FREEDOM OF INFORMATION
LITIGATION AND LEGISLATIVE UPDATE

2018 COGEL Conference

Philadelphia, Pennsylvannia

December 9-12, 2018

Prepared by

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Freedom of Information
Litigation and Legislation Update

❖ What is a "Public Record"? What is a "Public Agency"?

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

➢ *Litigation:*

- ***Illinois:***
  City of Danville v. Lisa Madigan, et. al.
  (No. 4-17-0182, Illinois Court of Appeals, 4th District) (April 25, 2018):

  The Court ruled that certain records requested from the City of Danville pertaining to the Danville Housing Task Force constituted "public records" as defined in the Freedom of Information Act.

  To qualify as a "public record", the requested document must (1) pertain "to the transaction of public business" and (2) have been "prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." Here, the Court found that "the requested records pertain to 'public business' as they appear to concern business or community interests and not private affairs….[The requested document] expressly provides that the Housing Task Force's recommendations are intended to set forth the City's housing strategy for the 2015-20 planning period and guide the daily decisions of City officials. The City's housing strategies and the daily decisions of City officials in such matters clearly pertain to public or community interests - not private affairs."

- ***Michigan:***
  Susan Bisio v. City of the Village of Clarkston
  (No. 335422, Michigan Court of Appeals) (July 3, 2018):

  The Court affirmed a decision of the trial court concluding that the contested records (i.e., records in the city attorney's files and the files of an engineering consultant) were not "public records."

  The Court found that "the plain language of the relevant statutes defining public record and public body, as well as relevant Michigan case law, do not support plaintiff's contention that the city attorney's possession and use of records in his role as city attorney is tantamount to the public body's use and possession of the records in the performance of an official function." Michigan's Freedom of Information Act defines a "public record" as "'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.'" A "public body" includes "'[a] county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.'" The Court noted that the definition of "public body" "does not

include officers or employees acting on behalf of cities, townships, and villages." Here, the records at issue "have remained in possession of the city attorney" and "[t]here is no evidence suggesting that he has shown them to the city council, that council members have used them for the basis of a decision, or even that the letters sent and received have resulted in an agreed-upon proposal that the city attorney could submit for the council's consideration."

- ***Rhode Island:***
  Paul E. Pontarelli v. Rhode Island Dept. of Elementary and Secondary Education, et. al. (No. 2016-336, Rhode Island Supreme Court) (January 16, 2018):

  The Court upheld a lower court's ruling that records related to the private law practice of one of the Department of Education's employees were not "public records" for purposes of the Access to Public Records Act (APRA), even if held by the Department. The Court held "without hesitation that the records Pontarelli requested are not public records for the purposes of APRA. In no way are records related to the private law practice of a [Department] employee 'made or received pursuant to law or ordinance or in connection with the transaction of official business by [the Department]'… Indeed, the very language of Pontarelli's public-records request and the nature of the requested documents undermine his claim."

- ***South Carolina:***
  DomainsNewsMedia.com, LLC, v. Hilton Head Island-Bluffton Chamber of Commerce (No. 27803, South Carolina Supreme Court) (May 23, 2018):

  The Court held that the Hilton Head Island-Bluffton Chamber of Commerce is not a public agency for purposes of the South Carolina Freedom of Information Act based upon its receipt and expenditure of certain funds designated for promoting tourism (i.e., accommodation tax funds). The Court found that "[c]ontrary to Domain's suggestion, the receipt and expenditure of these accommodation tax funds in no manner allows the Chamber [or any designated marketing organization] to spend public funds free from public accountability and oversight. We fully appreciate the need for some measure of transparency and public accountability in the expenditure of public funds. Yet, in this case, the A-Tax statute and Proviso 39.2 set forth the General Assembly's determination of the required level of oversight, transparency, and accountability."

- ***Virgin Islands:***
  Daily News Publishing Company, Inc. v. Virgin Islands Economic Development Authority, et. al. (No. ST-16-CV-209, Virgin Islands Superior Court, St. Thomas and St. John Division) (November 30, 2017):

  The Superior Court found that the Economic Development Authority ("Authority") is "an extension of the Government, as a government instrumentality and thus subject to the Public Records Act."

  Looking at the enabling statute, which states that the Authority is "semi-autonomous" (i.e., lacks full independence), the Court found that "the position of the Legislature [is] clear in that the Authority was formed as an extension of the Government. Looking towards the purpose of the Authority…it is to 'aid the Government in the performance of its duties to develop the

economy of the Virgin Islands.' The main reason this entity was created was to further goals of the government as it strives to develop the territory's economy. Reading further…the entire seven (7) person board is appointed by the Governor himself." The Court further notes that "it is hard for this Court to believe that the Authority is separate from the government of the Virgin Islands especially when the government has a firm hand in its creation and management."

- ***Virginia:***
  Transparent GMU v. George Mason University, et. al.
  (No. CL 2017-7484, Virginia 19th Judicial Circuit) (July 5, 2018):

  The Court ruled that the George Mason University Foundation, Inc., a corporation established to raise funds and manage donations to benefit the George Mason University, is not a public body subject to the Virginia Freedom of Information Act (Act). The Court noted, however, that the University is a public body, and the records generated by the Gift Acceptance Committee and records of the University's decisions to accept conditional gifts and use were subject to the Act.

  The Court found that "[u]nder a plain reading of [the Act]…the Foundation is not a public body because the stipulated and undisputed facts do not prove that the Foundation is either (1) wholly or principally supported by public funds, or (2) an entity of a public body created to perform delegated functions of a public body or to advise a public body." Notably, the Court declined to adopt either a totality of the circumstances analysis or a functional equivalent test (as urged by the petitioner) to determine how a Virginia court should define entities subject to a records request.

  Virginia Information Technologies Agency v. William H. Turner and Office of the Executive Secretary (No. CL17-5280, Virginia Circuit Court of the City of Richmond) (October 15, 2018):

  The Court found that the Virginia Freedom of Information Act (Act) does not apply to the judiciary, including the Executive Secretary of the Virginia Supreme Court, and further found that the itemized long distance phone records at issue are not public records of a public body under the Act, but rather are records of the judiciary, wherever lodged.

- ***Washington:***
  Service Employees International Union Local 925 v. University of Washington, et. al.
  (No. 76630-9-I, Washington Court of Appeals, Division 1) (June 11, 2018):

  The Court affirmed a lower court ruling, holding that records associated with union activities in the possession of four named University of Washington (UW) employees, were not "public records" subject to disclosure under the Public Records Act (PRA).

  The Court found that "[f]or information to be a public record, an employee must prepare, own, use, or retain it within the scope of employment. An employee's communication is 'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests. This limits the reach of the PRA to records related to the employee's public responsibilities." According to the Court, "[a]ctions undertaken within the scope of employment are those that the employer has the right to control…. [Under current

law]… UW is prohibited from controlling or directing employees' union activity…. Further, the employees' communications do not fall within the scope of their employment, even if in the future, these efforts affect appointment, promotion, evaluation, tenure, or state budgets…. Documents relating to faculty organizing and addressing faculty concerns are not within the scope of employment, do not relate to the UW's conduct of government or the performance of government functions, and thus are not 'public records' subject to disclosure."

❖ Access to Public Meetings

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

➢ *Litigation:*

- ***Connecticut:***
  City of Meriden v. Freedom of Information Commission
  (No. CV 17 6035943 S, Connecticut Superior Court) (January 29, 2018):

  The Court held that the Freedom of Information (FOI) Commission properly concluded that a meeting of a leadership group of City Council members was a "proceeding" under the FOI Act, and constituted a "meeting" within the meaning of the Act.

  The City argued that a meeting by the leadership group was not a meeting under the Act when a quorum of members was not present. The Court agreed, however, with the Commission, finding that "the gathering of the council's leadership with the mayor and the city manager was at least implicitly authorized by the city council as a whole" and "the leadership gathering constituted a step in the process of agency-member activity, in that the group decided what issue to bring before the council and drafted a detailed resolution for the council's consideration."

- ***Georgia:***
  City of College Park, et. al. v. Chawanda Martin
  (No. S17G2008, Georgia Supreme Court) (August 27, 2018):

  The Supreme Court ruled that the lower court incorrectly found that the City of College Park had violated the Open Meetings Act (OMA) by failing to take a "public vote" on the appointment of a public officer or employee. The Court concluded that the lower court "should have first determined whether the charter for the City of College Park actually requires a vote to effectuate such an interim appointment before considering the applicability of the public-vote requirement of the [OMA]." In addition, the Supreme Court found that the phrase "the vote…shall be taken in public" within the OMA "does not mandate a vote on a relevant employment decision, it simply references such vote and requires that any such vote be taken in public."

- ***Kentucky:***
  Kentucky House of Representatives v. Bluegrass Institute for Public Policy Solutions
  (Civil Action No. 17-CI-01246, Kentucky, Franklin Circuit Court, Division II) (May 9, 2018):

  The Court ruled that a meeting held at the Kentucky House of Representatives, where a quorum of members from the majority and minority parties were present and discussed public business (i.e., pension reform), was not a "caucus" and thus was not exempt from the Open Meetings Act. Accordingly, the House's failure to open the meeting to the public violated the Act.

- ***Montana:***
  Kristine Raap v. Board of Trustees, Wolf Point School District
  (No. DA 17-0386, Montana Supreme Court) (March 27, 2018):

  The Court ruled that the Wolf Point School District violated the open meetings laws when the Board of Trustees closed its meeting at which the Board terminated the employment of a new teacher. The Board closed the meeting erroneously based on unspecified third-party privacy rights, and the litigation strategy exception. The Court reversed the Board's decision to terminate the employee's employment.

  Under the open meetings laws, the presiding officer may close a meeting when the discussion relates to a matter of individual privacy. In this case, the Court found that "the Board closed the meeting to the public based on the cursory statement that closure was necessary 'to protect the rights of individual privacy of statements and information for those not in attendance.'… The Board made no showing that any third party testified at the hearing, that the superintendent's recommendation for termination was based in whole or in part on third-party complaints or allegations against [the employee], that the superintendent or school principal gave testimony that identified any third party who made complaints or allegations against [the employee] or otherwise referenced a matter in which a third party had an expectation of privacy…. [T]he Board failed to make any particularized showing as to the nature of the third-party privacy interests asserted, much less how they balanced out against public disclosure under the circumstances of this case."

