investigating a crime. [The Public Records Act] does not, by its plain language, limit the definition of '[p]ublic record' to those showing only direct government action (e.g., a filmed traffic stop), but rather uses broad language to capture 'information *relating* to the conduct of government or the performance of any governmental or proprietary function prepared."

  Among other exemptions, the Court also rejected the claim that the footage was protected by the "law enforcement" prong of the "investigative records" exemption. The Court found that the University and students failed to offer a persuasive reason as to why disclosure of the footage would be harmful in this case. The Court noted that

the University "makes a broad policy argument that there is the possibility that disclosure will dissuade it from voluntarily cooperating with law enforcement" and that the students failed "'to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement.'"

- ***Legislation:***

  - ***Arizona*:**
    House Bill 2383, *An Act…Relating to Public Records.*

    The bill limits access to law enforcement records depicting witnesses and crime victims, and personal identifying information of crime witnesses.

    The bill requires that in a special action for the release of any record created or received by or in the possession of a law enforcement or prosecution agency that relates to a criminal investigation or prosecution and that visually depicts the image of a minor witness or victim, the petitioner must establish that the public's interest in disclosure outweighs the witness' or victim's right to privacy. In addition, the bill prohibits the disclosure of the personal identifying information of a witness to a crime contained in records created or received by a law enforcement or prosecution agency and that are related to a criminal investigation or prosecution unless (1) the witness consents in writing to disclosure; (2) a court orders the disclosure; or (3) the witness' address is the location where the crime occurred. The bill does not affect any records that are transmitted between law enforcement and prosecution agencies, a court or court clerk, or any provision of law governing the discovery process or conduct of trials. (Signed).

  - ***California:***
    Assembly Bill No. 2792/Chapter 768, *An Act…Relating to Local Government. (The Transparent Review of Unjust Transfers and Holds (TRUTH) Act)*

    The bill provides, in part, that: "All records relating to [the United States Immigration and Customs Enforcement (ICE)] access provided by local law enforcement agencies, including all communication with ICE, shall be public records for purposes of the California Public Records Act…including the exemptions provided by that act and, as permitted under that act, personal identifying information may be redacted prior to public disclosure. Records relating to ICE access include, but are not limited to, data maintained by the local law enforcement agency regarding the number and demographic characteristics of individuals to whom the agency has provided ICE access, the date ICE access was provided, and whether the ICE access was provided through a hold, transfer, or notification request or through other means." In addition, "[b]eginning January 1, 2018, the local governing body of any county, city, or city and county in which a local law enforcement agency has provided ICE access to an individual during the last year shall hold at least one community forum during the following year, that is open to the public, in an accessible location, and with at least 30 days' notice to provide information to the public about ICE's access to individuals and to receive and consider public comment…." (Signed).

- ***Indiana:***
  House Enrolled Act No.1019*, An Act to Amend the Indiana Code Concerning State and Local Administration.*

  Enrolled Act No.1019 establishes the procedure for the retention and release of law enforcement recordings under the public records law.

  The bill sets forth the following requirements, among others: an unaltered, unobscured recording must be retained by a public agency that is not the state or a state agency for 190 days after the date of the recording, and for 280 days by a state agency, with exceptions; a request must be in writing and identify the recording with reasonable particularity (*i.e.*, date and approximate time of the law enforcement activity, specific location where activity occurred and at least the name of one individual, other than a law enforcement officer, who was directly involved in the activity); the fees for a copy of the recording may not exceed $150; and obscuring requirements prior to the release of the recording. In addition, a public agency must permit all persons to inspect and copy a recording unless the public agency finds, after due consideration of the facts of the particular case, that access to or dissemination of the recording: (1) creates a significant risk of substantial harm to any person or to the general public; (2) is likely to interfere with the ability of a person to receive a fair trial; (3) may affect an ongoing investigation; or (4) would not serve the public interest. (Signed).

- ***Kansas:***
  Senate Bill 22*, An Act Concerning Public Records Relating to Audio and Video Recordings Using a Body Camera or a Vehicle Camera….*

  The bill provides that every audio or video recording made and retained by law enforcement using a body camera or a vehicle camera shall be considered a "criminal investigation record," which are exempt from disclosure. Under the bill, a law enforcement agency must allow the following individuals, upon request, to listen to the audio recording or to view the video recording: (1) a person who is a subject of the recording; (2) a parent or legal guardian of a person under 18 years of age who is a subject of the recording; (3) an attorney for a person who is a subject of the recording; and (4) an heir at law, an executor or an administrator of a decedent, when the decedent is the subject of the recording. (Signed).

- ***Louisiana*:**
  Senate Bill 398, Act No. 525*, An Act…Relative to Public Records….*

  The bill exempts from disclosure video or audio recordings generated by law enforcement officer body-worn cameras that are found by the custodian to violate an individual's reasonable expectation of privacy. Such recordings however must be disclosed upon a determination and order from a court. The bill also provides that all requests for body-worn camera recordings must be incident specific and include reasonable specificity as to the date, time, location or persons involved. The custodian may deny a request not containing reasonable specificity. (Signed).

- ***Minnesota:***
  S.F. No. 498, ***An Act Relating to Data Practices….***

  The bill regulates a law enforcement agency's use of "portable recording system data," including, but not limited to establishing requirements for the retention and release of portable recording system data. A "portable recording system" is defined as "a device worn by a peace officer that is capable of both video and audio recording of the officer's activities and interactions with others or collecting digital multimedia evidence as part of an investigation."

  Under the bill, data collected by a portable recording system is private data on individuals or nonpublic data, with exceptions (*e.g.,* when data documents the discharge of a firearm by a peace officer in the course of duty or the use of force by a peace officer that results in substantial bodily harm or if a subject of the data requests it be made accessible to the public (also with exceptions).

  In addition, "[a]n individual who is the subject of portable recording system data has access to the data, including data on other individuals who are the subject of the recording. If the individual requests a copy of the recording, data on other individuals who do not consent to its release must be redacted from the copy. The identity and activities of an on-duty peace officer engaged in an investigation or response to an emergency, incident, or request for service may not be redacted, unless the officer's identity is subject to protection…." (Signed).

- ***Missouri:***
  Senate Bill 732, ***Act Modifies Numerous Provisions Relating to Public Safety.***

  The bill limits access to mobile video recordings in a nonpublic location, as well as access to crime scene photographs. A "nonpublic location" is defined as "a place where one would have a reasonable expectation of privacy including, but not limited to, a dwelling, school, or medical facility."

  Under the bill, mobile video recordings are "authorized to be closed, except that any person who is depicted in the recording or whose voice is in the recording, a legal guardian or parent of such person if he or she is a minor, a family member of such person within the first degree of consanguinity if he or she is deceased or incompetent, an attorney for such person, or insurer of such person may obtain a complete, unaltered, and unedited copy of a recording…upon written request."

