# Freedom of Information
# Litigation and Legislation Update

## 2017 COGEL Conference
## Toronto, Ontario
## December 3-6, 2017

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## ❖ Access to Law Enforcement & Criminal 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 be prejudicial to a pending law enforcement action. 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 other records:

### ➢ *Litigation:*

- ***California:***
  **American Civil Liberties Union Foundation of Southern California, et. al. v. Superior Court of Los Angeles, et. al.**
  (No. S227106, California Supreme Court) (August 31, 2017):

  The ACLU filed a records request under the California Public Records Act (CPRA) for all automated license plate reader (ALPR) technology data, which was collected by the Los Angeles Police and Sheriff's Departments during a one-week period. The ALPR technology was used by the departments to locate vehicles linked to crimes under investigation.

  The Supreme Court ruled that the ALPR scan data at issue was not exempt from disclosure under the CPRA's law enforcement investigation exemption. The Court found, in part, that the ALPR scanning "does not produce records of investigations, because the scans are not conducted as part of a targeted inquiry into any particular crime or crimes. The scans are conducted with an expectation that the vast majority of the data collected will prove irrelevant for law enforcement purposes."

  However, the Supreme Court did find that the "catch-all exemption" under the CPRA applied to the ALPR scan data. Under the "catch-all exemption," a public agency "may 'justify withholding any record by demonstrating that…on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.'" The Court noted that "[a]lthough we acknowledge that revealing raw ALPR data would be helpful in determining the extent to which ALPR technology threatens privacy, the act of revealing the data would itself jeopardize the privacy of everyone associated with a scanned plate. Given that [the police and sheriff's departments] each conduct more than one million scans per week, this threat to privacy is significant."

  The Court remanded the matter "for further consideration of whether the raw data may reasonably be anonymized or redacted such that the balance of interests would shift and disclosure of the data would be required under the CPRA."

- ***Florida:***
  **Palm Beach County Sheriff's Office, et. al. v. Sun-Sentinel Company**
  (No. 4D17-1060, Florida Court of Appeals, 4th District) (September 6, 2017):

  The requesters sought, among other information, the names of two witnesses who pursued, by car, a perpetrator who shot and killed another person. The perpetrator also fired shots which struck the vehicle in which the two individuals were traveling.

  The Appeals Court ruled that, based on a recent statutory amendment to the Public Records Act, the Palm Beach County Sheriff's Office was allowed to withhold the identities of the two witnesses. The amendment provides, in relevant part, that "[c]riminal intelligence information or criminal investigative information that reveals the personal identifying information of a witness to a murder…is confidential and exempt…for 2 years after the date on which the murder is observed by the witness."

  The Court also noted that the effect of the amendment "is that identifying information of a witness to a murder is not only exempt, which gives law enforcement agencies discretion in disclosing or not disclosing the information, but also confidential, which means that the agency has no discretion except for in the limited scenarios provided for in the amended statute."

- ***New Jersey:***
  **North Jersey Media Group, Inc. v. Township of Lyndhurst, et. al.**
  (No. A-35-15, New Jersey Supreme Court) (July 11, 2017):

  In this matter, the Supreme Court addressed the scope of the criminal investigatory records and records of ongoing investigations exemptions in the New Jersey Open Public Record Act (OPRA), as well as the common law right of access.

  To qualify for the "criminal investigatory records" exemption, a record (1) must not be "required by law to be made" and (2) must "pertain[] to a criminal investigation." Under the "ongoing investigations" exemption, an agency must show that (1) the requested records "pertain to an investigation in progress by any public agency," (2) disclosure will "be inimical to the public interest," and (3) the records were not available to the public before the investigation began. Access to records under the common law requires that (1) the person seeking access establish an interest in the subject matter of the material and (2) the citizen's right to access be balanced against the State's interest in preventing disclosure.

  "The case arises out of a high-speed chase in which a suspect eluded the police, crashed into a guardrail, and reportedly placed officers in danger as he tried to drive away. The officers then fired at the suspect and killed him. Two reporters filed OPRA requests for the names of the officers who used deadly force. The reporters also sought access to Use of Force Reports, dash-cam videos, activity logs, various investigative reports, and related items."

With respect to the Use of Force Reports (UFRs), the Court ruled that such reports must be disclosed. The Court found that the UFRs were not exempt pursuant to the criminal investigatory records exemption because they are "required by law to be made" (*i.e.,* under an Attorney General's policy, which has the "force of law for police entities."). In addition, the UFRs were not exempt under the ongoing investigation exemption because UFRs "contain relatively limited information" and "[b]ased on the nature of the form, the release of UFRs presents far less of a risk of taint to an ongoing investigation." Here, "[the] defendants did not demonstrate that disclosure of UFRs was inimical to the public interest, and the records should have been released without redactions."

With respect to the investigative reports, witness statements, and similarly detailed records, the Court found that such records fell within the criminal investigatory records exemption, and therefore were exempt from disclosure. The Court found that such records were not "required by law," and all pertained to an investigation into actual or potential violations of criminal law. The Court noted, however, that "although it may be appropriate to deny a request for investigative reports…early in an investigation – as in this case – the outcome might be different later in the process."

As for the dash camera recordings, the Court found that, "under the circumstances of this case...the public's substantial interest in disclosure of [the] recordings, which NJMG's requests fostered, warranted the release of those materials under the common law right of access." The Court explained that "[t]he balance can tip in favor of disclosure…for materials that do not contain narrative summaries and are less revealing. Footage of an incident captured by a police dashboard camera…can inform the public's strong interest in a police shooting that killed a civilian. It can do so in a typical case without placing potential witnesses and informants at risk. Dash-cam footage can also be released without undermining the integrity of an investigation…."

- ***Ohio:***
  **State of Ohio ex. rel. v. Ohio Department of Public Safety, et. al.**
  (No. 2016-Ohio-7987, Ohio Supreme Court) (December 6, 2016):

  The records at issue were three dash-cam recordings made by two state troopers during a high-speed chase. The Department of Public Safety claimed such recordings were exempt from disclosure as confidential law-enforcement investigatory records. For this exemption to apply, the respondents needed to establish that each of the withheld recordings "'pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature' and that its release would create a high probability of disclosure of specific confidential investigatory techniques or procedures or specific work product."

  The Court found that the records pertained to a law-enforcement matter of a criminal or quasi-criminal nature, but that only a 90-second portion of the recordings contained specific investigatory work product.

The Court held that "decisions about whether an exception to public-records disclosure applies to dash-cam recordings require a case-by-case review to determine whether the requested recordings contain investigative work product. Having reviewed the three recordings at issue here, [the Court] conclude[d] that respondents should have released all three recordings to the Enquirer upon request, with the 90 seconds of post-*Miranda* questioning of [the suspect] redacted as investigatory work product." [Emphasis in original].

**State ex rel. Caster v. City of Columbus, et. al.**
(No. 2016-Ohio-8394, Ohio Supreme Court) (December 28, 2016):

The records at issue were certain law enforcement documents concerning a convicted criminal defendant whose direct appeals ended more than four years prior to the date of the records request. The police department denied the request, relying on the specific investigatory work-product exception. They contended that they were not required to produce the records until the "completion" of the criminal trial, even though all appeals had been exhausted.

The Supreme Court held that the exception from disclosure for specific investigatory work product does not extend beyond the completion of the trial of the underlying criminal case at issue. The Court found that "[b]ecause the [Public Records Act] should be construed liberally to provide broad access, because the revisions to [Criminal Rule of Evidence 16, relating to discovery in criminal trials,] have leveled the disparity between information available through the PRA and through Crim. R. 16 discovery, and in the interests of justice…the specific investigatory-work-product exception…does not extend beyond the completion of the trial for which the information was gathered…. Respondents should have produced to [the requester] all the records that were withheld based on respondents' claim that the records constituted specific investigatory work product…because [the criminal defendant's] original trial had long been completed."

- ***Advisory Opinions:***

  - ***Kentucky:***
    **Attorney General's Opinion, Kathy Harris/Kentucky State Police**
    (No. 17-ORD-009) (January 18, 2017):

    The Attorney General found that the Kentucky State Police violated the Open Records Act in denying a request for a copy of a body-worn camera video recording of an officer-involved shooting that resulted in the death of the perpetrator. The shooting victim was the requester's son.

    The State Police withheld the video claiming that the "videos that recorded the incident contain extremely graphic images," public disclosure of which "could irreparably harm the surviving shooting victims as well as the surviving family of the deceased." The State Police also contended that "viewing such inherently disturbing images might cause 'emotional distress to any viewer.'"

Based on the particular facts presented, the Attorney General rejected the State Police's argument, finding that "[t]he instant appeal is unique insofar as the requester is the mother of the deceased perpetrator/shooting victim and, not only has no evidence been presented that she or any other surviving family members object to disclosure of the video in dispute, [the mother] has waived her privacy interests." The Attorney General further noted that "[a]lthough not dispositive, this fact certainly undermines the argument that the bodycam video capturing the officer-involved shooting…should not be disclosed ….The privacy interest asserted on appeal is based on speculation that *if* the video is publicly released it *may* cause the surviving victims to suffer additional distress." [Emphasis in original].

➢ ***Legislation:***

- ***Arkansas:***
  **House Bill 1236 (Act 531),** ***An Act to Protect the Privacy of Surviving Family Members of a Law Enforcement Officer who Dies in the Line of Duty….*** (Signed)

  The bill provides that a record that depicts or records the death of a law enforcement officer is confidential and exempt from disclosure under the Freedom of Information Act, with limited exceptions for family members of the deceased. The bill also provides that "upon a showing of good cause" a circuit court may issue an order authorizing a person to access such a record.

  In determining good cause, the circuit court must consider such factors as "(A) Whether access to the record…is necessary for the public evaluation of a law enforcement officer's conduct during the performance of his or her official duties; (B) Whether there is a compelling public interest in the disclosure of the record; (C) The seriousness of the intrusion into the privacy of the deceased law enforcement officer's family members; and (D) The availability of similar information in other forms."

- ***Florida:***
  **Senate Bill 118 (Ch. 2017-130),** ***An Act Relating to Criminal History Records….*** (Signed)

  Under the bill, the Criminal Justice Information Program, which provides criminal justice data and information services to criminal justice and law enforcement agencies, must administratively seal the criminal history records pertaining to an arrest or incident of alleged criminal activity of an adult or a minor upon notification by the court clerk that all charges related to the arrest or incident were declined to be filed by the state attorney or statewide prosecutor, were dismissed or nolle prosequi before trial, or resulted in a judgement of acquittal or a verdict of not guilty at trial and that all appeals by the prosecution have been exhausted or the time to file an appeal has expired.