  In addition, under the open meetings laws, a public body may go into executive session to discuss litigation strategy. The Court found that "the Board made no showing…explaining or indicating how its pending decision on whether to terminate [the employee's] employment at least generally related to its strategy for defending against a previously filed discrimination complaint regarding school district conduct alleged to have occurred prior to the termination hearing"; that "it requested or received advice of counsel regarding its ongoing or contemplated defense against the discrimination complaint, the potential effect of terminating [the employee's] employment on its defense strategy in that matter, or the potential for its termination decision to result in additional litigation with [the employee]"; and that "Board members communicated facts to counsel pertinent to the Board's defense strategy in any pending or future litigation."

- ***New Jersey:***
  Kean Federation of Teachers, et. al. v. Board of Trustees of Kean University, et. al.
  (No. A-84-16, New Jersey Supreme Court) (June 21, 2018):

  The Court held that the University's Board of Trustees was not required to provide notice to all affected employees who would be discussed at Board meetings where the Board determined from the start to conduct its discussion about faculty reappointments in public session.

  Here, an untenured Assistant Professor of Nursing, "as an affected employee, knew that the University President was not recommending her for reappointment and knew that the President's recommendation would go before the Board at the December 6 meeting." The Court found that [the employee] had no right to demand a closed session under the OPMA [Open Public Meetings Act] personnel exception. She had the right only, if all other affected employees agreed, to demand a public setting for discussion. She received a public setting for

the discussion and vote on the recommendations about reappointment." The Court also observed that "[i]t may not have been much of a discussion, but it was done in public view, as was the vote."

The Court also noted that the OPMA "does not provide employees with a right to 'select the forum of the discussion'…. Rather, it provides employees with the right to move a private discussion into the sunshine of a public discussion. The personnel exception's language is not applicable when a public entity already intends to take public action on a personnel matter implicating employees whose rights could be adversely affected by that action."

- ***Vermont:***
  Negotiations Committee of Caledonia Central Supervisory Union v. Caledonia Central Education Association (No. 2017-142, Vermont Supreme Court) (February 23, 2018):

  The Supreme Court concluded that collective bargaining negotiations between a school district negotiating committee and a labor union are not "meetings" under the Open Meeting Law.

  The Court summarized its analysis as follows: "[R]eading the Open Meeting Law, the Public Records Act, and the Labor Relations for Teachers and Administrators Act in concert shows: (1) the act of 'negotiating' is distinct from 'meeting' or 'discussing'; (2) the Legislature intended negotiation sessions between school board committees and teachers associations to be conducted on a level playing field – an intent that is incompatible with the unilateral authority and responsibility the Committee's construction of the Open Meeting Law would vest in the Committee; and (3) the Legislature did not intend to compel public airing of ongoing collective bargaining negotiations." Further, the Court noted that its conclusion is "further strengthened by (1) the customary practice between school board committees and teachers associations to hold negotiation sessions in private, and (2) this Court's past case law."

- ***Wisconsin:***
  State of Wisconsin ex rel Richard Zecchino, et. al. v. Dane County Board of Supervisors, et. al. (No. 2017AP2, Wisconsin Court of Appeals) (February 27, 2018):

  The Court ruled that emails sent by a member of the Dane County Board of Supervisors to other Board members regarding the renewal of a billboard lease did not constitute a "meeting" because the complaint failed to establish that there was a "walking quorum." A "walking quorum" is defined as "a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.... Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law."

  The Court found that in order to establish that there was a "walking quorum," the complaint must show that "the defendants purposefully engaged in discussions regarding the lease renewal vote and that the discussions were held between a sufficient number of board members so as to affect the vote." Here, most of the emails were "one-way messages, garnering few, if any, responses from other supervisors. None of the emails reflect a 'tacit agreement' between the [supervisors] to vote against the lease." In addition, "the complaint fails to establish that a sufficient number of supervisors engaged in discussions capable of

affecting the vote."

- ***Advisory Opinions:***

  - ***Illinois:***
    Kraft/City of Carlinville, OMA Request for Review
    (2018 PAC 51069) (March 7, 2018):

    The Attorney General's Office concluded that the Carlinville City Council improperly voted to pass a proposed ordinance at its January 2, 2018 meeting, when the Council's agenda indicated that the ordinance would only be the subject of a procedural motion.

    The agenda listed the relevant agenda item under "New Business" as "Ordinance Adopting Policy Prohibiting Sexual Harassment – First Read." "The inclusion of the 'First Read' language, however, turned out to be misleading when the Council suspended its rules and adopted the ordinance…. [The] meeting agenda may not be reasonably construed as providing the public with advance notice that the Council would vote on the ordinance at that meeting…," in violation of the Open Meetings Act.

  - ***Maryland:***
    Worcester County Board of Education, 12 Official Opinions of the Compliance Board 1
    (February 7, 2018):

    The Maryland Open Meetings Compliance Board issued an advisory opinion, determining that the Worcester County Board of Education violated four provisions of Maryland's Open Meetings Act (OMA).

    First, noting that the OMA requires public bodies to give reasonable advance notice of their meetings, the Compliance Board found that "when a public body [such as the school board] uses a calendar function for some meetings, it must post them all there"; and that the school board violated the Act's notice provision "by not posting its work sessions on the calendar."

    Second, the Compliance Board found that before closing a meeting to discuss certain delineated topics, the presiding officer must, among other requirements, "make a written statement, or 'closing statement,' that discloses certain information about the upcoming session." Here, the Compliance Board found that the school board's closing statements did not contain all of the required information. "Specifically, the school board did not disclose the topics to be discussed and did not disclose its reasons for excluding the public from the discussion."

    Third, the Compliance Board found that the school board's description of the topics discussed in closed session (i.e., "reviewed personnel matters") was "deficient."

    Lastly, the Compliance Board found that "whenever the school board reports that it recessed into a closed session in order to perform an administrative function, the school board must identify the subject matter that it addressed." The school board failed to provide any such information.

- ***Minnesota:***
  St. Anthony Village City Council, Advisory Opinion 18-003
  (April 5, 2018):

  The Commissioner of Administration found that the members of the St. Anthony Village City Council did not comply with the Open Meeting Law (OML) when they held meetings outside the jurisdiction of St. Anthony Village, in a different town; and failed to make at least one copy of members' materials available at City Council meetings. The Commissioner also found that when City Council members attended a dinner in a hotel dining room, where they did not sit together or discuss, decide, or receive information related to official business as a group, such dinner was a social gathering and not a "meeting" subject to the OML.

- ***Rhode Island:***
  David Caldwell v. East Greenwich Town Council and
  McNamara v. East Greenwich Town Council (No. AGO OM 18-1) (January 12, 2018):

  The Attorney General's Office found, in part, that the East Greenwich Town Council did not violate the Open Meetings Act when three members of the Town Council met with the Town Manager in groups of no more than two at a time, regarding an incident involving a Town employee.

  In its decision, the Office noted that "a quorum may be created, and a meeting 'convened,' by unconventional means. In particular, this Department has previously recognized the 'rolling' or 'walking quorum, where a majority of the members of a public body attain a quorum by a series of one-on-one conversations or interactions." In this case, the Office found that "the Town Manager had separate communications with various Town Council members. None of these separate communications individually contained a quorum of the Town Council. While the absence of a quorum during one meeting does not preclude a 'rolling' or 'walking' quorum…there is no evidence that any of the Town Council members discussed or were told the thoughts, actions, or opinions of any other members of the Town Council. Instead, it appears that the Town Manager relayed 'background' information about an incident…. Importantly, there is no evidence that the Town Manager served as a conduit that connected communications with Town Council members. Nor is there any evidence of any nexus between the communications."

➢ ***Legislation:***

- ***Idaho:***
  House Bill 606, ***An Act Relating to the Open Meetings Law….*** (Signed)

  House Bill 606 subjects all public agencies established by Executive Order of the Governor to the Idaho Open Meetings Law.

  House Bill 611, ***An Act Relating to Transparent and Ethical Government….*** (Signed)

  House Bill 611 requires that "[a]n agenda item that requires a vote to be identified on the agenda as an 'action item' to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item." In addition, the bill provides that "[f]inal action may not be taken on an agenda item added after the start of a meeting

unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes."

- ***Florida***:
  Senate Bill 1940, ***An Act Relating to Public Records and Public Meetings….*** (Signed)

  Senate Bill 1940 provides that any portion of a meeting of the Marjory Stoneman Douglas High School Public Safety Commission at which exempt or confidential and exempt information is discussed is not subject to the public meetings requirements.

- ***Vermont:***
  House Bill 910, Act No. 166, ***An Act Relating to the Open Meeting Law and the Public Records Act.*** (Signed)

  The bill makes various revisions to the Open Meeting Law including the following: (1) defining "business of the public body" as "the public body's governmental functions, including any matter over which the public body has supervision, control, jurisdiction, or advisory power"; (2) excluding from the definition of "meeting" (i) "occasions when a quorum of a public body attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers, provided that the public body does not discuss specific business of the public body that, at the time of the exchange, the participating members expect to be business of the public body at a later time" and (ii) "a gathering of a quorum of a public body at a duly warned meeting of another public body, provided that the attending public body does not take action on its business."

- ***Virginia:***
  House Bill 908, ***An Act…Relating to the Virginia Freedom of Information Act; Meetings Held by Electronic Communication Means.*** (Signed)

  House Bill 908 amends the provision in the Virginia Freedom of Information Act permitting public bodies to conduct any meeting wherein the public business is discussed or transacted through "electronic communications means." The bill removes the requirement that the remote locations from which members participate in meetings through electronic means be open to the public. Instead, under the bill, "members of the public [must be] provided a substantially equivalent electronic communication means through which to witness [i.e., observe or listen] the meeting." House Bill 908 also provides that although public access to the remote locations is not required, "if three or more members are gathered at the same remote location, then such remote location shall be open to the public."