  In addition, under the bill "crime scene photographs and video recordings, including photographs and video recordings created or produced by a state or local agency or by a perpetrator or suspect at a crime scene, which depict or describe a deceased person in a state of dismemberment, decapitation, or similar mutilation including, without limitation, where the deceased person's genitalia are exposed, shall be considered closed records and shall not be subject to disclosure…provided, however, that this section shall not prohibit disclosure of such material to the deceased's next of kin or to an individual who has secured a written release from the next of kin. It shall be the responsibility of the next of kin to show proof of the familial relationship." (Signed).

- ***New Hampshire:***
  House Bill 1584-FN, ***An Act Relative to Body-Worn Cameras for Law Enforcement Officers.***

  The bill regulates a law enforcement agency's use of body-worn cameras, and exempts such recordings from the wiretapping and eavesdropping statute, and from the right-to-know law, with exceptions. The bill provides, in relevant part, that video and audio recordings made by a law enforcement officer using a body-worn camera are exempt from disclosure except where such recordings depict any of the following: (1) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure; (2) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure; or (3) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure. (Signed).

- ***North Carolina:***
  House Bill 972, Ch. SL 2016-88, ***An Act to Provide that Recordings Made by Law Enforcement Agencies are not Public Records….***

  The bill exempts police dashboard camera and body-worn camera recordings from disclosure, with exceptions. The custodial law enforcement agency may disclose a recording to the following: (1) a person whose image or voice is in the recording; (2) a personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure; (3) a personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording; (4) a personal representative of a deceased person whose image or voice is in the recording; and (5) a personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.

  The law enforcement agency shall disclose only those portions of the recording that are relevant to the person's request. The agency may consider any of the following factors in determining if a recording is disclosed: (1) if the person requesting disclosure of the recording is a person authorized to receive disclosure; (2) if the recording contains information that is otherwise confidential or exempt from disclosure or release under state or federal law; (3) if disclosure would reveal information regarding a person that is of a highly sensitive personal nature; (4) if disclosure may harm the reputation or jeopardize the safety of a person; (5) if disclosure would create a serious threat to the fair, impartial, and orderly administration of justice; and (6) if confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential or criminal investigation.

  The requester must make a written request that states the date and approximate time of the activity captured in the recording or otherwise identify the activity with reasonable particularity sufficient to identify the recording to which the request refers.

A person receiving a copy of the requested recording cannot record or copy such recording.

- ***Pennsylvania:***
  House Bill 1310, Act No. 30, ***An Act…Providing for Prohibited Release of Information.***

  The bill provides that in response to a request under the Right-to-Know-Law, a public safety answering point (PSAP) may not release individual identifying information of an individual calling a 911 center, victim or witness. This provision does not apply if the PSAP or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. In addition, under the bill "identifying information" includes name, telephone number and home address. The term does not include the location of the incident, unless the location is the caller's, victim's or witness' home address or the disclosure of the location would compromise the identity of the caller, victim or witness; and (2) the street block identifier, the cross street or the mile marker nearest the scene of the incident. (Signed).

❖ 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, including, but not limited to, the right to record such meetings:

- ***Litigation:***

  - ***Iowa:***
    Peg Hutchison, et. al. v. Douglas Shull, et. al.
    (Docket No. 14-1649, Iowa Supreme Court) (March 18, 2016):

    The Supreme Court held that the County and its Board of Supervisors violated the Open Meetings Law by improperly deliberating through serial meetings.

    The Board of Supervisors decided to hire an administrator to assist them with the reorganization of the county government. The administrator met with the board members separately, but acted as a conduit for discussions that led to recommendations which were presented for the first time at a public meeting when such recommendations were adopted by the board.

    The Supreme Court concluded that the definition of "meeting" under the Act "extends to all in-person gatherings at which there is deliberation upon any matter within the scope of the policy-making duties of a governmental body by a majority of its members, including in-person gatherings attended by a majority of the members by virtue of an agent or a proxy."

    The Court found that "the supervisors intentionally developed a 'sophisticated methodology of communicating effectively with one another' about county business outside the public view 'by using Administrator Furler as a conduit'…. [T]he supervisors deliberately used Administrator Furler to flesh out the details of the reorganization plan and resolve conflicts among themselves about how best to accomplish the reorganization outside the public view." Further, the Court found that using the administrator "to conduct shuttle diplomacy and deliberate county business worked so well for the supervisors, they managed to implement the restructuring of the county government without deliberating a single detail of the reorganization plan during a public meeting."

  - ***Michigan:***
    Detroit Free Press, Inc., et. al. v. University of Michigan Regents
    (Docket No. 328182, Michigan Court of Appeals) (April 26, 2016):

    The Court of Appeals held that the University of Michigan Board of Regents, which is a constitutional corporation and public body responsible for governing the University of Michigan pursuant to Article 8, §§4 and 5 of the Michigan Constitution, is only required to hold its "formal meetings" in public. The Michigan Constitution

permits the defendant to hold "informal meetings" in private. However, the Court noted that the "plaintiffs need not be concerned that this gives [the] defendant completely unfettered discretion: our Supreme Court has also determined that although defendant and similarly situated boards are entitled to a great deal of deference, such boards' determination of what constitutes 'formal' and 'informal' is not wholly insulated from judicial review."

- ***Missouri:***
  Progress Missouri, Inc., et. al. v. Missouri Senate, et. al.
  (WD 79459, Missouri Court of Appeals, Western District) (June 28, 2016):

  The Western District Court of Appeals, affirming a lower court's dismissal of a lawsuit filed by Progress Missouri, ruled that the public has no right to record open public meetings of the Missouri Senate committees. The Court held that, contrary to the plaintiff's assertions, the Missouri Sunshine Law "does not state that all attendees must be allowed to [personally] record meetings so long as doing so is not disruptive; rather, it grants discretion to each individual public body affected by the law to define for itself, through guidelines, how best to enforce the law while minimizing disruption to the meetings of that particular public body." According to the Court, the plaintiff's argument "ignores that Missouri's Sunshine Law gives authority to the Senate to promulgate rules to enforce the law and, simply, fails to allege or otherwise show how the rules put in place by the Senate [*i.e.,* Senate Rule 96] exceed the parameters of that authority." The Court also noted that the Senate directed Senate communications to record committee meetings and to make those recordings available to the public.

- ***New Jersey:***
  New Jersey Foundation for Open Government, Inc. v. Little Egg Harbor Fire District #3 Records Custodian
  (Docket No. L-714-16, Superior Court of New Jersey, Ocean County)
  (May 31, 2016):

  The Court issued a consent order that requires the Board of Fire Commissioners of the Little Egg Harbor Fire District #3, prior to entering into closed session, to pass a resolution that separately describes each topic that will be privately discussed in closed session and to announce those descriptions orally to the public (*e.g.,* stating the specific litigation, contract and personnel matters to be discussed). The Board is also required to keep minutes, including closed meeting minutes, which are "reasonably comprehensible" and include the beginning time, ending time, members present and location/place of each meeting.