**House Bill 111 (Ch. 2017-11), *An Act Relating to Public Records….*** (Signed)

Under House Bill 111, criminal intelligence information or criminal investigative information that reveals the personal identifying information of a murder witness, is confidential and exempt from disclosure for a period of two years after the date on which the murder is observed by the witness, with exceptions (*e.g.,* in furtherance of the agency's official duties and responsibilities; to assist in locating or identifying the witness if the agency believes the witness to be missing or endangered; to another governmental agency for use in the performance of its duties and responsibilities; and to the parties in a pending criminal prosecution as required by law).

- ***Michigan:***
  **House Bill No. 4427 (Act 85), *An Act to Exempt From Disclosure Certain Audio and Video Recordings Recorded by Law Enforcement Officers with a Body-Worn Camera in Certain Private Places….*** (Signed)

  Among other provisions, House Bill 4427 exempts from disclosure "a recording recorded by a law enforcement officer with a body-worn camera that is recorded in a private place." "Private place" is defined as "a place where an individual may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or a substantial group of the public has access."

- ***Pennsylvania*:**
  **Senate Bill 560 (Act 22), *An Act Amending Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes…providing for Recordings by Law Enforcement Officers.*** (Signed)

  Senate Bill 560 limits access to video recordings by law enforcement officers. The bill provides, in relevant part, that: "Nothing in [Chapter 67A] nor the Right-to-Know Law shall establish a right to production of an audio recording or video recording made inside a facility owned or operated by a law enforcement agency or to any communications between or within law enforcement agencies concerning an audio or video recording." In addition, except as otherwise provided, "[i]f a law enforcement agency determines that an audio recording or video recording contains potential evidence in a criminal matter, information pertaining to an investigation or a matter in which a criminal charge has been filed, confidential information or victim information and the reasonable redaction of the audio or video recording would not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information, the law enforcement agency shall deny the request in writing."

❖ **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:***

- ***Colorado:***
  **Alex McDaniel and Joanne McDaniel v. South Jeffco Montessori Charter School, Inc. d/b/a Montessori Peaks Academy**
  (No. 2016 CV 30561, Jeffco District Court) (December 21, 2016):

  The Court, after considering the parties' cross motions for summary judgment, found that the Montessori Peaks Academy (MPA), a public charter school, violated, in part, the Colorado Open Meetings Law (COML) by failing to sufficiently identify certain executive sessions.

  Under COML, a local agency, entering into executive session, must (1) cite to the specific COML provision allowing the agency to enter into an executive session and (2) identify the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized.

  Here, for example, the Court concluded that the following description "Executive Session CRS 24-6-402(4) – 'discussion of individual students where public disclosure would adversely affect the person or persons involved,'" violated COML. The Court found that "[i]n announcing the executive session, the Board simply cited to subsection 4(f) and quoted the statutory language ('discussion of individual students where public disclosure would adversely affect the person or persons involved.') The Board did not include the particular matter to be discussed and did not strictly comply with the requirements for convening an executive session." The Court noted that the MPA "attempts to excuse its obligations by arguing that this session risked revealing the identity of the students involved. [However,] [w]ithout more facts and details, such conclusory facts are not sufficient to excuse the Board's obligation under the statute. Any number of descriptions, *e.g.* 'investigation of student misconduct,' may have been appropriate and would not have compromised the purpose for which the executive session was authorized. The Board's actions relating to [this executive session] violated the statute."

- ***Mississippi:***
  **Mayor and City Council of the City of Columbus v. Commercial Dispatch**
  (No. 2016-CC-00897-SCT, Mississippi Supreme Court) (September 7, 2017):

  The Supreme Court ruled that a series of meetings held by the Mayor and City Council of the City of Columbus violated the Open Meetings Act.

The Mayor and City Council members held "four pairs of prearranged, nonsocial and subquorum gatherings over the course of two months. The gatherings were on the topics of economic development and maintenance of a public building. For each pair of gatherings, the Mayor first met with three Council members, and then later the same day, he met with the remaining three Council members on the same topic. Because all of the gatherings were just shy of a quorum-four Council members would have constituted a quorum–the gatherings were not open to the public."

The Court emphasized that the holding was fact-specific. Here, "the City acted with the express intent of circumventing the Act. The gatherings were preplanned. The attendees invited purposely constituted less than a quorum. The gatherings were for the express goal of discussing City business. Further, the facts support[ed] that City business was conducted and policy formulated at the gatherings. Finally, the gatherings did not fall under any of the exceptions specified in the Act."

- ***Washington:***
  **Arthur West v. Pierce County Council, et. al.**
  (No. 48182-1-ll, Washington Court of Appeals, Division 2) (February 22, 2017):

  Petitioner filed a complaint against the Pierce County Council alleging violations of the Open Public Meetings Act (OPMA) based on a series of emails between Council members and the Pierce County Prosecuting Attorney's Office concerning whether to initiate a legal challenge to a referendum.

  The Court found that there was "no evidence that any of the council members who engaged in email communication with the prosecutor's office intended to meet to transact official business.... Here, the Council members were communicating with the prosecuting attorney, rather than with each other as a council. And, the Council primarily did not believe that this was an issue that was even part of official council business. Moreover, the Council members stated that they did not believe they were participating in a meeting through the emails with the Pierce County Prosecuting Attorney's Office. The Council also presented evidence showing that the Council members did not intend to hold a 'meeting' through the email communications regarding the referendum. Because *Woods* requires that the participants collectively intend to engage in a meeting to transact official business, there was no OPMA violation based on electronic communication. Moreover, here the email communications related more to information gathering and communication rather than to the transaction of official council business."

  **Columbia RiverKeeper, et. al. v. Port of Vancouver USA, et. al.**
  (No. 92455-4, Washington Supreme Court) (June 8, 2017):

  The plaintiffs brought an action alleging that the Port of Vancouver USA violated the OPMA by meeting on several occasions in executive session to discuss a proposed lease of port property for the development of a crude oil transportation facility.

Under OPMA, an agency may enter executive session "[t]o consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price."

The Supreme Court held that "a government entity may enter executive session to discuss the minimum acceptable value to sell or lease property, but not to discuss all factors comprising that value. To the extent that various factors directly alter the lowest acceptable value, the governing body may discuss how these factors impact the minimum price; but general discussion of the contextual factors themselves must still occur at an open public meeting."

Here, the Court found that the executive sessions at issue concerned "factors influencing price and were not themselves focused on arriving at a minimum price." During the executive sessions, the Port discussed such items as the duration of a "proposed exclusivity agreement" the Port planned to enter, updates on negotiated lease terms, construction timelines, types of petroleum products and related insurance requirements, and the project's safety plan, among other items.

As a result, the Court reversed the trial court's partial summary judgment in favor of the Port and remanded the matter for further proceedings consistent with its analysis.

- ***Advisory & Attorney General Opinions:***

  - ***D.C. Office of Open Government:***
    **Open Meetings Act Complaint against District of Columbia Public Charter School Board** (No. OMA OOG-0004) (August 9, 2017):

    The Office of Open Government (OOG) opined, in part, that the D.C. Public Charter School Board (DCPCSB) did not properly notice its June 19, 2017 meeting in violation of the notice requirements in the Open Meetings Act (OMA). The OOG found that the DCPCSB's meeting notice for its June 19th meeting failed to apprise the public that the Board would undertake business on certain charter amendments that had been disapproved at a prior meeting. According to the OOG, such was "an improper closure that prevented the public from attending the meeting."

  - ***Kentucky*:**
    **In re: Bluegrass Institute for Public Policy Solutions/Kentucky House of Representatives** (No. 17-OMD-228) (November 1, 2017):

    The Attorney General found that the House of Representatives violated the Open Meetings Act (OMA) in holding a closed meeting with a quorum present to discuss pension reform. The Attorney General noted that "[a]lthough it was unclear from the record who was present for the meeting, it does not appear to be disputed that there was both a quorum present and members of both the majority and minority caucus present. Accordingly, the meeting was not a caucus meeting, and is subject to the [OMA]."

The Attorney General also addressed the question as to whether the application of the OMA violated separation of powers, and found that it did not. The Attorney General noted that "the General Assembly chose not to exempt itself entirely from the [OMA]" and "[i]n issuing decisions under the [OMA], the Attorney General is only fulfilling the duties set out by the General Assembly...."

➢ ***Legislation:***

- ***Hawaii:***
  **Act 64, *A Bill for an Act Relating to Public Meetings*.** (Signed)

  The bill requires state and county boards to make "board packets" (*i.e.*, documents that are compiled by boards and distributed to board members before a meeting for use at that meeting) available for public inspection (in the board's office) at the time the packets are distributed to board members. The board must also provide notice to individuals requesting notification of meetings that the board packet is available for inspection and provide reasonably prompt access to such packet upon request. In addition, as soon as practicable, the board must accommodate requests for electronic access to the board packet. The board is not required to mail board packets.

  The bill also requires a board to keep written *or* recorded minutes, and to make such minutes available to the public on the board's website or, if the board does not have a website, on an appropriate state or county website within 40 days after the meeting, with exceptions. If minutes are posted in a digital or analog recording format, then the board must include a written summary of the minutes. The summary must include: (1) the date, time and place of the meeting; (2) the members present or absent, and the times when individual members entered or left the meeting; (3) a record, by individual member, of motions and votes made by the board; and (4) a time stamp or other reference indicating when in the recording the board began discussion of each agenda item and when motions and votes were made by the board.

❖ **Is it an Entity Subject to Public Records & Public Meetings 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 addressing whether and to what extent certain entities, such as non-profit organizations, are subject to freedom of information laws:

➢ ***Litigation:***

- ***Illinois:***
  **Chicago Tribune v. College of Du Page and College of Du Page Foundation**
  (No. 2-16-0274, Illinois Court of Appeals, 2nd District) (May 9, 2017):

  The Chicago Tribune made a request to the College of Du Page and its Foundation for copies of all state and federal grand jury subpoenas received by the Foundation during a certain time period. The College contended that it did not have any documents responsive to the request. The Foundation replied that it was not subject to the Freedom of Information Act because it was a nongovernmental not-for-profit corporation. Subsequently, the College provided the Chicago Tribune with some documents, but not a certain federal grand jury subpoena. The College claimed that such subpoena was not in its custody or control, and therefore it could not be compelled to produce it.

  The Court of Appeals, affirming a circuit court ruling, found that the College had contracted, by way of a Memorandum of Understanding, with the Foundation to perform a governmental function on its behalf and that the subpoena directly related to that governmental function. The Court declined to rule on whether the Foundation qualified as a public agency.

  The Court found that "[a] record that is possessed by a party under contract with a public body to perform a governmental function, and that directly relates to that governmental function, 'shall be considered a public record of the public body,' so long as it is not exempt.... [A]ccepting [the] defendants' view would allow public bodies to shield records from public scrutiny simply by delegating to third parties those responsibilities that do not involve the exercise of exclusive government powers.... [E]ven though the public body might not physically possess records sought in a [records] request...it must attempt to obtain them if they directly relate to a governmental function that the public body has delegated to a third party pursuant to a contract."