❖ Access to Judicial Records

Below are summaries of court decisions and legislation concerning access to judicial records:

➢ *Litigation:*

- ***Connecticut:***
  Mark Sargent v. Freedom of Information Commission
  (No. CV-16-5018092, Connecticut Superior Court) (December 13, 2017):

  Relying on previous rulings by the Supreme Court, the trial court found that the term "personnel," as applied to the administrative functions of the Judicial Branch, pertains to activities relating to court personnel, and excludes individuals appointed but not employed by the courts (e.g., guardians ad litem, attorneys for minor children). Therefore, "records having to do with the latter do not relate to the personnel of the branch and are not accessible via the [Freedom of Information] Act."

  In a 2006 case, *Clerk of the Superior Court v. Freedom of Information Commission*, 278 Conn. 28, the Supreme Court concluded that the judicial branch's administrative functions, as the term is used in the Act, consists of activities relating to its budget, personnel, facilities and physical operations.

- ***Pennsylvania:***
  James Magee v. Philadelphia District Attorney's Office
  (No. 754 C.D. 2016, Pennsylvania Commonwealth Court) (September 13, 2018):

  The Court affirmed an order of the trial court which reversed the final determination of the Office of Open Records directing the Philadelphia District Attorney's Office to disclose transcripts of court proceedings before a particular judge.

  The Court found that the Right-to-Know Law limits the records judicial agencies must disclose to "financial records." Here, because the requested transcripts were made by a court reporter, an employee of a judicial agency, and did not constitute financial records, such transcripts were not subject to disclosure.

➢ *Legislation:*

- ***Colorado:***
  House Bill 18-1152, *An Act Concerning Making Certain Records of the State Judicial Department Relating to Sexual Harassment Investigations Subject to the Colorado Open Records Act.* (Signed)

  The bill makes the judicial department subject to the sexual harassment provision of the Open Records Act, which provides that records related to sexual harassment complaints are available to a person making a sexual harassment complaint and the subject of the complaint.

❖ **Access to Records Relating to Law Enforcement, Criminal Investigations & Surveillance**

Below are several examples where various courts and legislatures addressed the public's right to access records relating to law enforcement, criminal investigations and surveillance, among other records:

➢ ***Litigation:***

- ***Connecticut:***
  Department of Emergency Services and Public Protection, et. al. v. Freedom of Information Commission, et. al.
  (No. SC 19852 and SC 19853, Connecticut Supreme Court) (October 30, 2018):

  The Supreme Court held that the CT search and seizure statutes do not provide a basis for an exemption from the disclosure requirements of the Freedom of Information Act (Act). The records at issue related to the shooting that took place at the Sandy Hook Elementary School on December 14, 2012, and were lawfully seized as part of a criminal investigation. The records included, among others, a book written by the shooter.

  The Court found that "the search and seizure statutes are silent on the issues of confidentiality, copying, or disclosure to the public," and therefore could not form the basis for an exemption under the Act. The Court also noted that although "limiting the disclosure of seized documents in order to protect the privacy of those whose property is seized, particularly if a criminal proceeding does not result, may be a good or even preferable way in which to deal with the documents seized," the Court nevertheless "cannot impose a duty of confidentiality or restriction on disclosure that is not provided by the express terms of the search and seizure statutes." In reaching its conclusion, the Court also relied on the FOI statute governing the disclosure of personal possessions seized during an arrest and by the FOI statute providing other detailed exemptions for records of law enforcement agencies where the agency can establish certain criteria.

  In addition, the Court disagreed with the Department's assertion that the records at issue were not "public records" under the Act. The Court found that "documents that are not created by an agency, but come into its possession because there was probable cause to believe that they constitute 'evidence of a [criminal] offense, or…evidence that a particular person participated in the commission of an offense,' relate to the conduct of the public's business," and therefore, constitute public records within the meaning of the Act.

- ***Florida:***
  State Attorney's Office, et. al. v. Cable News Network, Inc., et. al.
  (No. 4D18-1335, 4D18-1336, Florida Court of Appeals, 4th District) (July 25, 2018):

  The Circuit Court ordered the disclosure of certain video footage taken by surveillance cameras on February 14, 2018, at Marjory Stoneman Douglas High School which depicted law enforcement personnel responding to a shooting.

  The Court rejected the State Attorney's argument that the surveillance footage was exempt from disclosure as "active criminal investigative information." The Court found that "the footage was created before the criminal investigation began and was compiled by the School Board, not a law enforcement agency…. The criminal investigative information exemption

'furthers the critical importance of preserving the confidentiality of police records surrounding and compiled during an active criminal investigation…and is intended to prevent premature disclosure of information during an ongoing investigation being conducted in good faith by criminal justice authorities…. [It] 'does not exempt other public records from disclosure simply because they are transferred to a law enforcement agency.'"

The Court also rejected the School Board's argument that the surveillance footage was exempt from disclosure under the "security plan" exemption. The Court found that "[b]ecause the footage from the surveillance cameras 'relates directly' to the security system at [the high school], including both its capabilities and its vulnerabilities, the footage is confidential and exempt from disclosure…unless an exception [e.g., 'a showing of good cause'] to the exemption applies." Here, the Court found that the petitioners "established good cause because the footage reveals the conduct of public servants 'discharging their assigned duties and responsibilities…[and]…provides insight into how [the high school's] security 'net,' including the use of 70 unmonitored and possibly time-delayed cameras, failed to protect the students and staff…."

Executive Office of the Governor v. AHF MCO of Florida, Inc.
(No. 1D18-3951, Florida Court of Appeals, 1st District) (October 29, 2018):

The requester sought documents showing all meetings, events, appearances, and travel involving the Governor for a certain period of time. The Governor's Office denied the request, claiming that such information revealed surveillance techniques or procedures or personnel, which are exempt from disclosure under the Florida public records laws.

The trial court ruled, without inspecting the records at issue, that the information sought did not reveal surveillance techniques, surveillance procedures, or surveillance personnel, and that it was simply information regarding the Governor's travel schedule. (*See* Executive Office of the Governor v. AHF MCO of Florida, Inc. (No. 2018 CA 1648, Florida Circuit Court, 2nd Circuit) (September 5, 2018). The Executive Office of the Governor appealed.

The Court of Appeals reversed and remanded the matter for further proceedings. The Court found that "[h]ere, the trial court granted Appellee's request for disclosure of public records without inspecting the records, despite…[a Florida Department of Law Enforcement (FDLE)] special agent's undisputed attestation that the '[p]remature disclosure of prospective information regarding the Governor's detailed schedule, including drive times, and the time and location of the Governor's arrival and departure, would reveal FDLE's surveillance techniques, procedures, and personnel' and would jeopardize the security of the Governor and the officers whose duty is to protect him." The Court further found that the requests for "'[a]ll documents and records that indicate' where the Governor will travel and reside are broad and to the extent they seek information encompassed by the agent's affidavit, such as drive times and arrival and departure times, such information is exempt from disclosure." With respect to the other types of information not referenced in the special agent's affidavit, the Court remanded the matter to the trial court to conduct an in camera inspection and determine if the records and/or entries contained therein are exempt from disclosure.

- ***New Jersey:***
  John Paff v. Ocean County Prosecutor's Office
  (No. A-17-16, New Jersey Supreme Court) (August 13, 2018):

  The Court held that certain recordings made by mobile video recorders (MVRs) in police vehicles in compliance with a municipal police chief's general order constituted "criminal investigatory records" and therefore were not subject to disclosure under the Open Public Records Act. The Court, however, remanded the matter to the trial court to consider the requester's claim of a common-law right of access to the MVR recordings.

  The MVR recordings at issue "documented an incident in which police officers pursued and arrested a driver who had allegedly eluded an officer attempting a traffic stop. One officer's decision to deploy a police dog during the arrest led to internal investigations and criminal charges against the officer."

  The Court found that "an agency seeking to withhold a record from disclosure as a criminal investigatory record must satisfy 'both prongs of the exception' by demonstrating that the record is not required by law to be made, maintained or kept on file, and that it 'pertains' to a criminal investigation or related civil enforcement proceeding." Here, "the MVR recordings were made and retained in accordance with a local police chief's order to his subordinates, not in compliance with any law or directive carrying the force of law." In addition, when the MVR recordings were made, "they pertained – at a minimum – to the investigation of the driver's alleged eluding of police. That investigation was at its inception, but it was clearly underway. By the time plaintiff sought the MVR recordings, those recordings pertained to not one but several investigations: the criminal investigation of the driver for eluding and resisting arrest, and the internal affairs and criminal investigations of the Tuckerton Borough police officer."

  Notably, the Court rejected the argument that the driver's privacy interest warranted the withholding of the requested records. The Court found that "[i]n other settings, a third party's reasonable expectation of privacy may warrant withholding a record from disclosure." Here, however, the recordings depicted a driver's arrest in public, the driver's face is not shown, and no private information was disclosed. In addition, the driver did not identify any specific privacy concerns.

- ***New York:***
  In the Matter of Talib W. Abdur-Rashid and Samir Hashmi v. New York City Police Department, et. al. (No. 19, New York Court of Appeal) (March 29, 2018):

  The Court held that an agency may decline to acknowledge that records exist in response to a Freedom of Information Law (FOIL) request when necessary to safeguard statutorily exempted information. When an agency neither confirms nor denies that it possesses records in response to a FOIL request, it is known as a "Glomar response."

  Here, a law enforcement agency was asked to disclose records relating to a police investigation and surveillance activities involving two specific individuals and entities with which they were associated, and protected under the law enforcement and public safety exemptions.

Looking to the Glomar response in federal case law, the Court found that "there are indeed occasions when, due in large part to the precise manner in which the FOIL request is structured, an interpretation of the statute that compels a law enforcement agency to reveal that responsive records exist with respect to a specific individual or organization would, in effect, force the agency to disclose substantive information that is protected under FOIL's law enforcement and public safety exemptions…. [C]ompelling the NYPD to state whether or not it possesses 'investigative or surveillance' records would reveal substantive information concerning an individual's involvement with the NYPD investigation."