- ***New York:***
  News 12 Company, et. al. v. Hempstead Public Schools Board of Education
  (No. 2016-26121, 6871/15, New York Supreme Court, Nassau County)
  (April 12, 2016):

  The trial court ruled that the School Superintendent improperly prohibited local reporters from attending a meeting at the Hempstead High School.

The school argued that the meeting was a "community forum" for the purposes of discussing the "transformation plans" for the School District's high and junior high schools. In addition, the school argued that no school board business was conducted and/or discussed, a quorum of the School Board was not in attendance, and the press was not excluded from attending, only their use of cameras and media equipment was prohibited.

The Court noted that "the subject meeting was clearly a response to the statutory requirement under Education Law…requiring that a public meeting be held where the community, including the parents and guardians of the students in the District, were to be so informed as to the recent designations of the subject schools and the plans regarding the same. Although the Public Officers Law and its Open Meetings Law arguably do not apply to the case at bar, the recently enacted statutory provision renders the subject meeting as a public meeting."

The Court also noted that the superintendent "opened the nonpublic forum for a convocation of the general public and/or community to discuss a matter of public interest. Although the subject was relative to issues concerning the subject schools, the forum, contrary to the [School's] argument, was not being used for school purposes."

- ***Ohio:***
  Adam White v. David King, et. al.
  (Opinion No. 2016-Ohio-2770, Ohio Supreme Court) (May 3, 2016):

  The issue on appeal was whether a series of emails between and among a majority of the members of a public body relating to drafting a response to a newspaper editorial, which culminated in the publication of a response and was ratified at a public meeting qualified as a "meeting" for purposes of the Open Meetings Act.

  Following a board member's independent investigation of allegations of improper expenditures by two athletic directors, the Board revised its communications policy to require that all communications between Board members and school staff first pass through the district superintendent or district treasurer. A newspaper printed an editorial criticizing the Board's decision to change its policy. Through a series of emails, the Board decided to draft a response to the editorial.

  Under the Act, the term "meeting" means "any prearranged discussion of the public business of the public body by a majority of its members." The Court found that the Act "prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication. The fact that the discussion in this case occurred through a series of e-mail communications does not remove that discussion from the purview of [the Act]." Further, the Court found that "[t]he distinction between serial in-person communications and serial electronic communications via e-mail for purposes of [the Act] is a distinction without a difference because discussions of public bodies are to be conducted in a public forum, and thus, we conclude that in this instance, a prearranged discussion of the public business of a public body by a

majority of its members through a series of private e-mail communications is subject to [the Act]."

- ***South Carolina:***
  Stephen George Brock v. Town of Mount Pleasant
  (Opinion No. 27621, South Carolina Supreme Court) (April 13, 2016):

  The Supreme Court ruled that the Town of Mount Pleasant technically violated the Freedom of Information Act by taking unnoticed action at special meetings following executive sessions.

  The Town had issued agendas listing an executive session but did not indicate that the Town Council would take action following the executive session. The Supreme Court recognized that "unnoticed items may be added to an executive session discussion at the time of a meeting…. However, after the executive session concludes and the public body reconvenes in open session, any action taken or decision made must be properly noticed and, in the case of special meetings, such items may not exceed the scope of the purpose for which the meeting was called. In so ruling, we do not suggest that an agenda must specifically state the action to be taken; rather, it is sufficient for the agenda to reflect that, upon returning to open session, action may be taken on the items discussed during the executive session."

- ***Advisory Opinions:***

  - ***D.C. Office of Open Government (OOG):***
    4.18.16 Open Meetings Act Complaint against D.C. Housing Authority Board
    (April 18, 2016):

    In a March 8, 2016 Advisory Opinion, the OOG had already found the D.C. Housing Authority Board ("Housing Authority") in violation of the Open Meeting Act (OMA) for failure to: provide full records of meeting session minutes, make meeting minutes easily accessible to the public and to address and answer earlier complaints filed with the OOG. The OOG also found that the Housing Authority had willfully and recklessly disregarded the OMA. The allegation at issue in the above-captioned matter was whether the Housing Authority had also met in closed/executive sessions in violation of the OMA.

    The OOG investigated whether the Housing Authority violated the OMA by failing to notice pre-board monthly meetings, among others. Specifically, with respect to the pre-board monthly meetings, which occurred on the same day as regular monthly meetings, the OOG found that such meetings constituted meetings under the OMA. They found that a quorum of the Board members would gather to discuss and consider items within the purview of the Board's authority and that such meetings were closed to the public. The pre-board monthly meetings were in effect "closed/executive sessions" of the Board and violated the Act.

    The D.C. Housing Authority made several recommendations for changes (*e.g.*, timely publish notices, draft and final meeting agendas and open session meeting minutes,

adhere to statutory protocol relating to closed/executive sessions) and required retraining for staff.

- ***Legislation:***

  - ***Colorado:***
    House Bill 16-1259*, An Act concerning Local District Junior Colleges, and, in connection therewith, Changing the Term Local District Junior College to Local District College.*

    The bill allows the board of trustees of Colorado Mountain College, a public community college, to take action without holding a meeting, with exceptions. The bill requires the board secretary to provide full and timely notice of the proposed action to the public, and allows any member of the board or general public to request that the board discuss the proposed action in a regular or special board meeting. In addition, electronic mail or other written communications used to provide notice or to discuss the proposed action are subject to the open meeting requirements. (Signed).

  - ***Wyoming:***
    SF 0068, SEA No. 058, *An Act relating to Administration of Government…*

    The bill defines the Consensus Revenue Estimating Group (CREG) as one or more representatives of the legislative and executive departments of state government, created by agreement of the governor and the legislature to estimate and forecast revenues available to the state for appropriation. The bill also provides that any records of CREG that disclose information considered by, or deliberations or tentative decisions of, the group is not subject to disclosure. (Signed).

❖ Is it an Entity Subject to Public Records & Public Meeting Laws?

Access to an entity's records and meetings is guaranteed only if the entity that maintains the records or conducts the meetings in question is a "public agency" or a functional equivalent. Some entities clearly are public agencies, but others are not. Below are summaries of court decisions and enacted legislation addressing whether and to what extent certain entities, such as non-profit organizations, are subject to freedom of information laws:

- ***Litigation:***

  - ***Indiana:***
    ESPN, Inc, et. al. v. University of Notre Dame Police Department (Docket No. 71S05-1606-MI-359, Indiana Supreme Court) (November 16, 2016):

    The Supreme Court ruled that the campus police department at the University of Notre Dame is not a public agency subject to the Access to Public Records Act (APRA).

