FREEDOM OF INFORMATION
STATE LITIGATION AND LEGISLATIVE UPDATE

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INTRODUCTION

The following is an overview of action in state legislatures and courts around the country involving public access issues since the last COGEL conference in December 2018. The report is not an all-inclusive study. It should, however, provide a picture of where states are standing today on issues of government transparency.

Sources for this report include: *Access Reports,* the website for *The National Freedom of Information Coalition,* the website for *The Reporters Committee for Freedom of the Press,* and local online news websites. Attorneys Danielle McGee and Paula Pearlman, both counsel to the Connecticut Freedom of Information Commission, compiled and edited this year's report.

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Freedom of Information
Litigation and Legislation Update

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

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

➢ *Litigation:*

- ***Connecticut:***

Desmond v. Freedom of Information Commission, et al.
(No. HHBCV186042319S, 2019 WL 3526451 (Conn. Super. Ct. July 1, 2019))

A Connecticut superior court ruled that Yale-New Haven Hospital ("Yale Hospital"), a private, non-profit hospital was not a public agency, nor was it the functional equivalent of a public agency, and therefore was not subject to the Freedom of Information Act ("FOI") Act.

In determining whether an entity is the functional equivalent of a public agency, the court considers the following four factors: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government.

Considering all factors cumulatively, the court found that none were met. The court noted that Yale Hospital was "created to be a private charity and functions as a privately operated hospital[,] . . . the funds it receives from the government are compensation for medical care services it provides to individuals who are insured by Medicare or Medicaid[,] . . . [and] [i]t is not subject to direct, pervasive or continuous regulatory control and its employees are not government employees." Therefore, the court found that the FOI Commission correctly concluded that Yale Hospital is not the functional equivalent of a public agency.

Greenwich Emergency Medical Services, Inc. v. Freedom of Information Commission
(No. HHBCV176039788S, 2019 WL 3248554 (June 18, 2019))

A Connecticut superior court ruled that Greenwich Emergency Medical Services, Inc. ("GEMS"), a private, non-profit corporation that provides emergency medical services to the Town of Greenwich, only, was the functional equivalent of a public agency in that it met three of the four factor "functional equivalence test," and therefore was subject to the FOI Act.

As stated above, in determining whether an entity is the functional equivalent of a public agency, the court considers the following four factors: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government.

While the court disagreed with the FOI Commission that the first factor was met (i.e., GEMS "does not have the power to govern or to make decisions that bind the town"), the court concluded, "nevertheless, that the commission properly determined that GEMS is the functional equivalent of a public agency based on the remaining factors." Amongst the evidence relied

upon by the court to reach its conclusion was the following: the town provided over four million dollars per year from its general fund to GEMS and that such "payments constituted approximately 62 percent of GEMS' operating budget"; "the extensive regulation of GEMS' day-to-day activities by state statutes and regulations and by its contract with the town"; and that GEMS was created by the town.

- ***Florida:***
  O'Boyle v. Town of Gulf Stream
  (257 So. 3d 1036 (Fla. Dist. Ct. App. 2018) (October 24, 2018))

  A requester filed an appeal alleging violations of the Public Records Act when denied access to, among other records, "copies of text messages sent or received by the Town's Mayor since the time of his appointment."

  The appeals court remanded the matter to the trial court to conduct an in camera inspection of the text messages at issue to determine whether any qualify as "public records." The court noted that an "elected official's use of a private cell phone to conduct public business via text messaging can create an electronic written public record subject to disclosure. However, in order for that information to indeed be a public record, an official or employee must have prepared, owned, used, or retained it within the scope of his or her employment or agency. An official or employee's communication falls 'within the scope of employment or agency' only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests." The court found that a "governmental entity must proceed … by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester . . . regardless of whether the records are located on private or state accounts or devices . . . ."

- ***Georgia:***
  Institute for Justice v. Reilly
  (351 Ga. App. 317, 830 S.E.2d 793 (July 2, 2019))

  An appeals court held that certain state legislative offices are not subject to the Open Records Act ("ORA"). The Institute for Justice, a nonprofit public interest law firm, requested records from several legislative staff offices about a particular statute. The offices refused the request, asserting that the General Assembly ("GA") and its staff offices are exempt from disclosing records under the ORA.

  The court pointed out that its state Supreme Court had previously found that "the [GA], including its committees, commissions *and offices*, is not subject to a law unless named therein or the intent that it be included be clear and unmistakable." The Institute argued that "the addition of the word office to the list of state divisions somehow brings the [offices of the GA] within the scope of the [ORA] . . . ." The court pointed out, however, that the Supreme Court already found in a prior decision that "nearly identical language did *not* include the [GA]."

  The court concluded, "when appropriately considering the text of the current Act within the 'history of the text and the broader context in which that text was enacted, including statutory and decisional law,' . . . the mere addition of the word 'office' cannot be read in context and in light of [precedent] to make offices within the [GA] subject to the Act." The court found that the Institute's reading of the Act would encompass "a myriad" of offices and departments

within the GA, which would "allow the exception to swallow the rule that the [GA] is not subject to the Act.

- ***Illinois:***
  Sweeney v. Algonquin Township Road District
  (2019 IL App (2d) 19-0026-U (September 10, 2019))

  An appeals court ruled that a lower court did not err in finding that the Algonquin Township Road District ("Road District") is a "public body" under the Freedom of Information Act ("FOIA").

  The head of the International Union of Operating Engineers Local 150 ("Local 150") filed suit against the Road District. Among other claims, Local 150 alleged that the Road District violated FOIA by failing to respond to a records request.

  Under FOIA, a "public body" is defined as "all legislative, executive, administrative, or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof." Further, Illinois "has long recognized road districts as municipal corporations." Accordingly, the court found that "[b]ecause the Road District is a municipal corporation under . . . FOIA, it is a public body" and therefore is subject to the FOIA. The court also noted that the Road District also "satisfies the statutory definition of a public body because it is a subsidiary of the Algonquin Township, itself a public body."