  **Better Government Association v. Illinois High School Association, et. al.**
  (No. 121124, Illinois Supreme Court) (May 18, 2017):

  The Supreme Court ruled that the Illinois High School Association (IHSA), which governs and coordinates interscholastic athletic competitions for public and private secondary schools, is not a "public body" subject to the Freedom of Information Act.

The Court considered four factors: (1) the extent to which the entity has a legal existence independent of government resolution, (2) the degree of government control exerted over the entity, (3) the extent to which the entity is publicly funded, and (4) the nature of the functions performed by the entity. The Court emphasized that "[n]o single factor is dispositive, but the key inquiry involves an examination of the entity's creation and the extent of governmental control."

With respect to the first factor (independent legal identity), the Court found that "it is undisputed that the IHSA was not created by a school district or any other public body or by any other statute or government resolution. It has had a separate legal existence, independent from any public body, for more than the past 100 years." With respect to the second factor (degree of government control), the Court found that "no public body has control over how the IHSA's governing board is established or comprised.... The board is not accountable to any particular school district or particular public school. Nothing in the IHSA's governing documents show that the action of the board must receive approval from any public body." With respect to the third factor (public funding), the Court found that "the IHSA does not receive any direct governmental funding.... [T]he IHSA is not funded by participating member schools but, rather, generates its revenue from its organizational efforts. Additionally, the IHSA provides a function that no member public school could provide on its own and, for the last 100 years, no other public body in the State has sought to provide. The fact that the public schools could provide this service at their own expense does not transform the revenue generated by the IHSA into public funding." As for the fourth factor (nature of the functions performed), the Court noted that "[i]n view of our findings that the IHSA is not created, controlled, or funded by government, [the Court] need not decide whether it performs a governmental function. Even if the nature of the functions performed by the IHSA were governmental, this factor alone cannot transform a private entity into a public body for purposes of the FOIA. To hold otherwise would mean that any private entity that merely provides education services to public schools would risk being transformed into a public body."

- ***Kansas:***
  **State of Kansas v. Great Plains of Kiowa County, Inc.**
  (No. 115,932, Kansas Court of Appeals) (February 10, 2017):

  The Board of Trustees of the Kiowa County Memorial Hospital (Board) signed a lease agreement with the Great Plains of Kiowa County, Inc. (GPKC), a not-for-profit corporation, organized solely for the purpose of administering the county-owned hospital.

  The Kiowa County Commission (County) submitted a request to GPKC, seeking certain financial records (*e.g.,* hospital's budget, vouchers for payments for professional and management fees, salaries and titles of all administrative or executive employees of GPKC, registrations for any vehicles operated, whether owned or leased, by the hospital or GPKC).

GPKC denied the request contending that it was not a public agency subject to the Kansas Open Records Act (KORA), and that it only leased the hospital. GPKC suggested that the County file the records request with the hospital's Board. The County informed GPKC that it had already contacted the Board and was informed that the Board did not possess the requested records.

The Court held that the "GPKC has only one function – to operate the Hospital on behalf of the Board. As far as the record shows GPKC provides no services to any other entity, public or private. The Board cannot hide its records by delegating the operations to GPKC and violate its statutory duty to maintain adequate financial records pertaining to the operations of the County-created hospital. By assuming the role as the sole operator of the hospital on behalf of the Board, GPKC's operating records are deemed to be public records." The Court further found that "the Board is statutorily required to maintain the financial records of the Hospital and, as a result of the lease, GPKC is the custodian of the financial records and those records fall within the definition of public records."

- ***Louisiana:***
  **New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals, et. al.** (No. 2016-C-1809, Louisiana Supreme Court) (May 3, 2017):

  The Supreme Court held that the Louisiana Society for the Prevention of Cruelty to Animals (Society), through its function of providing animal control services for the City of New Orleans, is an instrumentality of the City and must comply with the Public Records Law.

  "Through the discharge of its duties and responsibilities set forth in the [Cooperative Endeavor Agreement] with the City of New Orleans, as well as the receipt of public money as remuneration for such services, we find that the [Society] is functioning as an instrumentality of a municipal corporation, and is therefore subject to the Louisiana Public Records Law.... We further find that the reporting requirements contained in the [Agreement] do not satisfy the Public Records Law, as the requirement for access to public records cannot be circumscribed by contract. The [Society] is required to disclose all documents specifically related to the discharge of its duties and responsibilities outlined in the [Agreement] with the City of New Orleans, and we remand to the district court to determine which documents satisfy that description."

- ***New Jersey:***
  **Robert A. Verry v. Franklin Fire District No. 1**
  (No. A-77-15, New Jersey Supreme Court) (August 7, 2017):

  The petitioner requested copies of the constitution and bylaws of the Millstone Valley Fire Department (MVFD), a volunteer fire company. MVFD annually enters into a contract with Franklin Fire District No. 1 to provide firefighter services to the public within the District. The District denied the request claiming that it does not maintain such records for its member companies.

The Court, affirming a lower court's ruling, held that "[t]he fire district, to which the OPRA [Open Public Records Act] request was made, is obliged to release such documents in its possession or to obtain them from a member volunteer fire company under its supervision and release them. OPRA demands such transparency and accountability of public agencies, and the fire district is undoubtedly a public agency subject to OPRA.... However, to the extent the holding under review also concluded that the member volunteer fire company is a 'public agency' subject directly and independently to OPRA requirements, the Court disagrees and modifies the judgment."

With respect to whether the MVFD is a public agency under OPRA, "public agency" is defined, in part, as a "division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State ... [or an] independent authority, commission, instrumentality or agency created by a political subdivision...." The Court found that "because it aids in fulfilling the greater fire district's purpose, a volunteer squad [such as MVFD] may be regarded as an instrumentality of a fire district. However, because the District itself is not a political subdivision, but rather the instrumentality of one, the volunteer company is only the instrumentality of an instrumentality. Although OPRA provides that an instrumentality of a political subdivision constitutes a public agency, it does not provide that an instrumentality of an instrumentality constitutes a public agency.... OPRA requires a direct connection to a political subdivision. Therefore, we cannot conclude from the language used by the Legislature that it intended for a volunteer fire company to be considered a separate public agency for OPRA purposes...." The Court also noted that "[w]e discern no evidence that the Legislature intended for an entity under a contractual relationship with an instrumentality of a political subdivision to become a public agency for OPRA purposes."

- ***Ohio:***
  **<u>James Hurt, et. al. v. Liberty Township, et. al.</u>**
  (No. 17 CAI 05-0031, Ohio Court of Appeals, 5th District, Delaware County) (September 22, 2017):

  The Court held that the interview notes prepared by Douglas Duckett, a private individual, hired by the Board of Trustees of Liberty Township to investigate alleged misconduct by, and prepare charges for the removal of, the Township's fire chief were public records subject to disclosure. Under state law, the Board was required to investigate such misconduct, and was authorized to designate a private citizen or the fire chief to conduct the investigation. Since the employee under investigation was the fire chief, the Township hired a private individual.

  The Court determined that Duckett was the "functional equivalent of a public office sufficient to compel compliance with the Public Records Act [PRA]." In reaching its determination, the Court considered the following factors: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government or to avoid the requirements of the PRA.

Applying this four-part test, the Court found that Duckett was performing a government function as "[t]he ultimate decision and responsibility for investigating, initiating, hearing and deciding the issue of whether to remove a fire chief are 'government functions.'" With respect to the level of government funding, the Court found that "Duckett was paid by Liberty Township with public tax dollars." In addition, the Court found that "[t]he extent of governmental involvement in the removal of a firefighter or a fire chief is extensive and can only be accomplished in accordance with the procedures established by the legislature" and "[n]othing in the record indicates Duckett was appointed to avoid the requirements of the [PRA]."

The Court also determined that Duckett was subject to the PRA under the "quasi-agency test." The Court found that Duckett was carrying out a function of the Township when he conducted his investigation; the Township monitored Duckett's investigation; and the Board of Trustees had access to the records at issue. The Court noted that "Duckett was hired to conduct an investigation.... To that end, Duckett prepared his reports and interviews in order to carry out the Board's public responsibilities. If a fire chief rather than a private individual conducts the investigation, then the records of the fire chief, who is a Township employee, would be accessible by the Board and subject to disclosure."

The Court further found that "Liberty Township did not introduce sufficient evidence to establish an exemption from disclosure or that Duckett's notes did not in their own right document the organization, functions, policies, decisions, procedures, operations or other activities of the Township."

- ***Tennessee:***
  **Memphis Publishing Company d/b/a The Commercial Appeal, et. al. v. City of Memphis, et. al.** (No. W2016-01680-COA-R3-CV, Tennessee Court of Appeals) (July 26, 2017):

  The Court of Appeals concluded that the International Association of Chiefs of Police (IACP), a nonprofit professional association, who was hired to assist the City of Memphis in recruiting candidates for its Director of Police, was not operating as the "functional equivalent" of the City of Memphis.

  According to the agreement between the City and IACP, the IACP was "to solicit and receive application materials from candidates nationwide, perform an initial review of those resumes and cover letters, and 'identify the best candidates (approximately 10-20 semifinalists) for initial screening, 'which would include 'internet checks and structured telephone interviews'.... IACP would then 'recommend a group (approximately six) of the most highly qualified candidates for further on-site evaluation.'"

  The Court considered four factors: (1) whether and to what extent IACP performed a governmental or public function; (2) the level of government funding of the entity; (3) the extent of government involvement with, regulation of, or control over the entity; and (4) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

With respect to the first factor (governmental or public function), the Court determined that "the services performed by IACP in identifying potential candidates for the position of Director of the Memphis Police Department does not equate to performing a governmental function. The governmental function here is the hiring of the director of police, and this function was never delegated or assigned to the IACP.... IACP provided a service to the City, and we do not construe the essentially administrative tasks of conducting a preliminary search and delivering a non-binding list of recommended candidates to be the same as managing a program of the City or otherwise making a decision that would bind the City. Rather, the services IACP performed were incidental to the selection of the director-a task wholly assumed by the City." With respect to the second factor (government funding), the revenue that IACP received for its services is a "miniscule part of its overall budget [i.e., less than one percent] and does not constitute a substantial level of governmental funding of IACP." As for the third factor (government involvement), the Court found that "[o]ther than the Agreement, there is no evidence of any other contract between the City and the IACP, and there is nothing to demonstrate that the City has regulated or exercised control over IACP in its provision of services or otherwise. The services IACP provides are limited to the three areas identified in the Agreement and the performance of those services necessitates little if any City involvement with or control over IACP. Further, the City has not delegated any of its official responsibilities or authority to IACP...." With respect to the fourth factor (legal identity), the IACP was not created by the Tennessee Legislature, nor has any court previously determined that the IACP's records relating to its executive search functions constitute "public records."