    According to the Court, "[t]he mere fact that the [University's] trustees have appointed police officers to protect its campus and who perform some [law-enforcement functions]…does not make the Department itself a governmental entity subject to APRA. The Court also noted that "a grant of arrest powers enabling university police departments to keep order on their private campuses does not transform those officers or the trustees who oversee them into public officials and employees subject to APRA."

    Notably, while the case was pending in the Court of Appeals, the Indiana legislature passed a bill (House Enrolled Act No. 1022) providing that certain records of a private university police department relating to arrests or incarcerations for criminal offenses are public records. The bill, however, allowed the police departments to withhold investigatory records and to redact the name of a crime victim (unless authorized by the victim). The Governor vetoed the bill, expressing that "[w]hile House Enrolled Act 1022 provides for limited disclosure of records from private university police departments, it would limit the application of the Access to Public Records Act following the Court of Appeals decision and result in less disclosure, therefore I have decided to veto the bill."[1]

  - ***Louisiana:***
    New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals (Docket No. 2015-CA-1351, Louisiana Court of Appeal, Fourth Circuit) (September 7, 2016):

[1] *See* Press Release, dated March 24, 2016, "Governor Pence Vetoes Bill that Would Limit Transparency at Private Universities," (http://www.in.gov/activecalendar/EventList.aspx?eventidn=244246&view=EventDetails&information_id=240075).

The Court of Appeals held that the Louisiana Society for the Prevention of Cruelty to Animals (LSPCA) is a quasi-public nonprofit corporation subject to the Public Records Law.

In reaching its ruling, the Court considered the following: "[B]y contract, LSPCA serves as the municipal instrumentality to provide mandated animal control services; in other words, the LSPCA is invested with the authority to investigate compliance with municipal code violations related to animals and take relevant action…. [Also,] the LSPCA receives an annual compensation of almost two million dollars…derived from public funds…. [In addition,] the City provided vehicles to the LSPCA and continues to fuel and maintain these City-provided vehicles. Finally, in wearing uniforms while investigating municipal violations, the appearance of the LSPCA is clearly designed to indicate a quasi-official status and, in serving municipal citations and appearing in municipal court regarding municipal code violations, the LSPCA officers clearly operate under the color of City authority. Thus, the old adage about walking and talking like a duck appears applicable here: the LSPCA performs municipal functions on behalf of the municipal government, and, in so doing, is both compensated by the municipality and acts under the auspices of the municipality."

- ***Washington*:**
  Woodland Park Zoo a/k/a Woodland Park Zoological Society v. Alyne Fortgang
  (Docket No. 72413-4-I, Washington Court of Appeals, Division I)
  (February 1, 2016):

  The Court ruled that the Woodland Park Zoological Society (WPZS) was not the "functional equivalent" of a government agency subject to the Public Records Act. To achieve such ruling, the Court applied a four-factor balancing test for determining whether a nongovernment entity is the functional equivalent of a public agency. The Court noted as follows:

  (1) Government function: WPZS exclusively manages and operates the Zoo, but "[o]perating a zoo does not necessarily implicate any function unique to government…. Fortgang fails to point to any Zoo operation that resembled a 'core government function' that could not be wholly delegated to the private sector…."
  (2) Government funding: "Public funding comprises a minority of WPZS' revenue. Washington courts have consistently concluded that the government funding factor weighs in favor of applying the PRA only when a majority of the entity's funding comes from the government."
  (3) Government control: "The City retains some oversight over WPZS via contract [but]… nothing Fortgang points to demonstrates sufficient City control over WPZS' exclusive authority to manage and operate the Zoo."
  (4) Origin of the entity: "[A] group of private citizens formed WPZS to support the zoo… WPZS has always remained a private nonprofit organization incorporated under Washington laws and registered with the Secretary of State as a charity."

  On balance, the four-factor test weighed against concluding that WPZS was the functional equivalent of a government agency.

- ***Advisory Opinion:***

  - ***D.C. Office of Open Government (OOG):***
    #OOG-0006, 6.28.16, Open Meetings Act Complaint against Office of the State Superintendent of Education (July 15, and July 21, 2016):

    A complaint was filed with the OOG against the Office of the State Superintendent of Education (OSSE) alleging that the OSSE convened a meeting of a working group or task force to review the uniform per-pupil school funding formula in violation the Open Meetings Act (OMA). The Uniform Per Pupil Student Funding Formula Working Group (UPSFF) was charged with studying the actual costs of education in consultation with District of Columbia Public Schools and the Public Charter schools, determining funding levels for public and charter school students, and then forwarding its recommendations to the D.C. Mayor to be included in a report issued biennially to the D.C. Council. At issue was whether such working group was a "Public Body" bound by the requirements of the OMA. The OOG considered "the importance of the work of the task force and its broad impact…on the public and educational agencies" and found that the UPSFF was a public body subject to the OMA.

  - ***Tennessee Office of the Attorney General:***
    Opinion No. 16-33, Public Records – Tennessee State Museum Foundation
    (August 26, 2016):

    The Tennessee Attorney General concluded that the records of the State Museum Foundation, including records identifying donors and donation amounts, are not required to be disclosed under the Tennessee Public Records Act (PRA).

    The Attorney General noted that since the Foundation is a nonprofit public benefit corporation and not a government agency, its records would not be subject to disclosure under the PRA, absent some exceptions. As part of its analysis, the Attorney General considered whether the Foundation was the "functional equivalent" of a governmental agency. Conducting a four-part analysis, the Attorney General found the following: (1) the Foundation does not perform any traditional government function. Rather, its purpose "is to support the activities of the Tennessee State Museum primarily through the solicitation of donations and other fundraising projects, which is generally recognized as a private-sector function, not a governmental function"; (2) the Foundation does not receive any governmental funding; (3) the government involvement with the Foundation is very limited, and the government does not regulate or control the Foundation; and (4) the Foundation was not created by any sort of government action, but was incorporated as a non-profit benefit corporation and has been recognized as a §501(c)(3) tax-exempt organization since 1976.

- ***Legislation:***

  - ***Colorado*:**
    Senate Bill 16-038, ***An Act Concerning Measures to Promote the Transparency of Community-Centered Boards….***

As set forth in section 1 of the bill (legislative declaration), the state demands that nonprofit, community-centered boards "be prudent and efficient stewards of the public moneys entrusted to them by requiring transparency with respect to the manner in which these moneys are spent….Such transparency will give the public confidence that funding the community-centered boards is a wise and prudent use of the state's resources, thereby justifying the transfer of additional public resources to these organizations as needed to support persons with intellectual and developmental disabilities." In addition, by enacting the bill, the General Assembly "intends that the community-centered boards largely supported by public resources be subject to transparency in connection with their use of public resources to the greatest extent possible."