- ***Iowa:***
  Diercks v. City of Bettendorf, Iowa
  (929 N.W.2d 273 (Iowa Ct. App. 2019) (July 3, 2019))

  An appeals court found that the City of Bettendorf (the "City") was obligated under the Open Records Act ("ORA") to retrieve records not in its possession from a private entity with which it contracted to provide legal defense against tort claims.

  A requester sought invoices from the City for legal services rendered by a third party. The City provided some responsive records, but argued that other responsive records were not in its possession, and that it was not obligated to produce any records not in its possession. The City asserted that these records were in the possession of the Iowa Communities Assurance Pool ("ICAP"), a government risk pool that the City contracted with to defend it against tort claims.

  The court reasoned that it must consider "whether the records requested are 'of or belonging to' a covered governmental body under [the ORA], or whether records are held by a nongovernment body with which the government body has contracted 'to perform any of its duties or functions' under [the ORA]."

  The court agreed with the requester that "the defense of lawsuits filed against [the City]" is a "government duty or function" and that "the public has an interest in knowing how public monies are being expended" when the City expends funds to join a risk pool. The court concluded, "[b]ecause . . . ICAP is performing a government function by virtue of its contract with the City, as specifically applied to the facts of this case, its records are 'public records' subject to examination."

The court remanded the matter for further proceedings, including consideration of exemptions raised by the City (i.e., work product, attorney client privilege, and confidentiality).

- ***Kentucky:***
  City of Ludlow v. Ludlow Youth Football League
  (No. 2017-CA-000539-MR, 2019 WL 2713128 (Ky. Ct. App. June 28, 2019))

  An appeals court concluded that a contractual arrangement between the City of Ludlow, KY and Ludlow Youth Football, Inc. ("LYF") (a private, non-profit youth football program), did not subject LYF to the Open Records Act ("ORA").

  For several years, the City and LYF co-sponsored an annual summer festival. After a dispute arose between the City and LYF pertaining to future events, the City requested several financial records from LYF pertaining to funds that passed from the City to LYF. LYF responded that it did not have any records responsive to the City's request. The City filed suit, which was dismissed by the court on the grounds that LYF is not a public agency.

  The ORA defines a public agency as "[a]ny body which . . . derives at least twenty-five (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds." LYF argued that "the City's expenditure of tax dollars to sponsor the annual festival cannot be included in any calculation of the football club's funds because the City's funds were paid directly to the fireworks vendor, City employees, and others not associated with LYF." The City argued that the funds were donations to LYF.

  The court concluded that LYF is not a "public agency" as defined by the ORA. "We agree with the circuit court that the City's payment of a portion of the costs of fireworks for the annual festival directly to the vendor, overtime pay to City employees, and payment directly to the supplier for temporary sanitation are not funds expended by LYF from state or local authority funds. Funds expended by the City in support of the annual festival are not sources of revenue to LYF. The private funds raised by LYF as a result of citizen's enjoying booths, food and drink, and other activities are not attributable to the City."

- ***Michigan:***
  Ahmad v. University of Michigan
  (No. 341299, 2019 WL 2552854 (Mich. Ct. App. June 20, 2019))

  An appeals court found that records donated to a public university's library, although donated with a condition that the records remain closed to the public through April 2035, constituted public records subject to disclosure under the Freedom of Information Act ("FOIA").

  The plaintiff made a FOIA request to the University of Michigan (the "University") for all "Tanton papers," a collection of 25 boxes of papers that were donated by Dr. John Tanton (described as "a figure widely regarded as the grandfather of the anti-immigration movement") to the University's Bentley Library. The donation required that boxes 15-25 remain closed for 25 years from the date of accession.

  The University denied the FOIA request, "asserting that the Tanton papers were closed to research until April 2035 and were therefore not 'public records' subject to FOIA disclosure because they were not 'utilized, possessed, or retained in the performance of any official University function.'"

On appeal, the University argued that the Tanton papers are not subject to disclosure because "under the terms of the gift agreement, they never became public records, and only public records are subject to FOIA disclosure." However, the court found that the plaintiff sufficiently pled that the library stored and maintained the Tanton papers consistent with its official functions (e.g., collecting and acquiring papers that the Library intends to preserve and make available to students at a future date). The court therefore "read the complaint as alleging that the defendant 'maintained the records' in the performance of an official function, which, under FOIA's definitions, renders them 'public records.'"

- ***North Carolina:***
  Southern Environmental Law Center v. Saylor
  (No. 19 CVS 500268, 2019 WL 4349608 (N.C. Super. Sept. 11, 2019))

  A trial court declined to dismiss an action on its pleadings alone as to the issue of whether the North Carolina Railroad Company ("NCRR"), a private corporation, and its leadership, are exempt from the Public Records Act ("PRA").

  The Southern Environmental Law Center ("SELC") sought records regarding the development of a light rail project that would travel through downtown Durham, NC. The NCRR argued that it is a private corporation, "regardless of the fact that all of the stock of the corporation is owned by the State of North Carolina." Defendants further argued "that ownership of 100% of the stock of the NCRR, and conduct by the State consistent with being the sole shareholder of a private corporation, does not, in and of itself, make the NCRR subject to the [PRA]." SELC argued that the state "exercises significant supervisory responsibilities and control over the NCRR, and, accordingly, should be considered an agency of the North Carolina government for purposes of the [PRA]."

  In its ruling, the court noted several factors supporting that NCRR is subject to the PRA, including, "(i) the NCRR's assets upon dissolution will be transferred to the State; (ii) the Governor of North Carolina and the General Assembly appoint all members of the NCRR Board of Directors; (iii) the NCRR is required to provide annual reports to the legislature which go above and beyond what is required for other corporate entities; and (iv) the NCRR has the power of eminent domain." The court also noted that the "NCRR's stated mission is to work for the 'good of the people of North Carolina[,]' . . . to manage a railroad corridor for the benefit of North Carolina Citizens," and that wording in the NCRR Charter "declares that the NCRR shall have a 'corporate existence as a body politic in perpetuity.'"