The Court emphasized that its "decision is premised on respondents' factual demonstration of the necessity for non-access" and the requirement that "courts must scrutinize an agency's refusal to confirm or deny the existence of responsive documents on a case-by-case basis to ensure it is warranted under the particular circumstances presented." Here, the Court looked to the requests themselves "which were both extremely specific and quite unusual" as well as the 22-page affidavit of the Chief of Intelligence providing "extensive detail how disclosing the information sought – i.e., who has been the subject of investigation or surveillance – would imperil its ongoing counterterrorism efforts to protect New York City."

- ***Oregon:***
  Pamplin Media Group v. City of Salem
  (No. A162248, Oregon Court of Appeals) (September 6, 2018):

  The Court ruled that the City of Salem improperly withheld records relating to the arrest of an individual on allegations of child abuse.

  The City asserted that all reports related to the police investigation and the subsequent arrest were compiled under certain child-abuse-reporting statutes mandating that reports of child abuse be investigated; and therefore, all the information in those reports, including all arrest information, was excluded from disclosure.

  The Court found that the child-abuse-reporting statutes "mandate that child abuse be reported and that each report be investigated by [the Department of Human Services] or law enforcement. Those provisions do not govern or even address the arrest of a perpetrator. Thus, even though a child abuse report and resulting investigation may lead, ultimately, to the arrest of a perpetrator, it does not follow that the arrest is made 'under the provisions of [the child-abuse reporting statutes].' Similarly, because those provisions neither authorize nor require any agency to keep records of such arrests, it would defy common understanding to conclude that reports containing information about an arrest, like the ones sought here, are reports or records 'compiled under' those provisions."

- ***Pennsylvania:***
  Justin Credico v. Office of Attorney General
  (No. 251 C.D. 2017, Pennsylvania Commonwealth Court) (February 14, 2018):

  The Court found that because the report at issue was a "record of an agency relating to or resulting in a criminal investigation," it was exempt from disclosure under the criminal investigation exemption in the Right-to-Know Law (RTKL). The report related to the Attorney General's criminal investigation into the misuse of government email communication systems by public officials.

The Court also disagreed with the requester's interpretation that reports and other documents relating to criminal investigations become subject to disclosure after the investigation is closed. According to the Court, the RTKL "exempts from disclosure records and reports relating to criminal investigations regardless of the status of the investigation."

- ***Legislation:***

  - ***California:***
    Assembly Bill 3131, ***An Act…Relating to Military Equipment.*** (Vetoed)

    Among other requirements, Assembly Bill 3131 would require a law enforcement agency to publish a "military equipment" use policy prior to taking certain actions relating to the funding, acquisition, or use of military equipment; and require the governing body of a law enforcement agency to consider such policy at a regular meeting held pursuant to open meetings laws. The Governor vetoed the bill stating that it was "overbroad" and "not only includes items that are clearly 'militaristic in style,' but many that are commonly used by law enforcement and do not merit additional barriers to their acquisition," and thereby "creates an unnecessary bureaucratic hurdle without commensurate public benefit…."

  - ***Florida***:
    Senate Bill 1940, ***An Act Relating to Public Records and Public Meetings….*** (Signed)
    Senate Bill 1940 exempts from disclosure any information held by a law enforcement agency, school district, or charter school, that would identify whether a particular individual has been appointed as a safe-school officer.

    Senate Bill 7024, ***An Act Relating to Public Records….*** (Signed)
    Senate Bill 7024 exempts from disclosure the addresses of victims of an incident of mass violence.

  - ***Kentucky:***
    House Bill 373, ***An Act Relating to Disclosure of Body-Worn Camera Recordings.*** (Signed)

    House Bill 373 specifies that body-worn camera recordings are governed by the Kentucky Open Records Act and provides certain delineated exceptions as to when a public agency may elect not to disclose such recordings. For example, body-worn camera recordings may be withheld if they: contain video or audio footage of a private residence where there is a reasonable expectation of privacy; disclose protected health information under the Health Insurance Portability and Accountability Act; are of a minor; or includes the body of a deceased individual.

  - ***Virginia:***
    Senate Bill 727, ***An Act…Relating to the Virginia Freedom of Information Act; Public Access to Noncriminal Records.*** (Signed)

    Senate Bill 727 clarifies the extent to which the public has access to noncriminal records maintained by public bodies engaged in criminal law-enforcement activities. Specifically, the bill provides, in relevant part, that: "Those portions of noncriminal incident or other noncriminal investigative reports or materials that contain identifying information of a personal, medical, or financial nature may be withheld where the release of such information would jeopardize the safety or privacy of any person…."

❖ Records Subject to the Deliberative Process Exemption

Below are summaries of court decisions where the courts addressed whether certain public records were "predecisional" and "deliberative," and therefore exempt from disclosure under the "deliberative process" exemption:

- ***Alaska:***
  Frank Griswold v. Homer City Council, et. al.
  (No. S-16236, Alaska Supreme Court) (September 14, 2018):

  The records at issue were certain communications between members of the Homer Board of Adjustment, City employees, and attorneys for the City relating to a Board decision in a separate case involving the requester, and attorney invoices.

  With respect to the communications, the Supreme Court ruled that such communications were protected from disclosure pursuant to the deliberative process privilege exception under the Public Records Act (Act). The Court reasoned that the subject communications "occurred before the decision was issued and contain give-and-take on the wording of the decision" and "therefore qualify as predecisional and deliberative, establishing a presumption of nondisclosure." In addition, disclosure of the records "would serve little public purpose. The Board issued its decision and that decision was appealed. Making public previous drafts of the decision or communications discussing those drafts would not change the decision or the appellate process."

  With respect to the attorney invoices, the Court addressed for the first time the applicability of the attorney-client and work-product privileges in the context of the Act. The Court found that such privileges constitute exceptions to the Act, and remanded the matter to the lower court to review all attorney invoices for any privileged information.

- ***New Jersey:***
  North Jersey Media Group v. City of Clifton, et. al.
  (No. A-1469-16T4) (New Jersey Superior Court) (January 11, 2018):

  The Court held that the report prepared for the City of Clifton by an accounting firm hired to perform an independent review of the City's payroll practices, was a "draft, pre-decisional report" and "deliberative material," exempt from disclosure under the Open Public Records Act (OPRA).

  Under the "deliberative process privilege" in OPRA, government entities are allowed to "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated." The Court found that "[h]ere, all six versions of the report predated the decision how to compensate employees for unpaid work time, issuance of special payroll checks to affected employees, and the filing of the arbitrations. Moreover, the first three drafts of the report predated the August 15, 2015 decision to convert to semimonthly pay periods. The fact that the report underwent five revisions at [the City's] request bespeaks its ongoing draft status." The Court further found "the report to be closely related to [the City's] formulation and exercise of 'policy-oriented judgment' to adopt semi-monthly pay periods and to decide how and when to remit payment for unpaid work time." Further, "[t]he fact that the report contains statistical data and other factual information does not preclude protection by the privilege."

Libertarians for Transparent Government v. Government Records Council, et. al.
(No. A-5563-15T4, New Jersey Superior Court) (January 26, 2018):

The Court concluded that draft minutes prepared for a public body's approval and adoption were "deliberative material" exempt from OPRA disclosure requirements. "We cannot conclude, as plaintiff urges, that because these minutes, as approved, appear to have only minor changes from the published agenda, they have lost the protection of the deliberate process privilege. Like all draft documents, they remained subject to qualification and supplementation. It is not until an agency's members approve the minutes that they become a public record." Further, "the inherent nature of a draft document as both advisory and requiring deliberation prior to approval, compels the conclusion that draft minutes are 'advisory, consultative, deliberate material,' and are not subject to disclosure under OPRA as a government record."

- ***Illinois:***

Chicago Tribune Company v. Cook County Assessor's Office
(No. 1-17-0455, Illinois Court of Appeals) (June 29, 2018):

The Court ruled that records regarding the Cook County Assessor's valuation of residential, commercial and industrial properties (e.g., spreadsheets valuing properties), were not exempt from disclosure under the "deliberative process exemption," and were therefore subject to disclosure under the Illinois Freedom of Information Act (FOIA).

The Court found that the requested records are "final-not preliminary" and "not ones in which opinions are expressed or in which policies or actions are formulated - they are factual."

The Court noted that "[j]ust because adjustments are made to the property value assessments along the way does not mean that the information must fall within the exemption. Even if analysts make adjustments as the process continues, the data is the data. There is nothing in the record here that discloses the Assessor's Office's internal evaluations. The Tribune is not seeking the regression analysis's algorithmic code nor is it seeking the divulgement of how and why the analysts make the predecisions that they make – it just seeks the results of that process. The evidence on file reveals that after the assessment process has run its course, the valuations are final; the valuations are not subject to further charge. The valuations and the reports that contain them represent final agency decisions and contain no predecisional communications – only the finalized results of the analysis…. Moreover, the reports sought in this case contain purely factual assessment data.... Purely factual material must be disclosed under FOIA once a final decision has been made, unless the factual material is inextricably intertwined with predecisional and deliberative discussions…. In this case, all of the data at issue can be characterized as factual." The Court further found that "[w]ith the policy issues presented in this case, the public has a strong right to know about how they are being taxed by their government as opposed to the government's fairly meek interest in secrecy."

❖ Other Noteworthy Litigation and Legislation

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

- ***Antitrust Act & Investigative Exemption:***

  - ***West Virginia:***
    St. Mary's Medical Center, Inc., et. al. v. Steel of West Virginia, Inc., et.al.
    (Nos. 16-1101, 16-1032, 16-1104, West Virginia Supreme Court of Appeals)
    (January 31, 2018):

    The Supreme Court concluded that the circuit court erred in ordering the production of certain documents collected in the course of an antitrust investigation of a proposed merger of St. Mary's Medical Center, Inc., and Cabell Huntington Hospital, Inc.

    The Supreme Court found that the records request for "'all public records and incoming and outgoing correspondence relating to the proposed merger' directly implicates the Attorney General's investigative exemption," and held that the West Virginia Freedom of Information Act "incorporates the investigative exemption from disclosure of information set forth in the West Virginia Antitrust Act…. The investigative exemption is mandatory in specifying that the Attorney General 'shall not' make public the name or identity of a person whose acts or conduct he investigates or 'the facts' disclosed in the investigation." Further, "[a] denial of the full import of the Attorney General's statutory exemption would place investigations of illegal conduct under the Antitrust Act at a disadvantage and would be contrary to the public's interest in the enforcement of the law."