To achieve such goals, the bill provides the state auditor with the ability to undertake performance audits of certain community-centered boards, and subjects all community-centered boards to the "Colorado Local Government Audit Law." In addition, the bill requires each community-centered board to post certain financial information on its website in a place that "allows access to the public in a clear, accessible, easily operated, and uncomplicated manner." (Signed).

❖ Civil Penalties & Attorney's Fees

In many states, individuals who are denied access to public records and/or public meetings have few options other than filing a court action to challenge such denials. Such course of action can be costly and the burden of legal fees related to litigation can have a chilling effect on a party seeking access to public records and meetings. The imposition of attorney's fees and civil penalties against public agencies that deny access can make challenging a denial less financially burdensome. The imposition of attorney's fees and civil penalties can also serve as an incentive to a public agency to comply with freedom of information laws in order to avoid placing a financial burden on the public agency. Below are examples of recent court cases and legislative proposals addressing the imposition of civil penalties and award of attorney's fees relating to public records requests and access to public meetings:

- ***Litigation:***

  - ***Florida:***
    Board of Trustees, Jacksonville Police & Fire Pension Fund v. Curtis W. Lee
    (Docket No. SC13-1315, Florida Supreme Court) (April 14, 2016):

    The Supreme Court held that "[i]n accordance with case law liberally construing the Public Records Act [PRA] in favor of open access to public records, the reasonable statutory construction of the attorney's fee provision, and the letter and spirit of the constitutional right to inspect or copy public records…a prevailing party is entitled to statutory attorney's fees under the [PRA] when the trial court finds that the public agency violated a provision of the [PRA] in failing to permit a public record to be inspected or copied. There is no additional requirement, before awarding attorney's fees under the [PRA], that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably." According to the Court, "[e]ven if not malicious or done in bad faith, the Pension Fund's actions-which were found to be unlawful-had the effect of frustrating Lee's constitutional right to access public records and required him to turn to the courts to vindicate that right. Reasonable attorney's fees should have been awarded [by the lower court] for the Pension Fund's violation of the [PRA]."

  - ***Louisiana:***
    Independent Weekly, LLC v. Lafayette City Marshal Brian Pope
    (Docket No. 16-282, Louisiana Court of Appeals, Third Circuit) (September 28, 2016):

    The Court of Appeals, affirming a trial court decision, found that the Lafayette City Marshal was unreasonable and arbitrary in his responses to two public records requests filed on behalf of the Independent Weekly and awarding statutory penalties and attorney's fees.

    The Court found that "the trial court did not abuse its discretion in finding that while Mr. Pope responded to both requests within three days, his responses were 'woefully inadequate' [*e.g.*, relying, in part, on the advice of counsel]. We do not believe that just any answer is sufficient to avoid civil penalties…. We further find no abuse of discretion in the trial court's finding that the failure of Mr. Pope to respond

adequately was unreasonable and arbitrary. Therefore, we find the imposition of civil penalties of $100 per day and attorney['s] fees for failure to adequately respond to the [two public records] request[s] was within the discretion of the trial court."

- ***Tennessee:***
  Bradley Jetmore v. The Metropolitan Government of Nashville, et. al.
  (Docket No. 16-418-IV, Chancery Court for Davidson County) (September 28, 2016):

  The Court ordered the Metropolitan Government of Nashville to pay $56,884.55 in attorney's fees and expenses to a public records requester.

  The Court found that the City "misinterpreted and ignored the 'promptness' requirement" in the Tennessee Public Records Act, and held that the City's "failure to produce accident reports promptly within seventy-two hours of its demonstrated ability to do so, constituted a willful denial of access to the requested records."

- ***Washington:***
  Wade's Eastside Gun Shop, Inc. v. Department of Labor and Industries, et. al.
  (Docket No. 89629-1, Washington Supreme Court) (March 24, 2016):

  The Washington Supreme Court addressed, among other issues, whether the Public Records Act (PRA) prohibits the calculation of a penalty for improperly withheld public records on a per page basis. The Court found that the trial court reasonably interpreted the PRA and did not abuse its discretion when it imposed a per page penalty. According to the Court, the plain language of the PRA confers great discretion on trial courts to determine the appropriate penalty for a PRA violation, and supports the trial court's calculation of an appropriate penalty on a per page basis. The Supreme Court upheld the trial court's imposition of $502,827.40 in penalties, plus attorney's fees.

- ***Legislation:***

  - ***Washington:***
    SB 6171, ***An Act Relating to Civil Penalties for Knowing Attendance by a Member of a Governing Body at a Meeting Held in Violation of the Open Public Meetings Act; amending RCW 42.30.120; and Prescribing Penalties.***

    Under the Open Meetings Law (OML), any public official who attends a meeting where action is taken in violation of the OML, with knowledge of the fact that the meeting is in violation of the OML, is subject to personal liability in the form of a civil penalty. The bill increases the amount of the penalty to $500 for the first violation, and $1,000 for any subsequent violation. (Signed).

- ***Illinois:***
  House Bill 4715, Public Act 099-0586, ***An Act Concerning Government. ("Molly's Law")***

  As reported by the media, House Bill 4715 was one of two bills signed by Illinois Governor Bruce Rauner that were collectively called "Molly's Law" in honor of a family that encountered roadblocks trying to investigate their young daughter's death.[2] House Bill 4715 increases the fines that can be levied against local governments if they violate court orders or attorney general binding opinions ordering disclosure of public records. For example, under the bill the court may impose an additional penalty of up to $1,000 for each day the violation continues. (Signed).

[2] *See* Northwest Herald: "Illinois Gov. Bruce Rauner signs law boosting fines for FOIA non-compliance." (http://www.nwherald.com/2016/07/27/illinois-gov-bruce-rauner-signs-law-boosting-fines-for-foia-non-compliance/a8bo1ac/) (August 2, 2016).

❖ Electronic Communications

Public officials and employees of government agencies are utilizing electronic communications to a greater extent than ever in performing governmental duties. E-mail, in particular, has become a dominant method of communicating information related to government service. At issue in the following cases, is whether, and to what extent, e-mail communications among public officials and/or employees are disclosable public records:

- ***Litigation:***

  - ***Pennsylvania:***
    Pennsylvania Office of Attorney General v. Brad Bumsted
    (Docket No. 2097 C.D. 2014, Pennsylvania Commonwealth Court) (March 15, 2016):

    The Court of Appeals ruled that copies of pornographic emails sent and received from email addresses in the Office of the Attorney General (OAG) are not records subject to the Right to Know Law (RTKL).