  Based on the record before it, the court ruled that it "cannot conclude as a matter of law that the NCRR cannot be an 'agency' of the State" under the PRA. The court noted that "in the absence of an express legislative enactment that the NCRR and its leadership are exempt from the [PRA], the Court must permit this action to proceed . . . ."

- ***Ohio:***
  Sheil v. Horton
  (2018-Ohio-5240, 117 N.E.3d 194, appeal not allowed, 2019-Ohio-1205, 155 Ohio St. 3d 1412, 120 N.E.3d 31 (December 20, 2018))

  An appeals court held that a community college foundation is the functional equivalent of a public office, that a contract the foundation entered into with actress Octavia Spencer was not

a "trade secret," and that the contract could be disclosed pursuant to the Public Records Act ("PRA").

The court found that all of the factors of the functional equivalency test (i.e., governmental function, level of governmental funding, extent of government involvement or regulation, and creation of entity) were met, and concluded that there was clear and convincing evidence that the foundation was the functional equivalent of a public office. The court considered, among other evidence, the following: how the foundation solicits and receives public donations for distribution to persons attending the college and for other purposes benefitting the community college; how the foundation performs an "indispensable sub-function within [the college's] traditional governmental education function"; that the foundation's articles of incorporation "include the purpose to receive, hold, invest and administer funds for the college"; the foundation does not pay to utilize the space or staff resources of the college; the foundation's operating expenses are funded in large part by contributions from the college; and that the foundation was both fiscally and administratively "intertwined" with the college (e.g., sharing staff, office space, and an email server).

Having found that the foundation was subject to the PRA, the court then considered whether the contract at issue was exempt from disclosure pursuant to the "trade secret" exemption. In order to meet the "trade secret" exemption, the community college foundation needed to establish that the contract "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means." The court found that "key information" about similar contracts by Spencer was publicly available, including "information revealing Spencer's speaking fee, a guaranteed fee, terms for the reimbursement of travel and expenses, and other requirements." The court concluded that "the essence of the information is known by individuals 'inside' and 'outside' the business, there is little savings to be recognized from further protection of the information, and others are able to easily duplicate and acquire the information." Accordingly, the court concluded that the contract was not exempt from disclosure.

- ***Pennsylvania:***
  California University of Pennsylvania v. Bradshaw
  (210 A.3d 1134 (Pa. Commw. Ct. 2019) (May 31, 2019))

  A court ruled that records containing information about donations to a public university's foundation, where such donations are made by an *entity* and not an individual, are public records.

  Citing the state's Statutory Construction Act, which defines the word "individual" as a natural person, the court concluded that a corporation is not an individual, for purposes of the Right To Know Law, and therefore, the records were subject to disclosure.

- ***Washington:***
  Serv. Employees Int'l Union Local 925 v. Univ. of Washington
  (193 Wash. 2d 860, 447 P.3d 534 (September 5, 2019))

  The Washington Supreme Court reversed a ruling by an appeals court finding that emails sent to or from a University of Washington ("University") professor pertaining to his union activities were not subject to the Public Records Act ("PRA"). The Court held that faculty member emails

"appeared to satisfy [the] requirement under PRA's public records definition that [a] writing contain information relating to the conduct of government or performance of governmental or proprietary function."

A labor union brought an action to enjoin the University from releasing faculty member emails relating to union organizing efforts by faculty members. The trial court granted a permanent injunction and the Court of Appeals affirmed, applying the "scope of employment" test articulated in legal precedent. The Supreme Court concluded, however, that the "scope of employment" test applies only to writings created on personal devices, and that the Court of Appeals erred in applying such test in this case.

The PRA defines a "public record", in relevant part, to include (1) any writing (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function (3) prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

The Supreme Court found that "[f]or an email to 'contain[] information relating to the conduct of government or the performance of any governmental or proprietary function…it need not have been sent or received within the 'scope of employment'…. Instead, the PRA requires only that it fall within the second prong's 'wide net'…. On the existing record, albeit limited, most of the disputed e-mails appear to satisfy that standard because they most likely address faculty working conditions or the [University's] educational mission." The Court further concluded that the "scope of employment" test "applies only to records retained on an agency employee's personal device or account and determines only whether such records meet the third prong of…[the 'public record'] definition. The Court of Appeals erred in applying the 'scope of employment test' to determine whether the records at issue in this case – most of which are concededly retained on agency servers-meet the second prong of the definition."

- ***Wyoming:***
  Wyoming Jet Center, LLC v. Jackson Hole Airport Board
  (2019 WY 6, 432 P.3d 910 (Wyo. 2019) (January 15, 2019))

  The Wyoming Supreme Court held that the Jackson Hole Airport Board ("Airport Board") is a public agency subject to the Wyoming Public Records Act ("WPRA").

  The requestor, Wyoming Jet Center, LLC, sought records held by the Airport Board. The Airport Board denied the request, and the requester appealed. The lower court held that the Board was not subject to the WPRA because it is neither a "state entity," nor is it a "political subdivision," and that it was governed solely by the "Special District Public Records and Meetings Act," not the WPRA.

  However, on appeal, the Supreme Court found that the Special District Public Records and Meetings Act neither defined the Board's record retention requirements, nor its disclosure requirements. The Court continued on to conclude that the Special District Act was only intended to ensure public access to *certain* records.

  The Court looked to the language of the WPRA, finding that the WPRA defines "political subdivision" to include "every county, city and county, city, incorporated and unincorporated town, school district and special district within the state." While the term "special district" is

not separately defined, the Court declined to limit its meaning to entities that are statutorily designated as special districts or have the term district in their names, and instead gave the term its broader, more general meaning of "a political subdivision of a state established to provide a single public service (as water supply or sanitation) within a specific geographical area." The court concluded that the Airport Board was a special district undisputedly created to perform a public function. The court also concluded that interpreting the WPRA as applicable to the Airport Board was consistent with the Act's purpose of maintaining an open and accountable government.