- ***Attorney-Client Privilege & Attorney Work Product Doctrine:***

  - ***Pennsylvania:***
    James Lockwood, et. al. v. Scranton Sewer Authority
    (Docket No. AP 2017-0508, Pennsylvania Office of Open Records) (January 10, 2018):

    At issue in this matter was the Sewer Authority's denial of a records request seeking contracts and legal bills for a particular sewer sale transaction. The Authority claimed that certain information was exempt from disclosure pursuant to the attorney-client privilege and attorney-work product doctrine.

    Based upon an in camera review of the records at issue, the Office of Open Records (OOR) found that certain information consisted of "non-privileged information – including routine responsibilities, such as telephone calls, attending meetings and sending and receiving correspondence." The OOR also found that certain information "contain[ed] descriptions of matters assigned by the Authority for legal review and research and specific types of legal research conducted by the attorney." "Further, any descriptions of the legal work performed by the attorney on behalf of the Authority [was] not subject to access and would disclose legal strategy or the content of confidential communications."

- ***Maine:***
  Marcel Dubois, et. al. v. Department of Environmental Protection, et. al.
  (Case No. Yor-17-23, Maine Supreme Court) (December 7, 2017):

  The Supreme Court ruled that the Department of Environmental Protection properly withheld certain records concerning the operation of a composting facility, under the work product privilege. "The work product privilege prevents a party from being required to disclose documents 'created because of the party's subjective anticipation of future litigation'…. For the privilege to apply, the party's subjective anticipation of litigation 'must also be objectively reasonable.'"

  The records at issue were (1) drafts of an administrative search warrant; (2) drafts of a warrant application; and (3) emails concerning the drafting process and a strategy for executing the warrant, if granted.

  The Court found that "[i]t is plain on the face of these documents that they were prepared in anticipation of regulatory enforcement or other compliance-related litigation," and therefore, the work product privilege applied.

- ***Attorney's Fees:***

  - ***California:***
    Senate Bill 1244*, An Act…Relating to Public Records.* (Approved by Governor)

    The bill clarifies that the court shall award court costs and reasonable attorney's fees to a requester (from whom records were withheld) if the requester prevails in litigation. If the court finds that the requester's case is clearly frivolous, it shall award court costs and reasonable attorney's fees to the public agency.

- ***Audit-Related Records:***

  - ***Kentucky:***
    University of Kentucky v. Lexington H-L Services, Inc.
    (No. 2017-CA-001423-MR, Kentucky Court of Appeals) (September 14, 2018):

    The Court held that records relating to an audit initiated by the University of Kentucky's Medical Chief Compliance Officer in response to complaints concerning treatment practices at an affiliated clinic were subject to disclosure.

    Under the terms of an affiliation with the Appalachian Heart Center (Clinic), the University purchased the Clinic's assets and entered into professional and adjunct medical facility staff agreements with cardiologists. Subsequently, two complaints were filed and the University directed an audit of the physician's medical record documentation and billing for services. The audits revealed that such documentation was inadequate and likely resulted in overpayments. The University decided to refund all payments received.

    Rejecting the University's arguments, the Court found that the preliminary-records exception did not apply as "preliminary records which form the basis for the agency's final action are

subject to disclosure." The Court also found that the University failed to establish that the audit documents were exempt under the attorney-client privilege or work-product doctrine.

- ***Autopsy Records:***

  - ***Colorado:***
    Senate Bill 18-223, *Concerning the Circumstances under which an Autopsy Report Prepared in Connection with the Death of a Minor May be Released to Certain Parties.* (Vetoed)

    The bill specified that an autopsy report prepared in connection with the death of a minor is confidential and may be disclosed by the county coroner only to certain individuals and entities including, among others, a parent or legal guardian, law enforcement agency, Colorado Department of Public Health, and Colorado Child Fatality Review Team.

  - ***New York:***
    Mazaltov Borukhova v. Office of the Chief Medical Examiner, et. al.
    (No. 2017-51676, New York Supreme Court) (December 5, 2017):

    The Court ruled that the City of New York's Office of the Chief Medical Examiner properly denied the petitioner's request for records, including autopsy records, in connection with her husband's death which was deemed a homicide by the medical examiner. Petitioner was convicted of hiring a relative to shoot her husband.

    The Court found that a provision in the New York City Charter, which has "the same force of a state statute," explicitly prohibits public inspection of records where there is any indication of criminality without consent of the appropriate district attorney's office.

  - ***Ohio:***
    Cincinnati Enquirer, et. al. v. Pike County Coroner's Office, et. al.
    (No. 2016-1115, 2016-1153, Ohio Supreme Court) (December 14, 2017):

    The Court concluded that the redactions to the final autopsy reports of eight murder victims were exempt from disclosure pursuant to the "confidential law enforcement investigatory records" (CLEIR) exemption while the investigation was ongoing. "Among the redacted information are specific facts about gunshot wounds including the path and trajectory of bullets, specific identifying information such as scars or tattoos, descriptions of body placement, and toxicology results." According to the Court, "there is no doubt that the nature of the coroner's work in a homicide-related autopsy is investigative and pertains to law enforcement."

- ***Burden of Proof – Safety & Security:***

  - ***Pennsylvania:***
    Pennsylvania State Police v. American Civil Liberties Union of Pennsylvania
    (No. 1066 C.D. 2017, Pennsylvania Commonwealth Court) (May 18, 2018):

    The Court concluded that the State Police had met its burden of showing that disclosure of the requested records would be "reasonably likely" to threaten public safety or a public protection activity.

Here, the requester sought the State Police regulation establishing policies and procedures for State Police personnel when using social media monitoring software. The State police denied the request, in part, claiming that disclosure of the information would be reasonably likely to threaten public safety or preparedness, and was therefore exempt from disclosure under the public safety exemption in the state's Right-to-Know Law. As evidence, the State Police offered an affidavit from the Director of the Bureau of Criminal Investigation.

The Court noted that "'the agency's burden does not include a requirement that the release of a record would definitely threaten or jeopardize public safety or protection.'" In addition, the Court noted that "'[g]enerally, whether an agency establishes [the public safety] exception depends on the level of detail in the supporting affidavit.'" The Court concluded that the Director's affidavit "was legally sufficient to sustain [the State Police's] burden. In his affidavit, [the Director] discussed his 22 years of experience involving criminal investigations, criminal investigation assessment, and intelligence operations. He also explained the purpose of [the requested regulation] and the role of open sources in relation to [the State Police's] law enforcement activities. Additionally, he addressed each session of [the regulation] containing redacted information, stating the section title, describing the nature of the information redacted, and explaining how release of the information would jeopardize [the State Police's] ability to conduct criminal investigations and other law enforcement activities…. [The Director] also stated there is a reasonable likelihood that disclosure would threaten [the State Police's] public protection activity of conducting investigations and other valid law enforcement activities…. Where, as here, the affiant bases his conclusion that such harm is reasonably likely on his extensive experience, such conclusion is not speculative or conclusory." In addition, the Court found that because the affidavit "adequately described the nature of the redacted information and was legally sufficient to sustain [the State Police's] burden, it is not necessary to review the unredacted record in camera…."

- ***Burden of Proof – Severability:***

  - ***Maryland:***
    Gary Glass v. Anne Arundel County, et. al.
    (No. 918-2015, Maryland Court of Special Appeals) (July 18, 2018):

    The Court held that the County failed to satisfy its burden of demonstrating that the disclosable information in the requested internal affairs investigation (IA) reports was not severable from exempt information in those reports. The case was remanded to the circuit court to determine whether any information in the IA reports was severable and should be disclosed.

    In an affidavit offered by the County regarding the issue of severability, the affiant stated that, "'[f]actual material is not readily separable from the findings and conclusions.'" The Court observed that "[t]hat may be so," but "[a] single sentence in an affidavit is simply not enough to justify refusing to sever and disclose any portion of 10 years' worth of IA reports-particularly given the basic format of the IA Reports: To From Subject Complainant Accused Complaint Date of Incident Witnesses Synopsis Investigation (including summaries of witness statements) Investigative Findings Conclusion and Recommendations."

- ***"Citizen" Requirement for FOI Requests:***

  - ***New Jersey:***
    Harry Scheeler v. Atlantic County Municipal Joint Insurance Fund, et. al.
    (Nos. A-2092-15T2, A-2704-15T2, A-2716-15T2, New Jersey Superior Court)
    (May 16, 2018):

    The Court concluded that the right to request records under the Open Public Records Act (OPRA) is not limited to "citizens" of New Jersey. "Because the more specific provisions of OPRA refer to 'any person,' and because OPRA is to be construed broadly to achieve the Legislature's over-arching goal of making public records freely available, [the Court] concluded that the right to request records under OPRA is not limited to 'citizens' of New Jersey."

- ***Communications with Legislators:***

  - ***Nebraska:***
    University of Nebraska; Chris Dunker, Lincoln Journal Star
    (File No. 17-R-145, Nebraska Attorney General's Office) (January 24, 2018):

    The Attorney General concluded that the University of Nebraska improperly denied access to communications between the administrators of the University or members of the Board of Regents and members of the Nebraska Legislature.

    The records request related to an incident outside of the Nebraska Union where a University student representing Turning Points USA was confronted by university students and employees. The University withheld certain emails claiming that the records were constituent communications with a member of the Nebraska Legislature, and therefore exempt from disclosure. The Attorney General rejected the University's argument, stating that the constituent communications exception "simply can have no application to records in the hands of a public body or official possessing correspondence of other records sent or received by members of the Legislature. In order to avoid an absurd result, the exception must be construed as one which may be invoked only by the Legislature and its members."

- ***Communications of a "Personal Nature":***

  - ***Kentucky:***
    House Bill 302*, An Act Relating to the Operation of State Government.* (Signed).

    The bill exempts from disclosure "communications of a purely personal nature unrelated to any governmental function."