**Oliver Wood, et. al. v. Jefferson County Economic Development Oversight Committee, Inc.** (No. E2016-01452-COA-R3-CV, Tennessee Court of Appeals) (September 26, 2017):

The Court of Appeals held that the Jefferson County Economic Development Oversight Committee (EDOC), a non-profit corporation, is the functional equivalent of a government agency subject to the Public Records and Open Meetings Acts.

The Court found that the EDOC performs a government function (*i.e.,* the promotion of economic development) and receives a substantial amount of taxpayer funding (*i.e.,* over a quarter of a million dollars in public funds per year). The Court also found that there was a substantial amount of government involvement with the operations of the EDOC (*e.g.,* four of the eight voting members of the EDOC's Board of Directors are public officers who voting together can block a proposed action by EDOC). In addition, the Court found that the EDOC was significantly involved with and regulated by the governing city and county legislative bodies (*e.g.,* testimony of various public officials established that "EDOC played a significant role in promoting [a] megasite development, which was described as one of the most important economic decisions ever made by the county, and which involved a large expenditure of public funds.")

- *Wisconsin*:
  **State of Wisconsin ex. rel. John Krueger v. Appleton Area School District Board of Education, et. al.** (No. 2015AP231, Wisconsin Supreme Court) (June 29, 2017):

  The Supreme Court held that the Appleton Area School District's Communications Art 1 Materials Review Committee ("CAMRC") met the definition of "governmental body" under the open meetings law and therefore was subject to its terms.

  Specifically, the Court found: "Where a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are 'created by…rule' under §19.82(1) and the open meetings law applies to them. Here, the Board's Rule 361 provided that the review of educational materials should be done according to the Board-approved Assessment, Curriculum & Instruction Handbook ("the Handbook"). The Handbook, in turn, authorized the formation of committees with a defined membership and the power to review educational materials and make formal recommendations for Board approval. Because CAMRC was formed as one of these committees, pursuant to authority delegated to it by the Board by means of Rule 361 and the Handbook, it was 'created by…rule' and therefore was a 'governmental body' under §19.82(1)," and "therefore subject to the open meetings law."

## ❖ Attorney's Fees & Penalties

The award of attorney's fees against public agencies that deny access to public records and/or meetings can make a court action challenging such a denial less financially burdensome for the complainant. At the same time, the award of attorney's fees against a petitioner may provide an agency with some relief from an individual who files frivolous requests and/or civil actions. Below are examples of recent court cases and legislation addressing the award of attorney's fees relating to public records requests and access to public meetings:

### ➢ *Litigation:*

- ***California:***
  **Ponani Sukumar v. City of San Diego**
  (No. D071527, California Court of Appeals, 4th District, Division 1) (August 15, 2017):

  The Court of Appeals ruled that the plaintiff "substantially prevailed" in his Public Records Act litigation against the City of San Diego because the litigation and court-ordered depositions forced the City to disclose additional records.

  The Court noted that "[i]n the face of the City's unequivocal assertion…that it had already produced everything, the conclusion seems inescapable that but for [the plaintiff's] persistent demand for discovery and the court-ordered depositions that resulted from those efforts, the City would not have produced any of the [subsequently disclosed] responsive documents." The Court added that because "the City told the [trial] court and [the plaintiff] that it had produced *everything* and there was nothing more to produce…the City would not have continued searching for documents it had just claimed did not even exist." (Emphasis in original). The matter was remanded and the lower court directed to determine the amount of reasonable attorney's fees and costs to which the plaintiff was entitled.

- ***New York:***
  **Competitive Enterprise Institute v. Attorney General of New York**
  (No. 2017-27135, 5050-16, New York Supreme Court) (April 19, 2017):

  The Court determined that the petitioner had "substantially prevailed" and that the respondent failed to fully explain the reason for denial of access and to detail its search for the requested information. Subsequently, the petitioner made an application for fees and costs to the Court. The Court ordered the respondent to pay the sum of $20,377.50 as counsel fees and $466.72 in litigation costs.

  The Court found that "on account of respondent's failure to either turn over the requested documents, or identify the applicable exemption and that the material requested fell squarely within that exemption…petitioner was required to commence this Article 78 petition. It substantially prevailed, and it was only through the use of judicial process that it was able to obtain the required disclosure. Further, given respondent's continued failure 'to proffer more than conclusory assertions' as a basis for withholding the subject record…and then only producing it after it was in the public domain – the Court's award of

substantial attorney fees is particularly appropriate' in order to promote the purpose and policy behind FOIL [Freedom of Information Law]'...."

The Court stated that "[i]n determining an award of fees and costs in a FOIL proceeding, the Court is mindful 'that the decision whether to award such fees is discretionary even when the statutory prerequisites have been established'..., that an 'award of attorney's fees is intended to 'create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL'..., and that the award should be reasonable and take into consideration appropriate factors including 'the time, effort and skill required; the difficulty of the questions presented; the responsibility involved; counsel's experience, ability and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation'...."

- ***Tennessee:***
  **Rickey Joe Taylor v. Town of Lynnville**
  (No. M2016-01393-COA-R3-CV, Tennessee Court of Appeals) (July 13, 2017):

  The Court of Appeals ruled that the Town of Lynnville willfully violated the Tennessee Public Records Act (TPRA) by refusing to allow the requester to inspect certain public records, and remanded the case to the trial court for a determination of costs and attorney's fees.

  "Under the TPRA, a trial court may award costs and attorney's fees if it finds 'that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and *willfully* refused to disclose it'....As is evident from the statute, a determination of willfulness is a condition precedent to an award of attorney's fees and other costs." The Court noted that "'[i]f a municipality denies access to records by invoking a legal position that is not supported by existing law or by a good faith argument for the modification of existing law, the circumstances of the case will likely warrant a finding of willfulness."

  Here, the Court found that the Town "erected barriers to access that had no basis in law." For example, at the time that the plaintiff came to inspect some of the requested records, Lynnville's City Reporter simply informed the plaintiff that she had tried to contact her attorney and that the plaintiff could not view the records until the following Friday. "In [the Court's] view, this explanation fails to contain any legitimate excuse for failing to provide access to the records...."

  The Court noted that the plaintiff "had to file a lawsuit to obtain access to the requested public records, and this appeal was part and parcel of his efforts to vindicate his right of access. Indeed, absent the willful denial of access, [the plaintiff] would not have incurred any attorney's fees, appellate or otherwise. Thus, in our view, his appellate costs and attorney's fees are 'costs involved in obtaining the record.'"

➢ ***Legislation:***

- ***Colorado:***
  **Senate Bill 17-040,** ***An Act Concerning Public Access to Files Maintained by Governmental Bodies.*** (Signed)

  Among other provisions, the bill repeals the criminal penalty (*i.e.,* class 2 misdemeanor) for willfully and knowingly violating the Colorado Open Records Act. According to the fiscal note released by the staff of the Colorado Legislative Council,[1] in the last three years, there have been no criminal charges filed or convictions entered for a violation of the class 2 misdemeanor.

- ***Florida:***
  **Senate Bill 80 (Ch. 2017-21),** ***An Act Relating to Public Records….*** (Signed)

  Senate Bill 80 amends Florida's public records laws concerning attorney's fees. Among other provisions, the bill requires that, in a civil action filed against an agency to enforce public records laws, the court "shall determine whether the complainant requested to inspect or copy a public record or participated in the civil action for an "improper purpose." If the court determines there was an improper purpose, the court may not assess and award the reasonable costs of enforcement, including reasonable attorney fees, to the complainant, and shall assess and award against the complainant and to the agency the reasonable costs, including reasonable attorney fees, incurred by the agency in responding to the civil action." The term "improper purpose" means "a request to inspect or copy a public record or to participate in the civil action primarily to cause a violation of this chapter or for a frivolous purpose."

[1] http://leg.colorado.gov/sites/default/files/documents/2017A/bills/fn/2017a_sb040_r3.pdf

## ❖ Electronic Records

Public officials and employees of government agencies are utilizing electronic records to a greater extent than ever in performing governmental duties. Below are summaries of court decisions and legislation concerning access to electronically stored records:

### ➢ *Litigation:*

- ***California:***
  **City of San Jose, et. al. v. Superior Court of Santa Clara County, et. al.**
  (No. S218066, California Supreme Court) (March 2, 2017):

  The Supreme Court held that when a city employee uses a personal account to communicate about the conduct of public business, the communications may be subject to disclosure under the California Public Records Act (CPRA).

  The Court concluded that "a city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account. Sound public policy supports this result....If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation 'would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private.'"

- ***Michigan:***
  **Terry Lee Ellison v. Department of State**
  (No. 336759, Michigan Court of Appeals) (June 13, 2017):

  The plaintiff made a request for an electronic file containing information concerning all vehicle registrants who were notified by the Department of State about their inability to verify proof of insurance at renewal. The defendant denied the request, claiming that it did not possess a responsive record and was not required to create a new record. In addition, the defendant claimed that the plaintiff had not paid the requisite fee for each record.

  The Court of Appeals ruled that a certain "database contained some of the information plaintiff sought, including the names, addresses, vehicle ID numbers, registration, and insurance audit information. It was not necessary for defendant to generate a report from the database for it to be a public record. The database itself was a writing because it was information stored in a computer...that defendant used to perform an official function...." The Court noted that "[a] FOIA request need only be descriptive enough that a defendant can find the records containing the information that the plaintiff seeks....When a plaintiff does not ask the defendant to create a new record, 'the fact that the [defendant] has no obligation to create a record says nothing about its obligation to satisfy plaintiff's request in some other manner'...." Here, the plaintiff "requested 'any'

information that was included in its list. The database's tables contained much of the information plaintiff sought."

Notably, while the database was ruled to be a public record, the Court found that the defendant nevertheless had grounds to deny the plaintiff's request because he had not paid the statutorily required fee – which, in this case, was estimated to be $1.6 million.

- ***New Hampshire:***
  **David Taylor v. School Administrative Unit # 55**
  (No. 2016-0702, New Hampshire Supreme Court) (September 21, 2017):

  The Supreme Court held that the School Administrative Unit's (SAU) thumb drive policy for transmitting electronic records complied with the Right-to-Know law.

  Here, the SAU denied, per its policy, the plaintiff's request that SAU forward to him, by email, a copy of meeting minutes. The SAU's policy "requires members of the public seeking electronic records to come to the SAU's offices with a thumb drive in sealed, original packaging or to purchase a thumb drive from the SAU at its actual cost of $7.49."

  Among other findings, the Supreme Court found that "[b]ecause the statute permits a fee for the copying of records, the use of a thumb drive as a medium to copy the records does not violate the statute." In addition, "copying the records onto a thumb drive satisfies the plaintiff's request to provide them in electronic form." Furthermore, "because the SAU's thumb drive policy 'does not diminish the use of the records requested and serves the important governmental interest of protecting public bodies' and agencies' information technology systems [from, for example, potential cyber security threats], we conclude that the policy is reasonable and does not violate [the Right-to-Know law]."