- ***Legislation:***

  - ***Connecticut:***
    House Bill 7424 (Public Act 19-117), ***An Act Concerning the State Budget for the Biennium Ending June Thirtieth, 2021….*** (Signed)

    Sections 183 through 189 of House Bill 7424 establishes "The Partnership for Connecticut, Inc.," a nonprofit corporation, and a 13-member governing board. The board, which will include five state officials (i.e., the Governor, House Speaker, Senate President Pro Tem, and House and Senate minority leaders) will oversee the expenditure of a $100 million contribution from the philanthropic foundation of Raymond Dalio, a matching $100 million allocation of taxpayer money and another $100 million contributed by other private donors over the next five years. Such funds are to be allocated for improvements in public education.

    Under House Bill 7424, the Partnership is exempt from the state's freedom of information and ethics laws. The bill provides that "no member of the board of directors or any officer or employee of the corporation shall, by virtue of such service to the corporation, be (1) a state employee or public official for purposes of part I of chapter 10 of the general statutes, or (2) a state contractor or prospective state contractor for purposes of section 9-612 of the general statutes." In addition, House Bill 7424 provides that "[t]he corporation shall not be construed to be a department, institution, public agency, public instrumentality or political subdivision of the state, or to perform any governmental function."

  - ***Texas*:**
    Senate Bill 943, ***An Act Relating to the Disclosure of Certain Contracting Information under the Public Information Act.*** (Signed)

    In addition to requiring greater disclosure of government contracting information, Senate Bill 943 amends the definition of "governmental body" under the Texas Public Information Act to include the following: (1) a confinement facility operated under a contract with any division of the Texas Department of Criminal Justice; (2) a civil commitment housing facility owned, leased, or operated by a vendor under contract with the state; and (3) an entity that receives public funds in the current or preceding state fiscal year to manage the daily operations or restoration of the Alamo, or an entity that oversees such an entity.

    The bill also excludes from the definition of "government body" "an economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts if", among other requirements,

"the entity does not receive $1 million or more in public funds from a single state agency or political subdivision in the current or preceding state fiscal year."

- ***Utah***:
  Senate Bill 197 (Session Law Chapter 280), ***Law Enforcement Agency Amendments.*** (Signed)

  Senate Bill 197 modifies provisions relating to law enforcement agencies. The bill includes law enforcement agencies in the definition of governmental entities that are subject to government records provisions; and also amends the definition of "law enforcement agency" to include a private institution of higher education whose law enforcement entity or division is certified by the Commission of Public Safety.

❖ 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:*

- ***Alabama:***
  Swindle v. Remington
  (No. 1161044, 2019 WL 1090393 (Ala. Mar. 8, 2019), reh'g denied, No. 1161044, 2019 WL 2240140 (Ala. May 24, 2019))

  The state Supreme Court found that members of the Board of the Public Education Employees' Health Insurance Program ("PEEHIP") violated the Open Meetings Act ("OMA") when they convened a closed meeting just before an open meeting and deliberated on items intended to be voted upon at the open meeting later in the day.

  Board members were scheduled to attend a regularly scheduled and publicly noticed Board meeting to discuss and vote on various matters, including increases to insurance premiums. The meeting was scheduled to take place in the afternoon. A few days prior to that meeting, the chair of the Board and other public officials decided to also schedule a morning session that was closed to the public. Although the intent of the morning session was to be a training session for staff members to make presentations about various matters, the session included a discussion of whether premiums should be increased and other alternatives. During the afternoon meeting the Board voted to increase the premiums.

  Following the afternoon meeting, the president of the Alabama Education Association ("AEA") filed an action alleging a violation of the OMA. The Circuit Court entered summary judgment for the AEA president and found that the Board violated the OMA.

  On appeal, the Board argued that the morning session met the "training program," "otherwise-gathers," and "gathering-of-state-officials" exceptions under the Act. The Supreme Court disagreed and held that the closed morning session was a meeting under the OMA. The court concluded that the morning session was not "merely a 'training program'," stating, "[i]t is clear that the staff presentation regarding the same matters that would be considered for a vote later in the day and that included proposals to increase insurance premiums does not fall within the 'training-program' exception." The Court further concluded that "under these particular circumstances, 'deliberation' occurred during the morning session" and as such the "otherwise-gathers" exception is not applicable. The record demonstrated that Board members asked questions, expressed disagreement with recommendations, and advocated for an alternative solution.

  The court also concluded that the "gathering-of-state-officials" exception was not applicable because the members of the Board met with their *own staff* during the morning session, and

therefore did not convene state officials "for the purpose of reporting or obtaining information" as required to meet the exception. The Court noted that it was "obvious" that, while there is no "instructive case law" on the "gathering-of-state-officials" exception, "when read in its entirety, [the OMA] differentiates between 'officials' and 'employees.'" A PEEHIP staff member is a "public employee," not a "public official."

- ***Arkansas:***
  City of Fort Smith v. Wade
  (2019 Ark. 222, 578 S.W.3d 276 (2019), reh'g denied (Aug. 1, 2019))

  The Supreme Court of Arkansas held that email communications between public officials can constitute public meetings under the Freedom of Information Act ("FOIA"), but not all email exchanges between public officials violated the open-meetings provision of FOIA.

  The City's police chief filed an action against certain City "directors," alleging that they violated the open-meetings provision of the FOIA when the directors and a city administrator exchanged emails related to city business. The City argued that because FOIA "does not include language that a public meeting can be constituted by electronic communication, this court should establish a bright-line rule that FOIA's reach does not extend to email."

  The court disagreed, relying on prior decisions in which it had found that "a FOIA meeting may occur even in the absence of an actual gathering of members in the case of a telephone poll or when serial third-party contact is made to obtain approval of [an] action." The Court concluded that "FOIA's open-meeting provisions apply to email and other forms of electronic communication between governmental officials just as surely as they apply to in-person or telephonic conversations. It is unrealistic to believe that public business that may be accomplished via telephone could not also be performed via email or any other modern means of electronic communication."