- ***Copying Fees & Redaction of Electronic Records:***

  - ***California:***
    National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et. al.
    (No. A149328, California Court of Appeals, 1st District, 3rd Division) (September 28, 2018):

    The Court concluded based on the language of the Public Records Act (PRA), legislative history, and policy considerations that "the costs allowable under [the PRA] include the City's

actual expenditures to produce a copy of the [requested] police body camera video recordings, including the cost of extracting exempt material from these video recordings with the aid of special computer programming in the form of the Windows Movie Maker software."

- ***Cybersecurity Related Records:***

  - ***Michigan:***
    House Bill 4973*, An Act to Provide for Public Access to Certain Public Records of Public Bodies….* (Approved by Governor)

    The bill exempts from disclosure "cybersecurity plans, assessments, or vulnerabilities, unless disclosure would not impair a public body's ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance." In addition, the bill exempts from disclosure "[i]nformation that would identify or provide a means of identifying a person that may, as a result of disclosure of the information, become a victim of a cybersecurity incident or that would disclose a person's cybersecurity plans or cybersecurity-related practices, procedures, methods, results, organizational information system infrastructure, hardware, or software."

  - ***New Mexico:***
    Senate Bill 98, *An Act Relating to Public Records….* (Signed)

    The bill provides that "information that would compromise the physical security or cybersecurity of [spaceport] authority facilities or an aerospace customer of the authority," is not subject to inspection pursuant to the Inspection of Public Records Act.

- ***Data Recoding and Creation of New Record:***

  - ***California:***
    Richard Sander v. State Bar of California, et, al.
    (No. A150061, A150625, California Court of Appeal, 1st District) (August 23, 2018):

    The Court of Appeal ruled that the disclosure of the requested bar admissions data would require the State Bar to create new records, which is not required under the California Public Records Act. The requesters sought individually unidentifiable records for all applicants to the California Bar Examination from 1972 to 2008 in various categories (e.g., race or ethnicity, law school, transfer status, year of law school graduation, law school and undergraduate GPA, LSAT scores, and performance on the bar examination).

    At trial, the parties argued whether the requested data could be anonymized and de-identified as to protect privacy rights. The petitioners proposed four methods or protocols for rendering data anonymous without unduly burdening the State Bar. However, the trial court determined, and the Court of Appeal agreed, that all of the petitioners' proposed protocols would require the creation of new records. The protocols would "require the State Bar to recode its original data into new values...." In addition, one or more of the protocols would require the State Bar "to create a physical data enclave which would provide restricted access to the State Bar's Admissions Database"; to create "even more new data"; and "require[] drastic changes to the State Bar's original data." The Court "rejected the petitioners' contention that their protocols merely required the State Bar to redact or manipulate existing data and do some computer programming…. Requiring the Bar to recode its existing data, the

court concluded, would thus require it to create new records…. [The State Bar] cannot be required to create a new record by changing the substantive content of an existing record or replacing existing data with new data."

- ***Death Certificates:***

  - ***Puerto Rico:***
    Centro de Periodismo Investigativo, Inc., et. al. v. Wanda Llovet Diaz, et.al., consolidated with **Cable News Network, Inc. v. Wanda Llovet Diaz, et. al.**
    (Civil Num. SJ2018CV00561 & SJ2018CV00843, San Juan Superior Court) (June 5, 2018):

    As reported by the media,[1] the Court ordered Puerto Rico's vital records bureau to release detailed data on every single death recorded on the island since Hurricane Maria.

- ***Education Data/Records:***

  - ***Minnesota:***
    Echo Newspaper v. St. Louis Park Public Schools, et. al.
    (No. A17-1967, Minnesota Court of Appeals) (August 13, 2018):

    The Court concluded that a security video depicting identifiable students allegedly involved in an altercation "relates to a student" within the meaning of the Minnesota Government Data Practices Act (Act). Therefore, the district court correctly concluded that the school district "maintained" the security video footage and that such footage was "educational data" within the meaning of the Act and not subject to disclosure.

    The Court noted that "as a general rule, the [Act] establishes that 'educational data is private data on individuals and shall not be disclosed' unless an exception applies…. The [Act] defines '[e]ducational data' as 'data on individuals maintained by a public educational agency or institution or by a person acting for the agency or institution which relates to a student.'" The Court further noted that it was unnecessary for the Court to address whether the video was an "education record" under the Family Educational Rights and Privacy Act (FERPA) because "the data is inaccessible regardless of its classification under FERPA."

  - ***North Carolina:***
    DTH Media Corporation, et. al. v. University of North Carolina, et. al.
    (No. COA17-871, North Carolina Court of Appeals) (April 17, 2018):

    The Court ruled that the North Carolina Public Records Act requires, with limited exception, the University of North Carolina to comply with the petitioners' request for disciplinary records of students who have been found to have violated the University's sexual assault policy.

    The parties did not dispute that the requested records were "educational records" for purposes of FERPA. The Court found, however, that "[t]he express terms of FERPA permit the

[1] Fernandez Campbell, A., "A judge just ordered Puerto Rico to release all death certificates issued after Hurricane Maria" (June 5, 2018): https://www.msn.com/en-us/news/us/a-judge-just-ordered-puerto-rico-to-release-all-death-certificates-issued-after-hurricane-maria/ar-AAygmpS.

disclosure of the information requested by Plaintiffs, except for the dates of violations." The Court noted that FERPA "authorizes disclosure of 'the name of the student, the violation committed, and any sanction imposed by the institution on that student'…. The dates of offenses requested by Plaintiffs are not disclosable under FERPA."

- ***Virginia:***
  House Bill 1*, An Act…Relating to Scholastic Records; Directory Information.* (Signed)

  House Bill 1 clarifies that directory information *may* be disclosed provided that the school has given notice to the parent or eligible student of "(i) the types of information that the school has designated as directory information; (ii) the right of the parent or eligible student to refuse the designation of any or all of the types of information about the student as directory information; and (iii) the period of time within which the parent or eligible student must notify the school in writing that he does not want any or all of the types of information about the student designated as directory information." The bill also provides, however, that "no school *shall* disclose the address, telephone number, or email address of a student…unless the parent or eligible student has affirmatively consented in writing to such disclosure."

  Senate Bill 512*, An Act…Relating to Student Addresses, Telephone Numbers, and Email Addresses.*

  Senate Bill 512 prohibits the custodian of a scholastic record to "release the address, phone number, or email address of a student in response to a request made under [the Virginia Freedom of Information Act] without written consent" of either the student or the student's parent or legal guardian.

- ***Electronic Records:***

  - ***Nevada:***
    Comstock Residents Association, et. al. v. Lyon County Board of Commissioners
    (No. 70738, Nevada Supreme Court) (March 29, 2018):

    The Court concluded that the Public Records Act does not categorically exempt communications maintained on private devices or servers from disclosure; public records are not limited to records maintained in government offices, but include all records concerning the provision of a public service; and records that can be generated or obtained by the county or its commissioners are considered to be within the county's control.

  - ***Texas:***
    City of Austin (OR2018-00740) (January 10, 2018):

    At issue were requests for information pertaining to the City's recruitment of a new city manager. Among other findings, the Attorney General's Office found that the City must withhold all personal e-mail addresses, unless the owners affirmatively consent to their public disclosure.

    The Office noted that the Public Information Act (1) "excepts from disclosure 'an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body' unless the member of the public consents to its release or the e-mail address is of a type specifically excluded…"; and (2) "does not apply to

an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor's agent, or to an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address a governmental entity maintains for one of its officials or employees."

- ***Virginia:***
  House Bill 906, ***An Act…Relating to the Virginia Freedom of Information Act; Definition of Electronic Communication.*** (Signed)

  House Bill 906 clarifies the definition of "electronic communication" in the Virginia Freedom of Information Act to mean "the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information."

- ***Failure to Respond to Records Request:***

  - ***Pennsylvania*:**
    Kevin Hayden v. City of Reading
    (Docket No. AP 2018-0244, Pennsylvania Office of Open Records) (March 19, 2018):

    The Office of Open Records (OOR) found that the City of Reading did not comply with the Right-to-Know Law (RTKL) by issuing a final response to the records request, nor did the City provide any factual or legal support for denying access to the requested records. In addition, the OOR found that the City has repeatedly ignored records requests and not participated before the OOR, and acted in bad faith.

- ***Gun Permit Information:***

  - ***Nebraska:***
    Legislative Bill 902, ***An Act Relating to Public Records….*** (Signed)

    The bill exempts from disclosure "[i]nformation obtained by any government entity, whether federal, state, county, or local, regarding firearm registration, possession, sale, or use that is obtained for purposes of an application permitted or required by law or contained in a permit or license issued by such entity."

- ***Inter-Agency & Intra-Agency Materials:***

  - ***New York:***
    In re Grace Rauh, et. al. v. Bill de Blasio, et. al.
    (No. 2018-03115, New York Supreme Court, First Department) (May 1, 2018):

    The Court concluded that communications between Mayor Bill de Blasio and/or the Office of the Mayor of the City of New York and outside consultants that were not retained by a government agency did not fall within the statutory exemption for inter-agency and intra-agency materials (i.e., "the agency exemption") under the State of New York's Freedom of Information Law (FOIL).

    The Court noted that "[i]t is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant

must be retained by the governmental agency…. Respondents seek to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency. This attempt expands the agency exemption and closes the door on government transparency. Requiring an agency to retain an outside consultant to protect its communications comports with the fundamental principle that FOIL exemptions should be 'narrowly interpreted so that the public is granted maximum access' to public records."

- ***Invasion of Privacy – Investigations of Employee Misconduct:***

  - ***Wisconsin:***
    Willis W. Hagen v. Board of Regents of the University of Wisconsin System, et. al.
    (No. 2017AP2058-AC, Wisconsin Court of Appeals, District II) (June 20, 2018):

    The Court ruled that no statutory exception to disclosure exists for records of closed investigations of employee misconduct. The records at issue related to a complaint against, and the related investigation of misconduct by, an University of Wisconsin professor.