- ***New Jersey:***
  **John Paff v. Galloway Township, et. al.**
  (No. A-88-15, New Jersey Supreme Court) (June 20, 2017):

  At issue was the scope of a municipality's obligation to disclose electronically stored information in accordance with the New Jersey Open Public Records Act (OPRA).

  The plaintiff made a request for specific information in emails sent by the Township's Municipal Clerk and Chief of Police over a two-week period. The plaintiff requested an itemized list of the information contained in the following fields: "sender," "recipient," "date," and "subject." He did not request the content of the emails. The Township argued, among other arguments, that only the emails themselves were "government records" subject to disclosure under OPRA, and that, even though they had previously provided the plaintiff with similar email logs, they were not required to create a new record by extracting and compiling information from those emails in the form of a list.

The Court, reversing an appellate court decision, concluded that "the requested fields of information from the identified emails constitute 'information stored or maintained electronically'... and are therefore 'government records' under OPRA." The Court also remanded the case for further proceedings consistent with its opinion, stating that "[t]he trial court must determine whether any of OPRA's exceptions or exemptions bar access to the requested information or whether any redactions are necessary."

- *Vermont:*
  **Brady C. Toensing v. Attorney General of Vermont**
  (No. 2017-090, Vermont Supreme Court) (October 20, 2017):

  The Supreme Court concluded that "records produced or acquired in the course of agency business are public records under the [Public Records Act], regardless of whether they are located in private accounts of state employees or officials or on the state system." The Court further concluded that "in this case, where plaintiff specifically seeks specific communications to or from individual state employees or officials, regardless of whether the records are located on private or state accounts, the [Office of the Attorney General's] obligation to conduct a reasonable search includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to plaintiff's request."

  The Supreme Court also addressed the adequacy of the search for records as follows: "[I]f, in addition to searching the AGO's own records as it has done, the AGO has policies in place to minimize the use of personal accounts to conduct agency business, provides the specified employees and officials adequate guidance or training as to the distinction between public and nonpublic records, asks them to provide to the AGO any responsive public records in their custody or control, receives a response and brief explanation of their manner of searching and segregating public and nonpublic records, and discloses any nonexempt public records provided, its search will be adequate. This approach strikes a balance between protecting the privacy of state workers and ensuring the disclosure of those public records necessary to hold agencies accountable."

➢ ***Legislation:***

- ***Colorado:***
  **Senate Bill 17-040,** ***An Act Concerning Public Access to Files Maintained by Governmental Bodies.*** (Signed)

  Among other provisions, Senate Bill 17-040 requires custodians of public records to provide copies of electronic records in digital format. Section 1 of the bill provides: "(I) If a public record is stored in digital format that is neither searchable nor sortable, the custodian shall provide a copy of the public record in a digital format [;] (II) If a public record is stored in a digital format that is searchable but not sortable, the custodian shall provide a copy of the public record in a searchable format [; and] (III) If a public record is stored in a digital format

that is sortable, the custodian shall provide a copy of the public record in a sortable format."

Senate Bill 17-040 also provides that, among other reasons, a custodian is not required to produce a public record in a searchable or sortable format if: "(I) Producing the record in the requested format would violate the terms of any copyright or licensing agreement between the custodian and a third party or result in the release of a third party's proprietary information; or (II) After making reasonable inquiries, it is not technologically or practically feasible…or the custodian would be required to purchase software or create additional programming or functionality in its existing software to remove the information."

❖ **Also Noteworthy**

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

➢ ***Affirmatively Pleading an Exemption:***

- ***Iowa*:**
  **Dr. Allen Diercks, et. al. v. Craig Malin, Davenport City Administrator, City of Davenport, Iowa, et. al.**
  (No. 15-0609, Iowa Court of Appeals) (December 21, 2016):

  The case arose from the City of Davenport's inquiry into acquiring the Isle of Capri's Rhythm City Casino. Among other documents, the requesters requested a legal memorandum regarding the casino acquisition. The City made no claim of confidentiality or privilege in its responses to the records request nor in its answer to the plaintiff's petition to the court. The City argued that "it had no duty to identify an exemption or plead privilege as an affirmative defense" and that "it was simply entitled to withhold the document."

  The Court found that "[a]lthough pleading an exemption would put the opposing party on fair notice of the claim, we find no requirement that a governmental body must affirmatively plead an exemption to disclosure. Regardless, our courts have consistently held the burden of proving a public record is exempt from disclosure or production is on the governmental body claiming the exemption.... Based on the parties' apparent agreement the City did not argue this issue before the district court, the City cannot now maintain this exemption on appeal....The City has failed in its burden; accordingly, we reverse."

➢ ***Attorney-Client Confidential Communications & Common Interest Privilege and Deliberative Material Exemption:***

- ***Indiana:***
  **William Groth v. Mike Pence, as Governor of the State of Indiana**
  (No. 49A04-1605-PL-1116, Indiana Court of Appeals) (January 9, 2017):

  The requester made a request to the Governor's Office for documents relating to the Governor's decision that Indiana would join Texas in a federal lawsuit against the President of the United States to contest certain presidential executive orders on immigration.

  The Governor withheld certain records from disclosure, including, among other records, "a legal memorandum, referred to by the parties as a "white paper," created by a Texas deputy solicitor general concerning the proposed Texas litigation and disseminated to governors' offices in Indiana and numerous other states."

  With respect to the "white paper," the Court affirmed the Governor's decision to withhold such record as it "contains legal theories in contemplation of litigation,

was used by the Governor in his decision to join the litigation, and is exactly the type of record that may be excluded from public access under APRA [the Indiana Access to Public Records Act]."

The Court agreed with the Governor, stating that, "[i]n the case of the white paper, one party is sharing a legal memo, drafted by its lead counsel, with other potential parties in order to assist those parties in determining whether to join in the lawsuit.... As such, the white paper was a communication made to further an ongoing joint enterprise with respect to a common legal interest....Accordingly, [the Court held] that the white paper was privileged attorney-client communication under the common interest doctrine....As promised by Texas Governor-Elect Abbott, Hodge sent the white paper to Governor Pence and other governors to explore their common interest in contesting the President's executive orders. This communication of a legal opinion occurred as Texas sought to determine whether other states would agree to join the federal suit and, as a result, twenty-five states joined Texas as plaintiffs."

The Court also agreed that the Governor acted within his discretion when he withheld the "white paper" under the deliberative material exception. "The Governor used that record within his office, making it an intra-agency record. And the white paper was an expression of legal opinion used by the Governor for the purpose of decision making."

Notably, the Court rejected the Governor's argument that the requester's APRA complaint was not justiciable. The Governor contended that "his 'own determinations' under APRA are conclusive and that it would violate the separation of powers doctrine for the judiciary to 'second guess' those determinations." The Court disagreed, finding that "[t]his case is not a challenge to the Governor's core executive functions or his constitutional authority as chief executive to decide whether Indiana should join Texas and other states as a plaintiff in a federal suit against the President. Rather, the APRA requests here are merely requests for access to public records that concern a matter of legitimate public interest.... The Governor's argument would, in effect, render APRA meaningless as applied to him and his staff. APRA does not provide for any such absolute privilege, and the separation of powers doctrine does not require it."

- ***Burden of Proof, "Legislative E-Mail Exemption" & "Privilege Exemption":***

  - ***Delaware:***
    **Chipman L. Flowers v. Office of the Governor, et. al.**
    (No. N16A-05-004 FWW, Delaware Superior Court) (August 22, 2017):

    The Court concluded that the Governor's Office did not violate Delaware's Freedom of Information Act (FOIA) when it withheld certain emails sent or received by the General Assembly. The Court found that the Governor's Office provided sufficient reasons to satisfy its burden of proof as to both the Legislative E-Mail Exemption and the Privilege Exemption.

With respect to the Legislative E-Mail Exemption claim, the Governor's Office argued that all emails sent or received by members of the General Assembly or their staff are exempt from disclosure, regardless of the emails' content and context, and that such exemption is not limited to constituent communications. The Court found that the Governor's Office properly invoked the plain language of the Legislative E-Mail Exemption to satisfy its burden of proof. The Court found that "the General Assembly's intent is evident based upon the unambiguous language of the Legislative E-Mail Exemption. Pursuant to the Legislative E-Email Exemption, '[e]mails received or sent by members of the Delaware General Assembly or their staff are not public records'.... There is no mention in the exemption of a 'content or context limitation.' Requiring the Governor's Office to review e-mails for 'content or context' adds an element of interpretive ambiguity not found in the statute."

With respect to the Privilege Exemption claim, the Governor's Office argued that it provided sufficient reasons for withholding emails under such exemption to satisfy its burden of proof. The FOIA "requires the public body to provide 'reasons' for withholding records under the exemption. Here, the Governor's Office claim[ed] the Response [to the FOIA petition, setting forth various exemptions], coupled with the [affidavit of the Governor's Deputy Legal Counsel], provide[d] sufficient reasons to support the nondisclosure of certain e-mails." The Governor's Office also argued "the plain language of FOIA does not require a public body to either outline the contours of any privilege asserted or provide a general description of how the privileges were applied." The Court, applying the language of the FOIA, found that "the General Assembly contemplated that a public body could meet its burden of proof without resorting to the production of an index or compilation of each document withheld under each FOIA exemption." The Court found that "an affidavit, along with a detailed written submission that indicates the reasons for the denial *may* be sufficient to satisfy the public body's burden. Otherwise, the public body would be in the *Catch-22* position of not being required to produce an index, but not being able to meet its burden unless it produced an index." [Emphasis in original].

➢ ***Catalog of Exemptions:***

- ***Oregon:***
  **Senate Bill 481 (Ch. 456),** ***An Act Relating to Public Records....*** (Signed)

  The bill requires, in relevant part, that the Attorney General maintain and regularly update a catalog of exemptions created by Oregon statute from the disclosure requirements of Oregon's Public Records Law. The catalog must be as comprehensive as reasonably possible and freely available to the public in a searchable electronic format. The catalog must include, among other information, citations to the Oregon statute(s) creating the exemption, the relevant text of the statute(s) creating the exemption, and a citation to any relevant Supreme Court or Appellate Court decision construing the exemption.

- ***Collective Bargaining:***

  - ***Washington:***
    **SEIU 775 v. State of Washington, Department of Social and Health Services, et. al.** (No. 48881-7-11, Washington Court of Appeals, Division 2) (April 25, 2017):

    The Freedom Foundation, an organization with a stated purpose of educating public employees about their constitutional right not to join or pay dues to public sector unions, made a records request to the Department of Social and Health Services (Department) concerning contracting appointments and training presentations for individual providers (IPs). SEIU 775, the union representing the IPs, filed a request for an injunction preventing the Department from disclosing the requested information. SEIU argued that the provisions of the Public Employees Collective Bargaining Act (PECBA) provide an "other statute" exemption to the Public Records Act (PRA) because the Department's disclosure of the records would constitute an unfair labor practice in violation of the PECBA.