  Ultimately, however, the court agreed with the City that the specific email exchanges at issue in this case did not constitute a meeting because no decision was sought or made in the exchanges. Rather, the emails at issue contained "information, a recommendation, and unsolicited responses with no decision."

- ***Colorado:***
  Bjornsen v. Board of County Commissioners of Boulder County
  (2019 COA 59, 2019 WL 183023 (April 25, 2019))

  An appeals court held that the trial court erred in finding, on a motion for summary judgment, that the Board of Commissioners for Boulder County did not violate the Colorado Open Meetings Law ("COML") when it went into executive session to discuss the development of an affordable housing project.

  After examining the record, the court found that the affidavit relied upon by the Board in its motion failed to establish that the Board complied with the state's open meetings laws. The affidavit did not address the individual executive sessions at issue, but merely set forth the general practices of the Board, and that "upon information and belief" those general practices were followed for each of the meetings that the complainant alleged were convened in violation of COML.

The affidavit also set forth that there are instances in which the Board may convene in executive session outside of a regular or special meeting, without announcing the topic or otherwise noticing the session beforehand, if doing so was "unavoidable and necessary." The court found that such actions were clearly in violation of COML's requirement that "executive sessions be convened only at regular or special meetings and only after the topic is announced in as much detail as possible."

- ***Connecticut:***
  City of Meriden v. Freedom of Information Commission
  (191 Conn. App. 648 (August 6, 2019))

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

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

  The court opined that "[t]he language of the statute . . . provides that the FOIA public meeting requirements apply to 'any hearing or other proceeding' of a public agency, no matter the number of people attending, but do not apply to a 'convening or assembly' of less than a quorum of a multimember public agency." The court focused on the issue of "whether the leadership group gathering was a 'hearing or other proceeding,' which does not require a quorum to constitute a "meeting."

  The court concluded, "[i]n sum, because the gathering of the leadership group did not serve an adjudicatory function within the plain meaning of 'hearing' and 'proceeding,' the gathering was not a 'hearing or other proceeding' under §1-200(2) but, instead, constituted a 'convening or assembly' for the purposes of that subdivision."

  The Supreme Court granted certiorari limited to the issue of whether the "Appellate Court properly construe[d] the term 'proceeding,' contained in General Statutes § 1-200(2), not to include a gathering of four political leaders of the Meriden City Council at which they discussed a search for a new city manager." City of Meriden v. Freedom of Info. Comm'n, 333 Conn. 926 (2019).

- ***Iowa:***
  Krapf v. Rastetter
  (927 N.W.2d 202 (Iowa Ct. App. 2019) (January 9, 2019))

  A plaintiff alleged that the Iowa Board of Regents violated the Iowa Open Meetings Act when five of its members had separate, but serial, contact with Bruce Harreld, an individual interested in gathering information about a vacancy in the University of Iowa President position. Harreld

was not a candidate for the university position at the time, but was interested in gathering more information about the position to determine whether he would be a good fit. The plaintiff alleged that these separate, but serial, meetings of the Board constituted a single "meeting" under the Act and that the University violated the Act because the meeting was held without notice, was not conducted in open session, and no minutes were recorded. Harreld later submitted an application for the position, and ultimately was selected to serve as President of the University of Iowa.

The plaintiff argued that the meetings, with a sub-majority in close proximity discussing the same topic, constituted a serial meeting. The court, however, found that Harreld never met with a majority of the members and there was never any deliberation within the meaning of the Act. The court further found nothing in the record showing that the Board members discussed amongst themselves the individual meetings with Harreld.

- ***Kentucky:***
  Attorney General's Opinion
  (Ky. Op. Att'y Gen. No. 19-001 (Feb. 7, 2019))

  The Kentucky Attorney General concluded that a new emergency administrative regulation by the Finance and Administration Cabinet ("Cabinet") restricting public access to all state owned facilities and grounds, including the State Capitol, may lead to violation of several state statutes, including the Open Meetings Act ("OMA").

  On June 4, 2018, members of the Kentucky Poor People's campaign sought entry into the State Capitol and were advised of a new "policy" whereby members of the group could only enter the building two at a time. This "policy" was not reflected in an administration regulation or other writing, but continued to be enforced. As a result, 32 members of the General Assembly sought an opinion of the Attorney General regarding the process by which rules and policies for public access to the Capitol may be implemented or altered. The Attorney General found in this instance that the Cabinet and the State Police violated state law by implementing and enforcing policies regarding entry into the Capitol that were not contained in properly adopted administrative regulations.

  The following year, less than two days before the start of the General Assembly's Regular Session, the Cabinet filed an emergency administrative regulation, placing restrictions on public use of and activities that may be conducted at all state-owned facilities and grounds, including the Capitol. The Cabinet admitted that it was aware of rising interest by the public in attendance at sessions of the General Assembly, yet waited until two days prior to the 2019 Regular Session to promulgate the regulation at issue, thus depriving the public of the opportunity to comment on its new restrictions prior to the Session commencing.

  A State Representative requested the opinion of the Attorney General regarding this newly promulgated regulation. The Attorney General found that the Cabinet improperly promulgated the regulation because conditions did not exist that necessitated the promulgation of an emergency administrative regulation. In addition, the Attorney General found that the regulation gave agencies broad discretion to place limitations on public meetings in contravention of the OMA.

- ***Oregon:***
  Wood v. Wasco County
  (294 Or. App. 155, 430 P.3d 575 (September 19, 2018))

  A plaintiff brought an action against the Board of County Commissioners of Wasco County alleging that the Board violated the Public Meetings Law when it voted to withdraw from an intergovernmental agreement at a Board meeting. The plaintiff alleged that the Board discussed the withdrawal in private, and failed to include the withdrawal on an agenda. Subsequent to the filing of the plaintiff's complaint, the Board convened a meeting and included on its agenda the issue of the county's participation in the intergovernmental agreement. At the meeting, the Board voted unanimously to rescind the decision to withdraw.