    The Court noted that "we must look to the subject matter of the requested emails in determining whether they qualify as records of an agency…. Given that the request seeks emails of a 'pornographic' nature, the requested emails cannot relate to any OAG 'transaction' or 'activity.' Although the emails may violate OAG policy, the OAG is not required under the RTKL to disclose such records simply because an agency email address is involved." The Court further found that, even if the requested emails were deemed to be "public records," they would nevertheless be exempt from disclosure under the non-criminal investigation exemption of the RTKL as they related to an investigation internal to the OAG.

  - ***Texas:***
    The Austin Bulldog v. Lee Leffingwell, Mayor, et.al.
    (Docket No. 03-13-00604-CV, Texas Court of Appeals, 3rd District at Austin) (April 8, 2016):

    The Court ruled that the Texas Public Information Act's exception to disclosure for "an email address of a member of the public" does not shield from disclosure the personal email address of an elected official when that email address is used to transact official government business.

    Here, the Court found that the personal email addresses of the Mayor of Austin, members of the Austin City Council, and the City Manager used to communicate official City business did not qualify under the member-of-the-public email exception. The Court noted that, "[i]n sum, the common and ordinary meaning of the phrase 'member of the public' depends, as does the meaning of all words and phrases, on context. Standing alone or without reference to another group, it means a person who belongs to the community as a whole. When used in relation to another group, it means anyone who is not a part of the other group. In the email-address exception, 'member of the public' does not stand alone. Its companion is the governmental body to which the email at the heart of the exception was sent: 'an e-mail address…provided for the purpose of communicating…with a governmental body.'

Accordingly, we hold that 'member of the public' in PIA…does not include a person who is part of the governmental body that was 'communicat[ed]…with' by email."

- ***Washington:***
  Arthur West v. Steve Vermillion, City of Puyallup
  (Docket No. 48601-6-II, Washington Court of Appeals, Division II)
  (November 8, 2016):

  The Court of Appeals held that it was proper for the Superior Court to require the city council member, whose records were at issue, to produce to the City emails in his personal email account that met the definition of a public record and to submit an affidavit "in good faith" attesting to the adequacy [*i.e.*, nature and extent] of his search for the requested records. The Court also found that there is no individual constitutional privacy interests in public records contained in a personal e-mail account.

- ***Attorney General Opinion:***

  - ***Illinois:***
    Illinois Public Access Opinion 16-006 (August 9, 2016):

    The records at issue were emails sent from the Chicago Police Department's email accounts and personal email accounts relating to the fatal shooting of Laquan McDonald by a police officer in October 2014. The City provided the requester with some documents, but argued that the officers' personal email accounts were not "public records" because they were not "prepared by or for" a public body (i.e., the City), nor were they in the possession or control of the City. In addition, the City argued that a search of personal email accounts would subject employees to unreasonable and unnecessary invasions of personal privacy. The Attorney General rejected the City's arguments and found that the email messages pertaining to the transaction of public business that were sent or received on the Police Department employees' personal email accounts were "public records" subject to disclosure under the Freedom of Information Act.

❖ Also Noteworthy

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

- ***Agents & Trade Secrets:***

  - ***North Dakota Attorney General:***
    Open Records and Meetings Opinion 2016-O-03; North Dakota State University Alumni Association and Development Foundation (January 25, 2016):

    The Attorney General's Office found that the North Dakota State University Development Foundation and Alumni Association violated the state's Open Records Law when it refused to release the names of individuals who submitted their information and qualifications to be considered for the President/CEO position.

    The Association and Foundation retained a search firm to assist in the hiring process. Both the Foundation and Association "recognize[d] that they, along with the search committee, are public entities subject to open records and meetings law." The Attorney General also found that the search firm was an "agent of" the Association and Foundation and as such "any records in the possession of [the search firm] related to the performance of its duties of advertising, generating interest, and obtaining applications on behalf of the public entities, are public records, unless otherwise provided by law." In addition, the Attorney General noted that "'records used to determine qualifications for employment' are open records, even if the records are in the hands of an independent consulting firm hired by the public entity to assist in searching for candidates."

    The Association and Foundation argued that the names of the individuals who contacted the search firm with an interest in the President/CEO position were "trade secrets." However, the Attorney General found that the search firm "[did] not derive 'independent economic value' from the information of the twelve individuals [who expressed interest and provided qualifications to the firm for consideration of the President/CEO position with the public entities]; rather, this information was bought and paid for by the Association and Foundation as part of [the firm's] duties under contract, and since there is a contract in place, [the firm] is not in competition with any other company to advertise and obtain applications for this CEO/president position."

- ***"Catch-All" Exemption:***

  - ***Maryland:***
    Andrew Glenn v. Maryland Department of Health and Mental Hygiene
    (No. 48, Sept. Term 2015, Maryland Court of Appeals) (February 22, 2016):

    The Court of Appeals found that the State Department of Health and Mental Hygiene's denial of a request for the names of owners, administrators, and medical

directors on applications for approval of surgical abortion facilities was within the agency's authority and justified.

Under the Maryland Public Information Act, an agency may refuse to disclose information that would "cause substantial injury to the public interest." Here, the Court noted that "[b]ecause of the history nationally of harassment and violence associated with the provision of abortion services, there is a palpable basis for concern that releasing the redacted information would jeopardize medical professionals from practicing within this particular field, which would deter ultimately access to women who seek an abortion in Maryland. The risk of violence is not speculative and is based on the ample evidence presented. The threshold for a denial under [the Act] was crossed." The Court concluded that "[w]e are convinced that the redaction in the present case was necessary to avoid a substantial injury to the public interest."

- ***"Commercial Purposes":***

  - **SEIU Healthcare 775NW v. State Department of Social and Health Services** (Docket No. 46797-6-II, Washington Court of Appeals, Division 2) (April 12, 2016):

    The Court of Appeals denied a party's request for injunctive relief, holding that the "commercial purposes" exemption in the Public Record Act (PRA) did not preclude the disclosure of the requested information.

    The Freedom Foundation, a Washington-based organization focused on various economic issues, made a records request to the Department of Social and Health Services for lists of Washington individual home care providers who provide personal care services to functionally disabled persons. The SEIU Healthcare, a labor union, sought to enjoin the Department from releasing the lists of individual providers under the "commercial purposes" exemption of the PRA. The Foundation's stated purpose was "to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments." The Union argued that the Foundation would economically benefit from the direct use of the lists.

    The Court found that "commercial purposes" "includes a business activity by any form of business enterprise intended to generate revenue or financial benefit," and that "[n]otifying individuals of their constitutional rights does not directly involve the generation of revenue or financial benefit…. [T]his purpose appears to be political rather than commercial." The Court noted that "[e]conomically injuring SEIU would not directly generate revenue or financial benefit for the Foundation. Even if SEIU ceases to exist there will be no direct financial benefit to the Foundation. Therefore, economically injuring SEIU does not fall within the definition of 'commercial purposes' that we adopt [here]. We decline to hold under the facts of this case that a nonprofit entity decreasing the revenue of another nonprofit entity is a type of commercial purpose under [the PRA provision]."