    The Court held that the PECBA does not provide an "other statute" exemption to the PRA. The Court found that the PECBA "is not concerned with the privacy or confidentiality of specific records or information, and it does not explicitly prohibit the release of records or information that would constitute an unfair labor practice." The Court found that "the PECBA does not even mention any records or information. Holding that the PECBA provides an 'other statute' exemption would require us to imply such an exemption.... If the legislature had wanted to prevent the disclosure of information related to public employees and their unions, it could have done so expressly through explicit language."

- ***Commercial Information:***

  - ***Maryland:***
    **Jayson Amster v. Rushern L. Baker, County Executive for Prince George's County, et. al.** (No. 63-2016, Maryland Court of Appeals) (May 22, 2017):

    The County withheld a certain lease, which was provided by a developer to the County, from disclosure under the confidential commercial information exemption in the Maryland Public Information Act (MPIA).

    In determining whether confidential business information voluntarily provided to the County may be withheld under the confidential commercial information exemption, the Court of Appeals adopted the D.C. Circuit's decision in Critical Mass v. NRC, 975 F.2d 871 (D.C. Cir. 1992). In Critical Mass, the Court held that "commercial information is 'confidential' -- and therefore exempt from MPIA disclosure -- if it 'would customarily not be released to the public by the person from whom it was obtained.'"

    The Court found that "[h]ere, the [County] had not met their burden of showing that this lease is protected in its entirety from disclosure because they have not

demonstrated that [the developer] would not 'customarily' disclose any of its contents." The Court further indicated that "[i]ndeed, when a source of commercial information has already revealed it to the public, it can hardly be said that the information 'would customarily not be released to the public by the person from whom it was obtained....Thus, such information should not be withheld under the MPIA's confidential commercial information exemption."

➢ ***Common Law Right to be Free of Physical Harm:***

- ***Texas:***
  **Texas Department of Criminal Justice v. Maurie Levin, et. al.**
  (No. 03-15-00044-CV, Texas Court of Appeals, 3rd District, Austin) (May 25, 2017):

  The appeal concerned whether the common-law right to withhold "public information" from disclosure under the Public Information Act when disclosure "would create a substantial threat of physical harm," shields the identity of a supplier of the lethal-injection drugs used by Texas in executions.

  In its analysis, the Court considered "whether disclosure of the identifying information at issue (i.e., making publicly available the identity of the pharmacy or pharmacist who supplied TDCJ [the Texas Department of Criminal Justice] with lethal-injection drugs) would make it probable (i.e., more likely than not) that the pharmacist, pharmacy employees, or others would be physically harmed."

  The TDJC offered expert testimony and provided examples of pharmacies that had received threats after their identities were publicly disclosed. The Court found that "[t]o the extent this evidence is relevant to the existence of a threat of physical harm to the pharmacy here, it would demonstrate only the residual or general threat of physical harm that would accompany virtually any participation in governmental functions or controversial issues. This falls short of the '*substantial* threat of physical harm'...." [Emphasis in original].

  The TDJC also offered, as evidence, "two writings [i.e., blog posting and email] that specifically referenced physical harm in the context of debate regarding pharmacies that supply lethal-injection drugs." With respect to such writings, the Court noted "we cannot conclude that these isolated threats, without more, would support more than mere speculation that disclosure of the identity of another pharmacy, or of the particular Texas pharmacy or pharmacist in question here, would necessarily give rise to the *substantial* (i.e., more likely than not) threat of physical harm...." [Emphasis in original].

➢ ***"Cooling Off Period" Prior to Court Action:***

- ***Colorado*:**
  **House Bill 17-1177, *An Act Concerning the Use of Alternative Methods of Resolving Disputes that Arise Under the "Colorado Open Records Act."***
  (Signed)

Under the Colorado Open Records Act, any person denied the right to inspect a public record may appeal to the district court for an order directing the record custodian to show cause why the custodian should not permit the inspection of such record. Prior to the enactment of House Bill 17-1177, at least 3 business days prior to filing the application with the court, the person who was denied the right to inspect was required to file a written notice with the custodian informing the custodian that the person intended to file an application with the court. The bill changes the time period from 3 business days to 14 days.

In addition, House Bill 17-1177 requires that, during the 14 day period, the custodian of the record and the person who was denied access to the record "either meet in person or communicate on the telephone…to determine if the dispute may be resolved without filing an application with the district court. The meeting may include recourse to any method of dispute resolution that is agreeable to both parties. Any common expense necessary to resolve the dispute must be apportioned equally between or among the parties unless the parties have agreed to a different method of allocating the costs between or among them." In addition, if the person who was denied access needs to pursue access on an "expedited basis," then the person must provide written notice to the custodian at least 3 business days prior to filing the application with the court, and no meeting is required.

- ***Debt Transparency:***

  - ***Illinois:***
    **House Bill 3649 (Act 100-0552),** ***An Act Concerning Finance*** **(aka "The Debt Transparency Act")** (Governor's Veto Overridden by General Assembly):

    The bill requires that each state agency provide a report, on a monthly basis, to "the State Comptroller identifying: (i) current State liabilities held at the agency, by fund source; (ii) whether the liabilities are appropriated; and (iii) an estimate of interest penalties accrued under the State Prompt Payment Act under criteria prescribed by the State Comptroller." The Comptroller is required to post these monthly reports on the Comptroller's website.[2]

- ***Emergency & Security Records – Public Schools & Institutions of Higher Learning:***

  - ***Arkansas:***
    **Senate Bill 12 (Act 541),** ***An Act to Establish that Emergency or Security Records or Other Information for a Public School District, Public School, or State-Supported Institution of Higher Education is Exempt from the Freedom of Information Act of 1967….*** (Signed)

    Under the bill, the following records or other information related to a public school district, public school or state-supported institution of higher education, are

[2] State of Illinois Comptroller Press Release, Debt Transparency Act Fact Sheet: https://illinoiscomptroller.gov/news-portal/debt-transparency-act-fact-sheet/#.Whwmf02ovmg

confidential and not subject to disclosure: (1) records or other information that upon disclosure could reasonably be expected to be detrimental to the public safety (*e.g.,* records or other information concerning emergency or security plans); and (2) records or other information relating to the number of security personnel (*e.g.,* licensed security officers), as well as any personal information about those individuals.

- ***Florida:***
  **House Bill 501 (Ch. 2017-109),** ***An Act Relating to Public Records and Public Meetings....*** (Signed)

  Under the bill, certain data or information from technology systems owned, under contract, or maintained by a state university or a Florida College System institution are confidential and exempt from disclosure, including, but not limited to, records that identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, and portions of risk assessments, evaluations, audits, and other reports of a university's or institution's information technology security program for its data, information, and information technology resources under certain circumstances.

➢ ***Emergency & Security Records – State Capitol Police:***

- ***Arkansas:***
  **Senate Bill 131 (Act 474),** ***An Act to Exempt from the Freedom of Information Act of 1967 Certain Records of the State Capitol Police....*** (Signed)

  The bill exempts from disclosure records or other information related to the operations, emergency procedure, and security personnel of the State Capitol Police, including, but not limited to, records that, if disclosed, could reasonably be expected to be detrimental to the public (*e.g.,* emergency or security plans, State Capitol Building or Capitol Hill apartment complex safety plans), and records relating to the number of licensed security officers, certified State Capitol Police officers or other security personnel, as well as any personal information about such individuals.

➢ ***Failure to View & Pay for Copies of Public Records:***

- ***Tennessee:***
  **House Bill 58/Senate Bill 464 (Ch. 233),** ***An Act to Amend Tennessee Code Annotated, Title 10, Chapter 7, Part 5, relative to Open Records Requests.***
  (Signed)

  Under the bill, if a person makes 2 or more requests *to view* a public record within a 6-month period and, for each request, the person fails to view the record within 15 business days of receiving notification that the record is available to view, the governmental entity is not required to comply with *any* records request from the person for a period of 6 months from the date of the second request to view the record *unless* the entity determines that the failure to view the record was for good cause.

In addition, if a person makes a *request for copies* of a public record and, after copies have been produced, the person fails to pay the cost for producing such copies, the governmental entity is not required to comply with *any* records request from the person until the person pays for such copies; provided, the entity gave the person an estimated cost for the copies prior to producing the copies and the person agreed to pay such cost.

➢ ***Fees – Costs for Producing Electronic Records:***

- ***Washington:***
  **House Bill 1595 (Ch. 304),** ***An Act Relating to Costs Associated with Responding to Public Records Requests….*** (Signed)

  Among other provisions, the bill provides that in determining the actual cost for providing copies of public records, including electronically produced copies, an agency may include the actual cost of the electronic production or file transfer of the record(s) and the use of any cloud-based data storage and processing service, as well as all costs directly incident to transmitting the requested records in an electronic format (*e.g.,* cost of any transmission charge and use of any physical media device provided by the agency).

➢ ***Fees – Prepayment:***

- ***Maine:***
  **L.D. 1432 (HP 986),** ***An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Advance Payment of Costs for Public Records Requests.*** (Signed)

  Under the bill, a public agency or official may require payment of all costs before the public record is provided to the requester.

➢ ***Fees for Searching:***

- ***Indiana:***
  **House Bill 1523,** ***An Act to Amend the Indiana Code Concerning State and Local Administration.*** (VETOED)

  House Bill 1523 would have allowed a state or local government agency to charge a maximum hourly fee (up to $20 per hour) for any records search that exceeds two hours. The bill would have also required public agencies to provide electronic copies of public records in electronic format, if requested.

  Although the Governor of Indiana supported the provision requiring public agencies to provide electronic records in electronic format, he vetoed the bill. In the governor's message to the Indiana General Assembly, he stated: "While I understand the intent behind the bill to offset the considerable time and expense often devoted to fulfilling public records requests… [p]roviding access to public records is a key part of the work public servants perform and is important from a

government transparency standpoint. I do not support policies that create burdensome obstacles to the public gaining access to public documents."[3]

- ***Fees – Request for Inspection of Electronic Records:***

  - ***Wyoming*:**
    **Cheyenne Newspapers, Inc. v. Board of Trustees of Laramie County School District Number One**
    (No. S-16-0059, Wyoming Supreme Court) (November 30, 2016):

    The newspaper made a request *to inspect* emails of a certain school board member. The school district retrieved the emails from the personal and school district email accounts of board members, downloaded them to a disc, and made the disc available to the newspaper, subject to a fee for the time staff spent retrieving the records.