  Based on the rescission, the County moved for summary judgment. The trial court ruled that the case was moot and the plaintiff appealed. The court concluded that the issue was moot once Wasco County rescinded its decision to give notice of intent to withdraw from the intergovernmental agreement.

➢ ***Advisory Opinion:***

- ***Massachusetts:***
  Advisory Opinion, OML 2019-48 (May 16, 2019):

  The Attorney General ("AG") found that the Westminster Police Chief Screening Committee violated the Open Meeting Law by improperly discussing certain matters in executive session. The Committee was appointed by the Board of Selectmen to assist in the selection of a new Police Chief. The AG explained that "[b]ecause any discussions concerning the overall selection process and conflict of interest issues did not specifically involve the consideration or interview of applicants [which is permitted in executive session], these discussions should not have occurred during the executive session . . . ." The AG ordered the Committee to publicly release the minutes of the portion of the executive session where these discussions occurred.

➢ ***Legislation:***

- ***Colorado*:**
  House Bill 19-1087*, An Act Concerning Online Notice of Public Meetings of a Local Governmental Entity*. (Signed)

  The bill removes the requirement that local government bodies post physical notices of public meetings in physical locations, with certain exceptions. The bill requires that such entities now post meeting notices on a website, social media account or other official online presence of the local government, to the extent practicable.

  House Bill 19-1201*, An Act Concerning the Ability of a Board of Education of a School District to Meet in Executive Session….* (Signed)

  The bill allows members of a board of education of a school district to hold an executive session for the purpose of developing the district's strategy in conducting negotiations relating to collective bargaining or employment contracts.

- ***Texas*:**
  Senate Bill 1640*, An Act Relating to the Open Meetings Law.* (Signed)

  Senate Bill 1640 provides more detailed language in the Open Meetings Law ("OML") regarding "walking quorums." Specifically, the bill provides that "[a] member of a governmental body commits an offense [of the OML] if the member (1) knowingly engages in at least one communication among a series of communications that each occur outside of a meeting…and that concern an issue within the jurisdiction of the governmental body in which the members engaging in the individual communications constitute fewer than a quorum of members but the members engaging in the series of communications constitute a quorum of members; and (2) knew at the time the member engaged in the communication that the series of communications: (A) involved or would involve a quorum; and (B) would constitute a deliberation once a quorum of members engaged in the series of communications."

  House Bill 2840*, An Act Relating to the Right of a Member of the Public to Address the Governing Body of a Political Subdivision at an Open Meeting of the Body.* (Signed)

  The bill requires that a governmental body "allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item." The governmental body may adopt reasonable rules regarding the public's right to comment including a limitation on the total amount of time that the member may address the body.

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

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

➢ ***Litigation:***

- ***California:***
  Walnut Creek Police Officers' Association v. City of Walnut Creek
  (33 Cal. App. 5th 940, 245 Cal. Rptr. 3d 398 (Ct. App. 2019) (March 12, 2019))

  A court of appeals denied several petitions for writ of supersedeas, filed by the Walnut Creek Police Officers Association (the "Association"), for their failure to show that "substantial questions will be raised on appeal." In January 2019, California amended its penal code to "expand public access to certain peace officer records maintained by a state or local agency." (See Senate Bill 1421, below). The Association argued that "application of the 2019 amendments to compel disclosure of records created prior to 2019 constitutes an improper retroactive application of the new law."

  The appeals court agreed with the trial court that such argument "is without merit." "Although the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law—a request for records maintained by an agency—necessarily occurs after the law's effective date . . . . [T]he new law also does not change the legal consequences for peace officer conduct described in pre-2019 records . . . . Rather, the new law changes only the public's right to access peace officer records."

- ***New Hampshire:***
  New Hampshire Center for Public Interest Journalism, et al. v. New Hampshire Dept. of Justice (No. 226-2018-CV-00537 (April 23, 2019))

  A superior court denied the New Hampshire Department of Justice's ("DOJ") motion to dismiss a petition, filed by several news organizations and the American Civil Liberties Union ("ACLU"), pertaining to their request for a list the DOJ maintains of "police officers who have engaged in sustained misconduct, when such misconduct reflects negatively on their credibility or trustworthiness" as witnesses in criminal cases. Such list is known as the Exculpatory Evidence Schedule ("EES").

  The DOJ provided a redacted version of the EES that removed "any personal identifying information of the officers contained therein," claiming that such records were personnel files and disclosure "would constitute an invasion of privacy of the officers contained within the EES."

  The court found that the records at issue are not confidential police personnel files exempt from disclosure pursuant to the Right-to-Know-Law ("RTKL"). The court concluded that the EES does not constitute a personnel file within the meaning of the statute (i.e., "employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee . . . . [a]s [t]hese constitute the core categories of personnel information that are useful in making employment decisions regarding an employee.") The court also concluded that the EES is not exempt as an "internal personnel practice," since the EES is not created and maintained by the police officers'

employer, and because the "character and purpose of the list does not relate to or occur within the limits of the officers' employment."[1]

- ***New Jersey:***
  Libertarians for Transparent Government v. New Jersey State Police
  (No. A-5675-16T2, 2019 WL 2172890 (N.J. Super. Ct. App. Div. May 20, 2019))

  A court declined to order the State Police to release the name of a trooper after information pertinent to the trooper had been included in an annual report to the Legislature concerning internal investigations and disciplinary action as a result of substantiated allegations of misconduct. The court found that the trooper's name was protected by the personnel records exemption.

  The court concluded that revealing the trooper's name, in light of the information the State Police already disclosed about the substantiated allegations against the trooper and the discipline imposed, would reveal information expressly protected by the personnel records exemption. The exemption provides that records relating to a grievance filed by or against an individual shall not be considered a government record. The court therefore concluded that the statute required that the trooper's name not be disclosed.

  Libertarians for Transparent Government filed a petition for certification, which has been granted by the state Supreme Court. Libertarians for Transparent Government v. New Jersey State Police, 239 N.J. 518, 218 A.3d 306 (October 10, 2019).