- ***Costs & Fees:***

  - ***Maryland:***
    Action Committee for Transit, Inc. and Benjamin Ross v. Town of Chevy Chase
    (Docket No. 1204, Maryland Court of Special Appeals, Sept. Term 2015) (September 1, 2016):

    The Court of Appeals ruled that the Town of Chevy Chase improperly considered the identity of requesters when it denied their requests for a fee waiver.

    With respect to Action Committee for Transit (ACT)'s request for a fee waiver, the Court found that "a significant factor, if not the primary factor, in the Town's decision to deny ACT's request for a waiver was that the organization had previously criticized Town officials for their opposition to the Purple Line [a proposed light rail public transit system]…. A decision based upon such unconstitutional considerations is clearly arbitrary and capricious." With respect to Ross's request for a fee waiver, the Court noted that "[b]ecause the Town did not identify any reason for denying Ross's request other than his affiliation with ACT, we hold that the Town's decision to deny his waiver request was also arbitrary and capricious."

  - ***New Hampshire:***
    House Bill 606-FN-LOCAL (Chapter 283), ***An Act Relative to Cost for Public Records Filed Electronically.***

    The bill prohibits a public body or agency from charging a fee for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. (Signed).

  - ***Utah:***
    House Bill 63, ***Fees for Government Records Requests.***

    The bill modifies certain provisions of the Government Records Access and Management Act relating to fees charged for record requests. Specifically, the bill provides for de novo review of an appeal of a fee waiver request. (Signed).

- ***Electronic Formats:***

  - ***New Hampshire:***
    Donna Green v. School Administrative Unit #55
    (Docket No. 2015-0274, New Hampshire Supreme Court) (April 19, 2016):

    The plaintiff requested that the public agency provide her with certain documents in electronic format. Although the documents at issue were maintained in electronic format, the public agency argued that they were not obligated to provide such documents in electronic format and they complied with the Right-to-Know Law by making the paper documents available for inspection. The Supreme Court unanimously ruled that the plaintiff was entitled to the requested documents in electronic format.

The Court concluded that the relevant statutory provisions were ambiguous and "look[ed] to the purpose of the Right-to-Know Law, which is to 'increas[e] public access to all public documents and governmental proceedings, and to provide the utmost information to the public about what its government is up to.'" Further, the Court wrote that "[i]n light of the purpose of the Right-to-Know law, and our broad construction of it, we conclude that the trial court erred when it determined that the plaintiff was not entitled to the requested documents in electronic format." In addition, the Court noted that "[g]iven that the 'overwhelming majority of information today' is 'created and stored electronically'…we agree with the plaintiff that the '[d]issemination of public, non-confidential information in commonly used [electronic] formats ensures the greatest degree of openness and the greatest amount of public access to the decisions made by the public officials.'"

- ***Farmers & Agricultural Data:***

  - ***Missouri:***
    House Bill 1414*, An Act…Relating to Agricultural Data Disclosure.*

    The bill exempts from disclosure broad categories of information and data (*e.g.*, agricultural operation, farming or conservation practices, environmental or production data) that is provided to government agencies by agricultural producers and owners of agricultural land. The Governor vetoed the bill on July 8, 2016, because it reduces government transparency. On September 14, 2016, however, the legislature overrode the Governor's veto.

- ***Identifying Specific Basis for Withholding:***

  - ***New Jersey:***
    John Paff v. City of Bayonne, et. al.
    (Docket No. HUD-L-5203-15, Superior Court of New Jersey)
    (Settlement and Agreement, dated February 22, 2016):

    Under the settlement agreement, the parties understood that "the City's response to Plaintiff's October 20, 2015 request for access did not clearly convey the specific basis for withholding certain government records, in accordance with N.J.S.A 47:1A-5(g)." Pursuant to section 47:1A-5(g) of the Open Public Records Act, "[if] the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." Here, the City acknowledge[d] that by not clearly conveying the specific basis for withholding [the] records, Plaintiff was unable to properly assess the exemptions asserted by the City in its partial denial of access…." The City agreed to pay attorney's fees in the amount of $5,000.00 to the Plaintiff's attorneys.

- ***Legislative Work-Product & Separation of Powers:***

  - ***Indiana:***
    Citizens Action Coalition of Indiana, et. al. v. Erich Koch, et. al.
    (Docket No. 49S00-1510-PL-00607, Indiana Supreme Court) (April 19, 2016):

    Citizen advocacy groups made several requests for copies of Representative Koch's, and his staff's, correspondence with various business organizations in relation to specific legislation. The requests were denied on the basis that the Access to Public Records Act (APRA) does not apply to the General Assembly and, in the alternative, were exempt from disclosure as legislative "work product."

    The Supreme Court held that the APRA applies to the Indiana General Assembly, including the members and groups that make up the General Assembly. However, the Court also held that the "specific question of whether the APRA requests at issue in this case are exempt from disclosure as legislative 'work product' is non-justiciable." The Court noted that "to define for the legislature what constitutes its own work product, and then to order disclosure…would indeed be an interference with the internal operations of the General Assembly" and a violation of the separation of powers clause of the Indiana Constitution. The Court noted that it was "not inclined to make determinations that may interfere with the General Assembly's exercise of discretion under APRA."

- ***Model Public Records Policy:***

  - ***Tennessee:***
    House Bill 2082, ***An Act to Amend Tennessee Code Annotated…Relative to Protecting Personally Identifying Information in Public Records.***

    The bill requires that government agencies adopt a written public records policy. The policy must include: the process for making requests to inspect or receive copies of public records; a copy of any required request form; the process for responding to requests (including redaction practices); a statement of any fees charged for copies and the procedures for billing and payment; and the name or title of an individual designated as the "public records request coordinator." (Signed).

- ***Privacy - "Conditional Exemption" & Balancing Competing Interests:***

  - ***Oregon:***
    American Civil Liberties Union of Oregon (ACLU) v. Civilian Review Board of the City of Eugene (Docket No. S063430, Oregon Supreme Court) (September 15, 2016):

    The Supreme Court ruled that the public's interest in whether the police engaged in excessive force outweighed the public agency's interest in confidentiality and protecting the officers' privacy.

The ACLU sought records relating to the Civilian Review Board's review of an internal investigation of police misconduct. The City denied the request, relying on a statutory provision which exempts from inspection information about a personnel investigation of a public safety officer if the investigation does not result in discipline of the officer. The exemption is conditional, however, and does not apply when "the public interest requires disclosure of the information."