    The retrieval of the emails required the involvement of the School District's IT staff and "special programming to extract the records from multiple email accounts based on the identities of the sender and recipient, the dates of the emails, and whether the emails pertained to any school board topic. Indeed, there has been no suggestion that it was in any way feasible for the [newspaper] to access the requested emails online or in any manner that did not require the School District to extract the emails and produce a copy of them."

    The Supreme Court ruled that the Wyoming Public Records Act "allows a public record custodian to charge for inspection of an electronic record if the inspection request requires production of a copy of the record. The limitation on the costs charged is that they be the reasonable costs of producing a copy."

- ***"Harassment" Petitions by Agencies:***

  - ***Massachusetts:***
    **House No. 4333, *An Act to Improve Public Records (effective January 1, 2017):***

    Pursuant to section 10 of House Bill 4333, which was effective January 1, 2017, an agency may petition the Supervisor of Records at the Secretary of the Commonwealth's Public Records Division, for an extension of the time for the agency to furnish copies of the requested record. Upon a showing of "good cause," the supervisor may grant an extension.

    The supervisor of records "shall consider, but shall not be limited to considering… whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency of municipality…. If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad

[3] http://indianacog.org/files/2017/04/Veto-Letter-1523.pdf.

dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought."

- ***Inmates:***

  - ***Louisiana:***
    **James E. Boren v. Earl B. Taylor**
    (No. 2016-CC-2078, Louisiana Supreme Court) (June 29, 2017):

    The Supreme Court held that a provision in Louisiana's Public Records Law (PRL) restricting an incarcerated individual's right to access public records does not apply to a prisoner's attorney, even if the request is made on behalf of such individual.

    The Court found that the plain language of the PRL "only restricts the right of 'an individual in custody after sentence following a felony conviction' to examine public documents. [The requester] is not an individual in custody after sentence following a felony conviction. Neither [the PRL] nor any other law cited to, or discovered by, this court restricts the right of a 'person' on the basis of that person's status as an attorney representing a client."

  - ***Utah:***
    **Senate Bill 0242, *Bill Modifying Provisions of the Government Records Access and Management Act.*** (Signed)

    The bill provides that a government entity is not required to respond to, or provide a record in response to, a records request from an individual who is confined in a correctional facility following the individual's conviction, with limited exceptions.

- ***Legal Invoices – Attorney-Client Privilege, Pending v. Closed Cases:***

  - ***California:***

    **Los Angeles County Board of Supervisors, et. al. v. Superior Court of Los Angeles County; ACLU of Southern California, et. al., Real Parties in Interest**
    (Opinion No. S226645, California Supreme Court) (December 29, 2016), *remanded for proceedings consistent with the opinion,*

    **County of Los Angeles Board of Supervisors v. Superior Court of Los Angeles County; ACLU of Southern California, Real Party in Interest**
    (Opinion No. B257230, California Court of Appeal, 2nd District) (June 5, 2017):

    At issue was whether invoices for work on currently pending litigation sent to the County of Los Angeles by an outside law firm are within the scope of the attorney-client privilege, and therefore exempt from disclosure under the California Public Records Act (PRA).

The ACLU submitted a request to the County for invoices specifying the amounts that the County had been billed by any law firm in connection with nine different lawsuits (pending and nonpending) alleging excessive force against inmates. The County agreed to provide the ACLU with the requested invoices for the lawsuits that were no longer pending, with attorney-client privileged and work product information redacted. It declined to provide the invoices for the pending lawsuits, claiming that such records were privileged and exempt from disclosure.

The Supreme Court held that "the attorney-client privilege does not categorically shield everything in a billing invoice from PRA disclosure. But invoices for work in pending and active legal matters are so closely related to attorney-client communications that they implicate the heartland of the privilege. The privilege therefore protects the confidentiality of invoices for work in pending and active legal matters."

The Court further noted that: "[t]o the extent that billing information is conveyed 'for the purpose of legal representation' – perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue – such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorially privileged. When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees. This is because, even though the amount of money paid for legal services is generally not privileged, an invoice that shows a sudden uptick in spending 'might very well reveal much of [a government agency]'s investigative efforts and trial strategy'.... Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event."

However, "[t]he same may not be true for fee totals in legal matters that concluded long ago. In contrast to information involving a pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation.... [T]he privilege turns on whether those amounts reveal anything about legal consultation."

- ***Open Government "Impact Statements":***

  - ***Oregon:***
    **House Bill 2101 (Ch. 654),** ***A Bill for An Act Relating to Public Records....***
    (Signed)

    The bill requires, in relevant part, that the Office of the Legislative Counsel, a nonpartisan legislative services agency providing legal and publication services to the Legislative Assembly, prepare an open government impact statement for each measure reported out of a legislative committee if the measure affects the

disclosure, or exemption from disclosure, of a public record. The impact statement must: "(a) State whether the measure conforms to any standards adopted by the Legislative Counsel for drafting measures that establish exemptions from disclosure of public records; and (b) Describe how the measure would alter existing standards regarding the disclosure or exemption from disclosure of public records and how the measure would impact public interests in disclosure that would be served if the public record were subject to mandatory disclosure."

- ***Ordinances, Exemptions:***

  - ***Illinois:***
    **Better Government Association v. Village of Rosemont**
    (No. 1-16-1957, Illinois Court of Appeals, 1st District, Second Division)
    (June 27, 2017):

    The Better Government Association (BGA) requested to view some contracts concerning the use of entertainment venues owned by the Village of Rosemont (Rosemont). Rosemont provided the BGA with the requested contracts, but redacted rent amounts and financial incentives.

    Among other claims, Rosemont claimed that a certain village ordinance exempted the redacted portions of the contracts from disclosure. The Court held, however, that the Freedom of Information Act (FOIA) "precludes Rosemont from creating additional restrictions on public access to information.... Home rule units have the power to expand the duty to disclose, but they lack authority to exempt from disclosure documents and information for which FOIA mandates disclosure."

    The Court found: "Rosemont, a home rule unit, may exercise any power pertaining to its government and affairs....The State legislature may preempt a home rule unit's authority over a particular issue, but to do so, the state 'legislation must contain express language that the area covered by the legislation is to be exclusively state controlled....'" The FOIA expressly provides that the Act "shall be the exclusive Statute on freedom of information, except to the extent that other State statutes might create additional restrictions on disclosure of information or other laws in Illinois might create additional obligations for disclosure of information to the public'.... We find that in this provision, the legislature expressly stated its intent that only State statutes may create additional restrictions on disclosure of information, and other laws in Illinois, including ordinances on home rule units, may create additional obligations for disclosure but cannot create exemptions from disclosure."

➢ ***Permanent Order by the Court:***

- ***Missouri:***
  **Curtis Farber v. Metropolitan Police Department of the City of St. Louis** (No. 1622-CC05285, Missouri Circuit Court) (April 4, 2017):

  The Court concluded that the police department "knowingly violated the open records laws by refusing to disclose the open records portions of the [internal affairs] investigatory file to the [requester]" and thereafter "*permanently* restrained and enjoined [the police department] from refusing to disclose Internal Affairs Investigation records which were not prepared and maintained exclusively for the purpose of hiring, firing, disciplining or promoting identifiable employees, and from refusing to disclose to plaintiff the items identified as open records" [emphasis added] by the court in the instant matter.

➢ ***Photographing Records:***

- ***Tennessee:***
  **Comptroller of the Treasury, Office of Open Records Counsel, Model Public Records Policy:**

  As reported by the media,[4] the Office of Records Counsel's model policy "stirred a statewide dispute over what rights are guaranteed in Tennessee open records law." In response to a new state law requiring government offices to establish a written public policy by July 1, 2017, the Office of Records Counsel, an advisory body, drafted a model policy which gave the custodian of records discretion regarding a requester's right to photograph public records. The policy stated: "A requestor will [not] be allowed to make copies of records with personal equipment."

➢ ***Public Records Request – Format of Request:***

- ***Tennessee:***
  **House Bill 58/Senate Bill 464 (Ch. 233),** ***An Act to Amend Tennessee Code Annotated, Title 10, Chapter 7, Part 5, relative to Open Records Requests.*** (Signed)

  Under the bill, a governmental entity cannot require a requester to submit a written request or assess a charge to view a public record unless otherwise required by law. Requests to view records may be submitted in person, telephone, facsimile, mail or email if the entity uses such means to transact official business, or via the entity's internet portal if the entity accepts public records requests via such portal.

  A governmental entity may require that a request for copies of a public record be in writing or on a form developed by the office of open records counsel. If the

[4] http://www.tennessean.com/story/news/2017/10/11/tennessee-government-offices-deny-taking-photos-public-records-legal-battle-looms/747513001/

entity requires that the request be made in writing, then the records custodian must accept any of the following: a request submitted in person or by mail; an email request if the entity uses email to transact official business; and a request submitted on an electronic form via an internet portal if the entity maintains an internet portal that is used for accepting records requests.

A governmental entity may also require any person making a request to view or make a copy of a record to present a government-issued photo identification, or other form of identification.

**Kenneth L. Jakes v. Sumner County Board of Education**
(No. M2015-02471-COA-R3-CV, Tennessee Court of Appeals) (April 12, 2017):

Among other issues, the Court of Appeals considered whether the Board of Education (BOE) violated the Tennessee Public Records Act (PRA) when it refused to respond to the petitioner's email and phone requests for records. The BOE's public records policy required a written request or an in-person visit.

Noting the recent amendment to the PRA (*see* House Bill 58, above), the Court ruled that the BOE violated the Act when it refused to respond to the email and phone requests. The Court found that the plaintiff "was forced to either make his request by mail or in person. These requirements, considered individually, have been specifically held unlawful. Likewise, we hold that these requirements, even when considered together, do not provide the fullest possible access to public records in accordance with the [PRA] in its prior form."

- ***Public Records "Bot" Requests:***

  - ***Washington:***
    **House Bill 1595 (Ch. 304),** ***An Act Relating to Costs Associated with Responding to Public Records....*** (Signed)

    Among other provisions, House Bill 1595 provides that "an agency may deny a bot request that is one of multiple requests from the requestor to the agency within a [24] hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential functions of the agency." A "bot request" is defined as "a request for public records that an agency reasonably believes was automatically generated by a computer program or script."

- ***Public Records Request – Description of Request/Identifiable Records:***

  - ***D.C. Office of Open Government:***
    **Office of Open Government Advisory Opinion, Mulhauser FOIA**
    (No. OOG-0004) (May 13, 2017):

    The Office of Open Government (OOG) opined that the records request to the D.C. Office of the Chief Technology Officer (OCTO) reasonably described the documents sought in compliance with the Freedom of Information Act.