- ***New York:***
  Patrolmen's Benevolent Association of the City of New York v. De Blasio, et al
  (171 A.D. 3d 636, 101 N.Y. App. Div. 2019 (April 30, 2019))

  An appeals court held that given its "nature and use," the body-worn-camera footage at issue was not a personnel record covered by the confidentiality and disclosure requirements of the Civil Rights Law governing personnel records of police officers.

  A police union challenged the City's public release of police department body-worn- camera footage without a court order or relevant officers' consent, and moved for a preliminary injunction. Such motion was denied by the trial court, and the union appealed.

  The Supreme Court, Appellate Division, found "[t]he purpose of body-worn camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building. Although the body-worn- camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times,

[1] Currently, under consideration by the General Court of New Hampshire, are two bills that would increase access to records relating to the conduct of police officers. See House Bill 153, *An Act Relative to Circumstances under which Police Officer Disciplinary Records Shall Be Public Documents,* and House Bill 155, *An Act Relative to Procedures for Determining and Disclosing Exculpatory Evidence in a Police Officer's Personnel File*. Under House Bill 153, the following records shall be considered a "public record": (1) any record which includes a finding that a law enforcement officer discharged a firearm which led to death or serious injury; and (2) any disciplinary record in which there has been a final adjudication of a matter involving an officer who was found guilty of sexual assault, or in which there was a sustained finding of dishonesty by an officer including perjury, false statements, filing false reports destruction, or falsifying or concealing evidence. House Bill 155 would expressly make exculpatory evidence schedules a public record under New Hampshire's Right-to-Know Law. House Bills 153 and 155 both passed the New Hampshire House of Representatives, and were referred to interim study by the Senate.

to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with, any pending disciplinary charges or promotional processes." The Court further found that the footage at issue was "more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability."

Prisoners' Legal Services of New York v. New York State Dep't of Corr. & Cmty. Supervision (173 A.D.3d 8, 98 N.Y.S.3d 677 (N.Y. App. Div. 2019) (May 2, 2019))

An appeals court held that "unusual incident reports," "use of force reports," and "misbehavior reports," which are generated in a correctional facility, do not qualify as personnel records that are protected from disclosure under New York's Freedom of Information Law.

Prisoners' Legal Services of New York made a request for records to the Department of Corrections and Community Supervision. The Department withheld responsive records, claiming that the records were personnel records used to evaluate employees of the Department. Prisoners' Legal Services filed suit.

The appeals court reviewed the nature and use of the reports, as well as their lack of potential to be used against officers, and concluded that the reports do not qualify as personnel records. The court also noted that given their factual nature and that they were written by witnesses, the requested reports were "more akin to arrest reports, stop reports, summonses, accident reports, and body-worn camera footage…"

- ***Legislation:***

  - ***California*:**
    Senate Bill 1421 (Chapter 988), ***Act Act…Relating to Peace Officer Records***. (Signed)

    Senate Bill 1421 requires that certain personnel records of peace and custodial officers be made available for public inspection. Such records include, *but are not limited to,* records relating to the discharge of a firearm at a person by an officer, reports concerning use of force incidents resulting in death or in great bodily injury, reports relating to incidents in which a sustained finding was made that an officer engaged in sexual assault involving a member of the public, and reports relating to incidents in which a sustained finding was made of dishonesty by an officer relating to the reporting and investigation of crime.

  - ***Colorado:***
    House Bill 19-1119, ***An Act Concerning Public Disclosure of a Completed Peace Officer Internal Investigation File.*** (Signed)

    The bill makes a completed internal investigation file of a peace officer for in-uniform or on-duty conduct that involves a member of the public subject to disclosure, with certain limitations. Prior to disclosure, the custodian *must* redact any personal identifying information, information related to confidential informants, witnesses or victims; home address, personal phone number and personal email address of a peace officer; any information prohibited for public release by state or federal law; medical or mental health information; identifying information related to a juvenile; and any nonfinal disciplinary recommendations. The bill also delineates other information that *may* be withheld, such as the identity of officers who volunteered information

relating to the investigation, but who were not a subject of the investigation. In addition, if there is an ongoing criminal investigation or criminal case, the file may be withheld until all charges are dismissed or the defendant is sentenced.

- ***Connecticut*:**
  Senate Resolution 30 and House Resolution 33, *Proposing Approval of an Interest Arbitration Award Between the State of Connecticut and the Connecticut State Police Union* (NP-1). (Signed)

  The General Assembly approved an agreement between the State of Connecticut and the State Police Union that contains provisions superseding the public records requirements within the FOI Act. Specifically, Article 9 of the agreement exempts from disclosure the personnel files and internal affairs investigations of state troopers, with limitations.

❖ Access to Education Records

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

➢ *Litigation:*

- ***New Jersey:***
  L.R. v. Camden City Public School District
  (238 N.J. 547, 213 A.3d 912 (July 17, 2019))

  The Supreme Court concurred with the Appellate Division that a "student record" under the New Jersey Pupil Records Act (and its implementing regulations) retains its protected status, notwithstanding a school district's redaction of "personally identifiable information," as required by the Federal Family Educational Rights and Privacy Act ("FERPA") and its implementing regulations.

  The Supreme Court noted that the "text and history of New Jersey's student record privacy regulations suggest that those regulations are intended to be distinct from – and stricter than – those imposed by FERPA and federal regulations." The Court concluded that state law "includes in the definition of a 'student record' a document containing information relating to an individual student, even if that document has been stripped of personally identifiable information that might identify the student in compliance with federal law." Consequently, a "student record . . . remains a student record and retains its protected status even if all 'personally identifiable information,' as defined in FERPA, is redacted from that record."

- ***Pennsylvania:***
  Central Dauphin School District v. Hawkins
  (199 A.3d 1005 (Pa. Commw. Ct. 2018) (December 10, 2018))

  A court of appeals ruled that the Central Dauphin School District ("School District") violated the state's Right-to-Know Law ("RTKL") when it failed to disclose a video that "depicts a confrontation between a member of the girls' high school varsity basketball team" and a parent (of another student) to a news entity.