The Court found that, "to decide the applicability of the conditional exemption…the appropriate question for a trial court is whether the public interest in disclosure outweighs the competing interest in confidentiality, with the presumption in favor of disclosure." The Court found the competing interests were "on one side, the public's interest in transparency of police department and CRB operations, and, on the other side, the City's interest in protecting the privacy of its police officers and in effectively disciplining, evaluating, and training those officers."

The Court further concluded that "the public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct…. In contrast, the interests in confidentiality established at trial in this case were not equally fundamental. The public body's interest in protecting the privacy of officers whose conduct was questioned was substantially diminished because the identity of those officers and their alleged misconduct had already been made a matter of public record."

The Court further noted that "the City made no showing that disclosure posed a risk of harm to its employees or operations, and it is not our role to decide whether the public's interest in monitoring the public's business may be satisfied with some quantum of information less than full disclosure…. On this record, we conclude that the public interest in transparency requires disclosure of the requested documents."

- ***Privacy - Constitutional Right of Privacy & Home Addresses:***

  - ***Pennsylvania:***
    Pennsylvania State Education Association, et. al. v. Commonwealth of Pennsylvania, et. al. (Docket No. 11 MAP 2015 and No. 22 MAP 2015, Pennsylvania Supreme Court) (October 18, 2016):

    The Supreme Court ruled that the home addresses of public school employees are protected by the constitutional right to privacy, and may not be disclosed unless outweighed by the public interest in disclosure.

    Performing the necessary balancing test, the Court noted that "[o]n the one hand, the public school employees have strong privacy interests in protecting their home addresses from disclosure, in response to broad and generic requests based upon no criteria other than their occupation…. On the other hand, the OOR has identified no public benefit or interest in disclosure of perhaps tens of thousands of addresses of public school employees. We likewise perceive no public benefit or interest to disclosure in response to such generic requests for irrelevant personal information of these particular public employees who have undertaken the high calling of educating

our children. To the contrary, nothing in the [Right to Know Law] suggests that it was ever intended to be used as a tool to procure personal information about private citizens or, in the worst sense, to be a generator of mailing lists."

- ***Privacy Interests & Risk of Harassment:***

  - ***Wisconsin:***
    Thomas Woznicki v. Jeff Moberg, Records Custodian, School District of New Richmond (Docket No. 2015-AP-1883, Wisconsin Court of Appeals) (October 4, 2016):

    The Court of Appeals held that the public interest in disclosure of a former teacher's personnel file outweighed his privacy interests.

    Citizens for Responsible Government sought copies of the teacher's personnel file which included information relating to an investigation of disciplinary matters involving the teacher. The School District intended to release the personnel file, with the home address redacted. The teacher sought an injunction prohibiting the District from disclosing his file arguing, in part, that the disclosure of such file would cause harassment.

    The Court noted that "[a]lthough 'the possibility of threats, harassment or reprisals alone is a legitimate consideration for a custodian, the public interest weight given to such a consideration increases or decreases depending upon the likelihood of threats, harassment or reprisals actually occurring…. Mere embarrassment from the disclosure of a public record is not sufficient, especially in this case, when truly private information, such as Woznicki's address, will be redacted." Here, the teacher failed to demonstrate a reasonable probability that if his personnel file was disclosed, the information contained within would be used to harass him.

- ***Redaction Requirements:***

  - ***Virginia:***
    Senate Bill 494 & House Bill 817, ***An Act…Relating to the Virginia Freedom of Information Act; Record Exclusions; Rule of Redaction; No Weight Accorded to Public Body's Determination.***

    The bill reverses the holding of the Virginia Supreme Court in the case of Virginia Department of Corrections v. Scott A. Surovell,[3] by setting out the general rule of redaction, which provides that "[n]o provision of [the Virginia Freedom of Information Act] is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by [the Act] or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the

[3] *See* Virginia Department of Corrections v. Scott A. Surovell (776 S.E.2d 579, Supreme Court of Virginia, Record No. 141780) (September 17, 2015).

extent that an exclusion from disclosure under [the Act] or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under [the Act] or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed." (Signed).

- ***School Personnel & Firearms:***

  - ***Oklahoma:***
    Senate Bill 1036, *An Act Relating to School Personnel….*

    Under the bill, the names of school district personnel who have been designated to carry a firearm are exempt from disclosure. (Signed).

- ***"Speech or Debate" Exemption:***

  - ***District of Columbia:***
    Kirby Vining v. Council of the District of Columbia
    (Docket No. 14-CV-1322, D.C. Court of Appeals) (June 9, 2016):

    The Court of Appeals held that the D.C. Council could not withhold documents pursuant to the Legislative Privilege Act, D.C. Code §1-201.42. The Legislative Privilege Act provides that "'[f]or any speech or debate made in the course of their legislative duties, the members of the Council shall not be questioned in any other place.'"

    In this case, the D.C. Council invoked Exemption 6 of the District of Columbia's Freedom of Information Act, which "allows the Council and executive agencies of the District government to withhold from the public '[i]nformation specifically exempted from disclosure by statute…, provided that such statute' either leaves no discretion on the issue or '[e]stablishes particular criteria for withholding or refers to particular types of matters to be withheld.'" The Court however rejected the Council's argument that the Legislative Privilege Act "is some kind of super-statute that either trumps FOIA or must be broadly construed thereunder…as a nondisclosure provision." The Court noted that "[t]o allow the Council to invoke the Legislative Privilege Act under Exemption 6 and withhold all information related to its legislative activities would permit the Council to withhold swaths of public documents in direct conflict with FOIA's open-government mission."

- ***Waiver & Inadvertent Disclosure:***

  - ***California:***
    Estuardo Ardon v. City of Los Angeles
    (Docket No. S223876, California Supreme Court) (March 17, 2016):

The Supreme Court concluded that the waiver provision in the California Public Records Act (PRA) "applies to an intentional, not inadvertent, disclosure" of public records. "A governmental entity's inadvertent release of privileged documents under the [PRA] does not waive the privilege."

Here, in civil discovery proceedings in an underlying litigation, the trial court determined that certain documents the City possessed were privileged under the attorney-client privilege or the attorney work product privilege. Subsequently, the plaintiff filed a request under the PRA seeking to obtain documents relating to the subject matter of the litigation. In response, the City inadvertently provided the plaintiff with some of the privileged documents. The plaintiff refused to return the documents, arguing that the City waived the privileges by disclosing the documents in response to the PRA request.

The Supreme Court noted that "the Legislature intended to permit state and local agencies to waive an exemption by making a voluntary and knowing disclosure, while prohibiting them from selectively disclosing the records to one member of the public but not others. But, considering the language of the [waiver provision in the PRA] in its proper context, we conclude that it does not apply to inadvertent disclosures." Further, the Court noted that "[i]n this case, consideration of the statutory text, context, purpose, and history leave us with no genuine doubt but that the Legislature did not intend for the [PRA's] protections to be forfeited through simple inadvertence."