The OOG found that the requester's original request "state[d] a discrete time period (January 1, 2017 to March 1, 2017) for emails that were sent to or by particular individuals (to or from Catherine Dellinger and any member of the 'staff at the Office of the State Superintendent of Education).'" The OOG further found that "OCTO's request that [the requester] provide both the name of the sender and the recipient of an email to conduct the search for responsive records in violation of the D.C. Official Code…" and "advised OCTO "to immediately cease and desist the practice of requiring both the name of the sender and the recipient of an email to conduct a search for responsive records."

- ***Washington:***
  **House Bill 1595 (Ch. 304),** ***An Act Relating to Costs Associated with Responding to Public Records….*** (Signed)

  The bill requires, among other requirements, that a public records request be for "identifiable records." "A request for all or substantially all records prepared, owned, used, or retained by an agency is not a valid request for identifiable records under this chapter, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records."

➢ ***"Preliminary" Emails:***

- ***Kentucky:***
  **Attorney General's Opinion, Charles Wheatly/City of Covington**
  (No. 17-ORD-004) (January 13, 2017):

  The Attorney General found, among other findings, that the City of Covington had met its burden of justifying the withheld emails on the basis that they were "preliminary" records. The City justified the withholding of certain emails, in their entirety, because "they consist of preliminary correspondence with private individuals, preliminary drafts, preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended…. The excluded documents include emails in which City staff and/or officials discuss strategies and approaches, solicit or consider opinions, or recommend a course of action….These documents also include preliminary drafts, notes and correspondence with private individuals, which are exempt from disclosure…. These emails have not been adopted as the basis of final agency action. Disclosure of these documents would harm the City's ability to freely discuss options and to formulate policies."

➢ ***Public Records Advisory Council & Public Records Advocate:***

- ***Oregon:***
  **Senate Bill 106 (Ch. 728),** ***An Act Relating to Public Accountability in Administering the Public Records Law….*** (Signed)

  The bill establishes, in relevant part, a Public Records Advisory Council to perform the following, among other functions: identify inefficiencies and

inconsistencies in application of the public records law that impede transparency in public process and government; make recommendations on changes in law, policy or practice that could enhance transparency in public process and government, and facilitate rapid dissemination of public records to requesters; and survey state agency and other public body practices and procedures for determining fee estimates and applying exemptions.

The bill also creates the Office of the Public Records Advocate who must provide, among other services, facilitated dispute resolution services when requested by a person or by a public agency concerning disclosure of public records. The failure of a person seeking public records to engage in "good faith" in the facilitated dispute resolution process shall be grounds for the state agency to deny the request and refuse to disclose the requested records. The failure of a state agency to engage in "good faith" in the facilitated dispute resolution process shall be grounds for the award of costs and attorney fees to the requester for all costs and attorney fees incurred in pursuing the request after a "good faith" determination.

➢ ***Reasonable Search:***

- ***Maryland:***
  **Gary Alan Glass v. Anne Arundel County, Maryland, et.al.**
  (No. 20-2016, Maryland Court of Appeals) (May 25, 2017):

  Among other findings, the Court of Appeals ruled that the search for documents responsive to a certain records request was reasonable in light of the nature (*i.e.*, "broadly worded" and "unbounded by date") of such request.

  The Court reasoned that "the adequacy of the agency's search is measured by whether it is reasonably calculated to uncover responsive records, not by whether it locates every possible responsive record.... In the end, what the PIA [Public Information Act] requires is a *reasonable* search designed to locate all records responsive to the particular PIA request, not a perfect search that leaves no stone unturned. Reasonableness must be measured against the specificity of the request and the willingness of the requestor to focus a request to improve the efficiency of the search. An agency is not expected to divert its resources to an exhaustive search in response to a broadly worded request that the requester refuses to focus and at an expense that will not be recovered." [Emphasis in original].

➢ ***Recording & Photographing Meetings:***

- ***New York:***
  **Committee on Open Government, Advisory Opinion, Senator Hoylman**
  (January 9, 2017):

  The Committee opined that the state Senate's rules restricting the usage of cellphones for the purposes of taking photographs or recording audio or video, without permission of the Secretary of the Senate, was contrary to the Open Meetings Law (OML), as well as judicial precedent.

"Although public bodies have the right to adopt rules to govern their own proceedings ...the courts have found in a variety of contexts that such rules must be reasonable.... In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process."

The Committee found that, in the instant matter, "it is clear that the Senate, or any public body, may prohibit activity that would be disruptive. Certainly, the Senate, by rule, could prohibit the use of a cellular telephone by members of the public relative to the sound or noise that often is or can be heard when the phone rings, when users of a phone speak into the phone, or even when a message is received or sent. When the sound is audible, I would agree that it may be disruptive and detract from the deliberative process. However, when the cellular telephone is used to record public proceedings silently and unobtrusively, as in the case of its use in the Senate gallery, a prohibition of its use in that situation would...be contrary to §103(d) of the [OML], as well as the judicial precedent that preceded the enactment of that provision."

➢ ***Social Media:***

- ***Tennessee:***
  **Attorney General Opinion, Application of Tennessee Public Records Act to Municipal Social Media Accounts** (Opinion No. 16-47) (December 22, 2016):

  The Attorney General opined that "[t]o the extent a municipal social media account or website is made 'pursuant to law or ordinance or in connection with the transaction of official business,' then that municipal social media account, including any comments regarding official business posted by municipal officials on the account, are public records subject to inspection under the [Tennessee Public Records Act]."

➢ ***Student Growth Percentile Data & Teacher Performance Indicators:***

- ***Virginia:***
  **Virginia Education Association v. Department of Education, et. al.**
  (No. 161017, Supreme Court of Virginia) (August 31, 2017):

  The requester sought student growth percentile (SGP) data for certain Loudoun County Public School students.

  The Supreme Court held that "[t]he information in the SGPs are teacher performance indicators and disclose identifiable teacher information, including teacher names and license numbers," which are confidential pursuant to Code §22.1-295.1(C)." Section 22.1-295.1(C) of the Virginia Code states, in pertinent part, "[t]eacher performance indicators or other data...used by the local school board to judge the performance or quality of a teacher, maintained in a teacher's personnel file or otherwise, shall be confidential."

➢ ***University Records - Investigations:***

- ***Kentucky:***
  **Attorney General's Opinion, In re: The Courier-Journal/University of Louisville** (No. 17-ORD-213) (October 17, 2017):

  The Attorney General found that the University of Louisville violated the Kentucky Open Records Act in partially denying a request for emails relating to the computer of former President James Ramsey. At the time of the request, the Attorney General's Department of Criminal Investigations was conducting an investigation into the University of Louisville Foundation.

  The University invoked the "law enforcement" exemption and denied the records request, in part. The University alleged that the disclosure of a certain email string "would compromise the investigation by revealing the nature or scope of the information sought in that investigation." The Attorney General disagreed finding that the "law enforcement" exemption did not apply.

  The Attorney General found that a key element of the law enforcement exemption was lacking in this appeal, *i.e.,* the record in question must be "'compiled in the process of detecting and investigating statutory or regulatory violations.'" Here, the records at issue were "'were generated in the normal course of business,' not 'as an integral part of a specific detection and investigation process.'"

  The Attorney General also noted that there was nothing in the record to indicate how the release of this information would have "a deleterious effect on the investigation" or "present[ed] a concrete risk of harm to the ongoing investigation."

➢ ***University Records - Title IX and Research Records:***

- ***North Dakota*:**
  **Senate Bill 2295, *An Act...Relating to the Exemption of State University and College Title IX Records from Public Disclosure; and...Relating to the Confidentiality of Research Information.*** (Signed)

  Under Senate Bill 2295, university research records and personally identifiable study information are exempt from disclosure. In addition, any record related to a complaint or investigation under Title IX of the Education Amendments of 1972 at an institution under the control of the state board of higher education which contains personally identifiable information about a party to the complaint is exempt from disclosure.

- ***Rhode Island*:**
  **Senate Bill 177/House Bill 5098, *An Act Relating to Public Records – Access to Public Records.*** (Signed)

  The bill provides that "[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state

institutions of higher education on commercial, scientific, artistic, technical or scholarly issues, whether in electronic or other format…" would not be deemed a public record.

- ***Vacant Housing Lists: Working Paper/Product Exemption & Balancing Test: Public Interest v. Privacy Interest***

  - ***Rhode Island*:**
    **Attorney General Opinion, Shorey v. City of Pawtucket**
    (PR-16-53) (December 22, 2016):

    Requester sought a copy of the City's "vacant housing list," which refers to a list maintained by the City Zoning Division of houses located in the City that are vacant and/or abandoned. Among other claims, the City asserted that the requested document was not subject to disclosure because it constituted a "working paper" and/or "work product" and the "privacy interest" outweighed the "public interest" in disclosure.

    With respect to the "working paper" and/or "working product" claim, the Attorney General stated as follows: "The requested document here is a continuously updated list of the vacant and/or abandoned homes in the City. We find no indication that the requested document is pre-publication in the way contemplated by the common usage of the term 'working paper.' Indeed, the document is sufficiently final that it is (or at least was) periodically submitted to City Council members for review.... [In addition,] [w]e find no evidence, and none has been presented, that the requested document was produced in anticipation of litigation or that it was produced by or for lawyers. As such, the requested document does not easily fall within the ambit of either 'working paper' or 'work product.'.... We are unaware of any authority that exempts disclosure of a document simply because it is continuously updated."

    With respect to the "balancing test" whereby the "public interest" in disclosure is weighed against any "private interest," the Attorney General concluded that the "limited privacy interests [record contains names and addresses of property owners] are outweighed by the public interest in disclosure [record sheds some light on the operations and performance of the City in addressing blight]." The Attorney General also found that the privacy interests "can be addressed through redaction [of the numerical addresses]."

- ***Trade Secrets & Financial/Proprietary Information:***

  - ***Michigan:***
    **Senate Bill 69 (Act 21),** ***An Act to Amend 1984 PA 431, entitled "An act to prescribe the powers and duties of the department of management and budget"....*** (Signed)

    The bill exempts from disclosure records containing trade secrets as defined in the Uniform Trade Secrets Act, or financial or proprietary information. "Financial or proprietary information" is defined in the bill as "information that has not been

publicly disseminated or which is unavailable from other sources, the release of which might cause the submitter of the information competitive harm."

- ***Wage Violations & Trade Secrets:***

  - ***Colorado:***
    **House Bill 17-1021,** ***An Act Concerning the Release of Information by the Division of Labor Standards and Statistics in the Department of Labor and Employment Concerning an Employer's Violation of Wage Laws (aka "Wage Transparency Act").*** (Signed)

    Under the bill, certain information concerning the violation of a wage law that is obtained by the Department of Labor and Employment must be disclosed, unless the Department director makes a determination that the information is a trade secret. Before releasing the information, the director must notify the employer of the potential release of the information. The employer has 20 days to provide the director with further documentation demonstrating that the information is a trade secret. If the director, in his discretion, determines that any information is a trade secret, then the director must treat such information as confidential.