    The subject employee sought to enjoin the Board of Regents of the University of Wisconsin System and the University of Wisconsin (collectively, University) from disclosing the requested information. The Court "recognized the 'great importance of disclosing disciplinary records of public employees and officials where the conduct involves violations of the law or significant work rules…[and] the public's 'particularly strong interest in being informed about public officials who have been 'derelict' in [their] duty,' even at the cost of possible reputational harm" as well as the public's "strong interest in monitoring the disciplinary operations of a public institution." The Court further noted that the professor's "stated concern that release would have a chilling effect on attracting qualified candidates for future employment is 'remote – too remote to overcome the policy favoring disclosure of public records.'"

- ***Legislative Public Records:***

  - ***Washington:***
    Senate Bill 6617, *An Act Relating to Records Disclosure Obligations of the Legislative Branch….* (Vetoed)

    Senate Bill 6617 proposed to establish the Legislative Public Records Act (Act) to govern the public records disclosure obligations of the legislative branch. Under the Act, "legislative public records" would be made available for public inspection and copying, with exceptions. "Legislative public records" included, but were not limited to, correspondence, amendments, reports, and minutes of meetings; transcripts or other records of hearings; internal accounting and financial records; floor amendments; recordings of floor debate; legislators' calendar notations of dates, events, and names of individuals or organizations, for meetings or events that are related to official legislative duties; and legislators' correspondence on legislative business to and from persons outside the legislature who are not constituents. As stated by the Governor in his veto message, he was vetoing Senate Bill 661 "in its entirety so that the Legislature can engage with the public and stakeholders in a transparent process to discuss and consider legislative public records issues." The Governor noted that "[w]hile a wide majority of lawmakers voted for [the bill] as a genuine effort to create clarity and increase transparency, the process was seriously flawed."

- ***Lethal Injection Drugs:***

  - ***Arkansas:***
    Arkansas Department of Correction, et. al. v. Steven Shults
    (No. CV-17-544, Arkansas Supreme Court) (March 29, 2018):

    The Court held that the identity of the manufacturers of potassium chloride, one of the drugs in the State's execution protocol, is not protected under the "seller" and "supplier" confidentiality provisions of the Arkansas Method of Execution Act. However, the Court also ruled that "because disclosure of information such as lot, batch, and/or control numbers could lead to the identification of the seller and/or supplier of the [legal drug], the [Department of Correction] is required to redact and maintain this information as confidential…." The case was remanded to determine which information must be redacted on the potassium chloride labels and/or package inserts.

- ***"Litigation Exception":***

  - ***Alaska:***
    Kaleb Lee Basey v. Department of Public Safety, Division of Alaska State Troopers, et. al. (No. S-16609, Alaska Supreme Court) (December 29, 2017):

    The Supreme Court ruled that the Division of Alaska State Troopers improperly withheld certain records pertaining to pending federal cases under the "litigation exception." The cases involved a criminal case against the requester and a related civil suit he brought against various state employees.

    The Court held that the "litigation exception" "applies only when the requestor is involved in litigation 'involving a public agency.'" Here, the "State failed to establish Basey was involved in such litigation. Basey's complaint refers to his criminal case, but that case is being prosecuted by the federal government, not the State. The federal government is not a 'public agency' as defined in the Public Records Act." Further, the Court noted that the "State requested that the superior court take judicial notice of Basey's civil case, but no public agency is a party to that case either. Rather, Basey's civil complaint names a number of individual state officials as defendants, and explicitly states Basey is suing them '[i]n their individual capacities.'"

- ***Management and Processes for Accessing Information:***

  - ***Minnesota:***
    Tony Webster v. Hennepin County, et. al.
    (No. A16-0736, Minnesota Supreme Court) (April 18, 2018):

    The Court ruled, in part, that there was substantial evidence in the record to support the conclusion of an Administrative Law Judge (ALJ) that the County's established procedures did not "insure" that requests for government data were received and complied with in an appropriate and prompt manner, in compliance with the Data Practices Act. The Court noted that the "[k]ey to the violation here…is that the County's established procedures were the cause of the untimely response. The County has 'established procedures' or standard practices, followed those procedures or practices, and yet the record contains substantial evidence of the County's missteps and failures in responding to [the] request at every

juncture, leading inexorably to the conclusion that the existing procedures were insufficient to meet the statutory requirements."

- ***New Jersey:***
  Kevin Conley v. New Jersey Department of Corrections
  (No. A-4754-14T3, New Jersey Superior Court, Appellate Division) (January 12, 2018):

  The Court concluded that the Department of Corrections (DOC) did not provide a legally recognized basis for denying the records request for certain monthly reports.

  The Court noted that federal and state regulations require the DOC to maintain and keep in the course of its official business the type of information sought. In its response to the records request, the DOC claimed that it began utilizing a new database system in which the requested records were no longer generated or available. Although not required under the Open Public Records Act (OPRA) to create any document in order to respond to a request, the Court found that the "DOC should have considered the public-access ramifications before modifying the manner it stored public records. Technological advancements in data storage should enhance, not diminish, the public's right to access 'government records' under OPRA…. A government agency cannot erect technological barriers to deny access to government records that were previously available under OPRA."

- ***Medical Marijuana Act & Personal Security:***

  - ***Pennsylvania:***
    Pennsylvania Department of Health v. Wallace McKelvey, et. al.
    (No. 1372 C.D. 2017, Pennsylvania Commonwealth Court) (September 27, 2018):

    The Court concluded that the Department of Health failed to carry its burden to establish that the disclosure of records containing identifying information about panelists reviewing and scoring applications for grower/processor and dispensary permits under the medical marijuana program, were exempt from disclosure.

    The Department claimed that the requested information was exempt under the Department's regulations governing the medical marijuana program. Such regulations provide, in part, that "the applicant may not obtain the names or any other information relating to persons reviewing applications, including a reviewer's individual application reviews." The Court found, however, that such regulation applies only to "applicants" and that the Department failed to establish that the requester was an "applicant."

    In addition, the Department claimed that the requested information was exempt from disclosure under the personal security exemption in the Right-to-Know Law. The Court found, however, that the Department failed to prove that disclosure of such information "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." The Court noted that "[a] substantial and demonstrable risk means a risk that is real and apparent" and that "the likelihood requires more than speculation." Here, the Court found that the Department's statement that "disclosure of the information 'may expose the Review Panel to a plethora of issues' is conjecture and simply too speculative."

- ***Personnel Records & "Reverse CPRA" Petition:***

  - ***California:***
    Tom Williams v. City of Milpitas, et. al.
    (No. 17CV309235, California Superior Court, Santa Clara County) (April 27, 2018):

    The Court overruled a former Milpitas city manager's (Tom Williams) effort to block disclosure of public records related to his performance and allegations of misconduct. After a records request was submitted for such records, Mr. Williams filed a "reverse-CPRA" action to stop any release of documents. Mr. Williams claimed, among other exemptions, that the disclosure of the records would be an invasion of privacy. A temporary restraining order was granted.

    Among other findings, the Court found that even though Mr. Williams has privacy rights relating to his personnel file, he was nevertheless "a high-ranking public official with the City" and "therefore had a 'significantly reduced expectation of privacy in the matters of his public employment.'" The Court noted that "the public has a significant interest in learning how City employees spend (or misspend) taxpayer money…[and]…in understanding the City's response to allegations that high-ranking City officials may have committed misconduct. These interests, in [the Court's] view, outweigh Mr. Williams' privacy rights. And disclosure of the requested documents will help satisfy these public interests."

    The Court also rejected the argument that because Mr. Williams has retired, the disclosure of the requested information would serve little public purpose. The Court noted that "[e]ven if Mr. Williams is no longer with the City, his claims against the City live on, and the public has a right to know information about those claims"; "[t]he public also should know what steps, if any, the City and its elected officials have taken or are taking in response to the allegations made against Mr. Williams and made by Mr. Williams"; and "Mr. Williams may well seek another public sector job in the future, and the public has a right to know what kind of person it is hiring."

- ***Personnel Records & Sufficiency of Response to Records Request:***

  - ***New Jersey:***
    Libertarians for Transparent Government v. Ocean County Prosecutor's Office, et. al.
    (No. A-1608-16T1, New Jersey Superior Court) (January 5, 2018):

    The Superior Court ruled that the Ocean County Prosecutor's Office (OCPO) is not required to provide an explanation of the reason for a former OCPO employee's separation from employment.

    Petitioner contended that OCPO's response was deficient because the information provided indicated only that the employee resigned, and did not describe the circumstances surrounding his resignation or the reasons he decided to resign. Relying on an exception to the personnel records exemption, the Court found "no basis in the plain language of [the exception] to conclude that in addition to providing the reason for [the employee's] date of separation, the OCPO was required to investigate, determine and disclose [the employee's] motivation for resigning or the circumstances surrounding his decision to resign. The first exception requires only the production of the specified information and…existing 'document[s] otherwise classified as personnel records fit[ting]' within the exception."

- ***Procurement Exemption:***

  - ***Kentucky:***
    House Bill 302, *An Act Relating to the Operation of State Government.* (Signed)

    House Bill 302 exempts from disclosure records of a procurement process. The exemption shall not apply after (1) a contract is awarded or (2) the procurement process is canceled without award of a contract and there is a determination that the contract will not be resolicited.

  - ***Pennsylvania:***
    UnitedHealthcare of Pennsylvania v. Pennsylvania Department of Human Services, et. al.
    (Nos. 348 C.D. 20217, 543 C.D. 2017, Pennsylvania Commonwealth Court) (May 31, 2018):

    The Court upheld a decision of the Pennsylvania Office of Open Records (OOR) and ruled that the selection of offerors stemming from certain requests for proposal conducted by the Department of Human Services (DHS) does not constitute an "award of the contract" for purposes of the procurement exemption of the Right-to-Know Law (RTKL).

    Here, at the time of the requests and the OOR's ruling on the appeals, "DHS had selected offerors for negotiations…. However, negotiations with the selected offerors had not commenced and no contracts had been finalized or executed. There is no evidence that DHS made any announcement of an award of contracts…. In fact, DHS submitted affidavits attesting that no award of any contracts or agreements…has occurred…." Accordingly, "[b]ecause no contract has been awarded, the requested documents pertaining to the RFPs continue to remain exempt from disclosure under [the procurement exemption] of the RTKL."

- ***Prompt Access:***

  - ***Tennessee:***
    Linda C. Noe v. Solid Waste Board of Hamblen County/Morristown
    (No. E2017-00255-COA-R3-CV, Tennessee Court of Appeals) (August 27, 2018):

    The Court ruled that the Solid Waste Board violated the Tennessee Public Records Act (Act) by failing to provide the petitioner with prompt access to certain records relating to a landfill maintained by the Board. The Court noted that, under the Act "a citizen may inspect public records promptly upon request" and that "[a]ny delayed access to nonexempt public records is contingent only on whether such prompt inspection is 'practicable.'" Here, certain records "could easily be located in the office, such that access or an opportunity to inspect them should have been granted…. Given their ready availability, access to [such records] was practicable."

- ***Public Records Request System – Catalog of Requests:***

  - ***Vermont:***
    House Bill 910, Act No. 166, *An Act Relating to the Open Meeting Law and the Public Records Act.* (Signed)

    House Bill 910 requires the Secretary of Administration to maintain and update the Public Records Requests System, and post System information on the website of the Agency of

Administration. All executive branch public agencies must catalogue written records requests in the System by furnishing the following information: date the request was received; agency that received the request; name of the requester; status of the request; exemption or other grounds asserted for partial fulfillment or denial (if applicable); estimated hours necessary to respond to the request; date the agency closed the request; and the elapsed time between receipt of the request and the date the agency closed the request.

- ***Reasonable Access – Distance Required to Travel:***

  - ***Florida:***
    State Attorney for Third Judicial Circuit of Florida v. L.J. Johnson
    (No. 1D17-992, Florida Court of Appeals) (February 20, 2018):

    The Court ruled that the State Attorney did not violate the Public Records Act (Act) when it required the requester to travel 25 miles to view the requested records (i.e., state attorney's case file in a closed matter), instead of at an office closer to the requester's home.

    The Act requires that "'[e]very person who has custody of a public record [to] permit the record to be inspected and copied at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.'" The Court found that "[t]he Act does not define 'reasonable' as requiring government officials to move records from where they are being maintained to a different place convenient to the requester…." The Court further found that "[b]y making the records available at his main office…where they had been reviewed for exemptions… [the State Attorney] satisfied his legal obligation. His office was a reasonable place to make the State Attorney's records available…even if [the requester] had to drive some [25] miles to view them."

- ***"Rerouting" Public Records Requests:***

  - ***Arizona:***
    John M. Lunney, et. al. v. State of Arizona, et.al.
    (No. 1 CA-CV 16-0457, Arizona Court of Appeals) (December 7, 2017):

    The Court held, in part, that the Office of the Arizona Attorney General's involvement in responding to the requesters' records request did not violate Arizona's Public Records Law because "it did not unnecessarily delay the process of promptly providing the requested information."

    The petitioners argued that by routing their requests and responses through the Attorney General's Office instead of responding directly to the petitioners, the Department of Public Safety and Department of Transportation violated the Public Records Law. The Court, however, found that agencies are entitled to seek legal advice from the Attorney General's Office, and therefore "routing public record requests and responses through the [Attorney General's Office] to ensure legal compliance with [the] Public Records Law does not violate the law." The Court further noted that the Public Records Law "does not delineate the procedure state agencies must follow when responding to requests, other than to require a records custodian to 'promptly furnish' public records."

- ***Social Media - Facebook:***

  - ***New Mexico:***
    Stephen Pacheco, et. al. v. Honorable James M. Hudson, et. al.
    (No. S-1-SC-35445, New Mexico Supreme Court) (March 5, 2018):

    The Court held that the contents of an officeholder's personal election campaign social media website, among other records, were not public records subject to disclosure under New Mexico's Inspection of Public Records Act (IPRA).

    The Court noted that "IPRA textually makes clear that it is aimed at 'the affairs of government' and the 'official' acts of public officers and employees." Here, "[t]here is no evidence that [the judge's] personal election campaign or its Facebook site were acting on behalf of the First Judicial District Court or any other public body, or that any government funding was involved in maintenance of the Facebook site or any of its activities, or that [the judge] conducted public business through the site." The Court further noted that "[i]t would blur any standards imposed by IPRA if we were to hold that third-party comments about an officeholder's performance of the officeholder's official duties that are communicated through social media, news outlets, online discussion sites, or other nongovernmental entities would transform those entities into public bodies and subject their records to IPRA disclosure and inspection obligations."

  - ***Washington:***
    Arthur West v. City of Puyallup
    (No. 49857-0-11, Washington Court of Appeals) (February 21, 2018):

    The Court held that certain posts by a City Council member on her personal Facebook page were not public records because she did not prepare the posts within the scope of her employment or official capacity as a City Council member.

    The Court noted that "there is no indication that [the City Council member] was acting in her 'official capacity' as a City Council member in preparing these posts. The Facebook page was not associated with the City and was not characterized as an official City Council member page. Instead, the Facebook page was associated with the 'Friends of Julie Door,' which according to the [member's] declaration was used to provide information to her supporters…. In making the posts, [she] was not acting in her official capacity, conducting public business, or otherwise furthering the City's interests."

- ***Trade Secrets:***

  - ***Florida:***
    Rasier-DC, LLC v. Broward County, Florida, et. al.
    (No. 4D16-3070, Florida Court of Appeals, 4th District) (January 10, 2018):

    The Court affirmed a trial court ruling determining, after an in camera review of the documents at issue, that the aggregate number of pickups and the sum of money paid by Uber to the County as a usage fee at the airport did not constitute trade secret information that is exempt from disclosure.

Uber and Broward County entered into a licensing agreement governing Uber's services at the airport and Port Everglades. Uber issued monthly reports which were marked by Uber as containing trade secret information. The Court found that "[n]othing indicates the fees or total pickups provide an advantage to Yellow Cab or that Uber derives independent economic value from keeping that information secret."

- ***Vermont:***
  Michael Long, et. al. v. City of Burlington, et. al.
  (No. 2017-434, Vermont Supreme Court) (September 21, 2018):

  The Supreme Court ruled that certain information within a financial feasibility study provided by a private developer to a contractor hired by the City of Burlington to help the City assess the viability of the developer's plans, constituted a "trade secret" under the Public Records Act, and was therefore exempt from disclosure. The Court concluded that the redacted information "is of the type" that "'gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it'" and that "reasonable efforts [were] made to keep the information secret." The Court observed that "the exemption here promotes not only the private company's interest in protecting its commercial secrets, but also the government's interest in 'its continuing ability to secure such data on a cooperative basis…to make intelligent, well-informed decisions.'"

- ***Vexatious Requests***:

  - ***Connecticut:***
    House Bill 5175; P.A. 18-95, ***An Act Concerning Appeals under the Freedom of Information Act and Petitions for Relief from Vexatious Requesters***. (Signed)

    House Bill 5175 permits the Freedom of Information (FOI) Commission to grant relief to public agencies from vexatious requesters and their filing of frivolous complaints. Specifically, the bill amends the FOI Act to give the Commission greater statutory authority to refuse to hear a complaint should it be "repetitious or cumulative." The Commission could also refuse to hear a complaint if a complainant has a history of "nonappearance at commission proceedings or disruption of the commission's administrative process" or if the complainant refuses to participate in settlement conferences.

    In addition, House Bill 5175 allows a public agency to appeal to the Commission should it believe that a requester demonstrates a "vexatious history" of requests, including but not limited to, the number of requests, the nature of the requests, and a pattern of conduct that amounts to abuse of the right to access information under the FOI Act. After reviewing the public agency's appeal and possibly holding a hearing on the matter, the Commission would have the authority to provide relief to the agency, including allowing an agency not to comply with requests from the vexatious requester for a specified period of time not to exceed one year.

- ***Voter Information***:

  - ***Connecticut****:*
    House Bill 5173*, An Act Protecting the Privacy of Voters*, and House Bill 5176*, An Act Protecting Municipal Police Officers and their Families*. (Both Failed to Pass)

    House Bill 5173 proposed to restrict access to voter registration information according to the following purposes and people: for election, primary or referendum purposes to a candidate, referendum committee, political party or political committee; to a person verifying his or her own signature; to an election primary or referendum official; for scholarly or journalistic purposes, to the scholar or journalist; or for governmental purposes, to a government agency as determined by the Secretary of the State. Any information provided under this section would have included only the year of birth, not the month and day, unless the recipients were government agencies, in which case the whole date would have been provided. House Bill 5173 also would have prohibited the personal, private or commercial use of voter registration information; prohibited the reproduction of such records in print or on the Internet; and created a new class C felony punishable by a 10 year term of imprisonment and a fine of $10,000 for obtaining or using voter information not in accordance with the new prohibitions.

  - ***Wisconsin****:*
    Madison Teachers, Inc. v. Wisconsin Employment Relations Commission, et. al.
    (No. 2016AP2214, Wisconsin Supreme Court) (February 6, 2018):

    In a ruling reversing a circuit court decision, the Wisconsin Supreme Court concluded that the Chairman of the Wisconsin Employment Relations Commission (WERC) lawfully performed the balancing test in concluding that the public interest in elections free from voter intimidation and coercion outweighs the public interest in favor of openness of public records.

    The requester made three requests seeking the names of school district employees who had voted in the 2015 certification elections for collective bargaining representatives (i.e., "union elections"). WERC denied the first and second requests based on the Commission Chairman's determination that while the election was ongoing, the public interest that elections remain free from voter intimidation and coercion outweighed the public interest in favor of openness of public records. In response to the third request, which was submitted after the election ended, WERC disclosed the requested names. The Commission Chairman concluded that the public interest in maintaining openness of public records was satisfied by disclosing the requested lists immediately after the elections were over.

    The Court found that "[i]ntimidation in the WERC certification election was a concern. [The Chairman] had received detailed and specific complaints of past coercion in other certification elections. Complaints included: a union representative directing an employee to a computer and coercing her to vote for recertification; another employee being repeatedly asked whether she had voted; and a third employee witnessing employees being similarly pressured to vote." The Court further found that "[e]ach individual voter has a fundamental right to cast his or her

vote without intimidation or coercion. WERC is charged with conducting fair and accurate annual certification elections, free from the taint of voter intimidation. The public has a significant interest in fair elections, where votes are freely cast without voter intimidation or coercion."