  The School District refused to provide the video, claiming that disclosure would violate the Federal Family Educational Rights and Privacy Act ("FERPA"), and that the video was exempt from disclosure under the RTKL because it was a record "relating to" a noncriminal investigation.

  The appeals court agreed with the trial court that the School District failed to prove that the video was an education record (i.e., that it directly related to a student and is maintained as part of the student's permanent record).

  The appeals court also agreed with the trial court that the School District failed to prove that the video related to a "noncriminal investigation" (defined as "one not undertaken for a criminal prosecution and denotes 'a systematic or searching inquiry, a detailed examination, or an official probe'"), and was therefore not exempt from disclosure. The court noted that "the mere fact that a record has some connection to an investigation does not automatically exempt it" from disclosure, and found that the School District failed to prove that the video captured a

noncriminal investigation. The video did not "reveal any progress in or result of an investigation conducted by the District."

West Chester University of Pennsylvania v. Rodriguez
(216 A.3d 503 (Pa. Commw. Ct. 2019) (July 24, 2019))

A court held that the Office of Open Records ("OOR") erred in applying an erroneous standard to a university student's request for records to the West Chester University of Pennsylvania (the "University") under the RTKL.

A student filed a request for emails from the University Office of Student Conduct and Computer Science Department pertaining to the student, a certain student conduct case, and the "Computer Science Club." The University produced 50 pages of emails, but denied access to 500 emails, claiming that the emails were exempt from disclosure pursuant to FERPA. The respondent University later provided the complainant with additional responsive records, albeit with any personally identifiable information ("PII") of other students redacted. With respect to the 500 emails, the OOR determined that such records were not education records under FERPA and not exempt from disclosure. The OOR found that "the records are (1) not academic records, and (2) not kept in the central, permanent file of any student" and ordered disclosure of the emails.

On appeal, the court found that the OOR applied the incorrect standard. "First, the OOR stated that 'only those records relating to student academics are 'education records,' suggesting that the potential nonacademic nature of some of the requested emails deprives them of FERPA protection. . . As this Court has made clear, however, the appropriate inquiry is whether the record – regardless of its subject matter – directly relates to a student other than Respondent. Second, the OOR concluded that '[b]ecause the University has not proven that the requested emails were kept in the permanent file of . . . any . . . student[ ], the requested emails are not education records. That inquiry is, like the first, overly narrow. Education records must be maintained in some way that preserves them and tracks requests for access to them, but placement within a single student's permanent file is not the only action that could constitute such maintenance."

The court found that the OOR's interpretation of FERPA to be overly restrictive. The court remanded the matter to the OOR to apply the correct FERPA analysis and consider the constitutional privacy interests in nondisclosure asserted by the University.

- ***Legislation:***

  - ***Tennessee:***
    House Bill 788 (Chapter 248), ***An Act to Amend Tennessee Code Annotated… Relative to Education.*** (Signed)

    House Bill 788 makes confidential "records maintained by an intercollegiate athletics program of a public institution of higher education…if the records contain information relating to game or player integrity and that is traditionally not revealed publicly due to the public institution of higher education's need to maintain competitiveness in the sport to which the records relate." As set forth in the bill, such information includes, but is not limited to, plays or playbooks, techniques, philosophies, strategies, recordings of practices, games, and assessments of a

participant.

Notably, access to such information must be released to the public "when the public's interest in the content of the records outweighs the interest of game or player integrity or the need to maintain competitiveness in the sport to which the records relate, or when game or player integrity or the need to maintain competitiveness in a sport are no longer relevant due to the passage of time."

- ***Tennessee*:**
  Senate Bill 182 (Public Chapter 256), ***An Act to Amend Tennessee Code Annotated… Relative to Cameras on School Buses*.** (Signed)

  Senate Bill 182 requires local school boards to adopt a policy establishing a process to allow parents to view photographs or video footage collected from a camera or video camera installed inside a school bus. The policy must require that such photographs and video footage be viewed under the supervision of the director of schools or a school official designated by the director. The policy must comply with the Family Educational Rights and Privacy Act.

❖ Access to Records Relating to Attorney-Client Privilege and Work Product Doctrines

Below are summaries of court decisions concerning the attorney-client privilege and work product doctrine exemptions:

➢ *Litigation:*

- ***Texas:***
  Paxton v. City of Dallas
  (No. 06-18-00095-CV, 2019 WL 2119644 (Tex. App. May 15, 2019))

  An appellate court concluded, after review of an affidavit and records filed under seal, that documents and communications by and between the City of Dallas, its agents, adjusters, damage claims coordinators, office of risk management personnel, and City program managers reflecting efforts to determine liability for respective claims, and information regarding reserves set on various claims based on the City's investigation and damage assessments, were made or prepared by agents and employees of the City of Dallas in anticipation of litigation against the City, and were properly classified as "noncore work product" that is exempt from disclosure.

  The court examined the records at issue to determine whether they were in fact work product. The court found that the records demonstrated that the City of Dallas conducted investigations for the purpose of preparing for litigation against it. The records were properly classified as "noncore work product." Noncore work product is any work product that is not "core work product," defined as work product that contains an attorney or his agent's mental impressions, opinions, conclusions, or legal theories.

- ***Virginia:***
  Bergano v. City of Virginia Beach
  (296 Va. 403, 821 S.E.2d 319 (December 6, 2018))

  A requester engaged in ongoing litigation with the City of Virginia Beach submitted a request for billing records regarding all of the City's expenses related to the litigation. The City provided the records to the requester with many redactions, including most details, leaving only the date, name of the attorney, time billed, and the attorneys' hourly rates. The City claimed that the redacted information was exempt from disclosure under the attorney-client privilege and work product doctrine exceptions to the Virginia Freedom of Information Act ("FOIA").

  The requester appealed. The state Supreme Court held that the City's application of the exceptions was excessively broad. It noted that, typically, the attorney-client privilege does not extend to billing records and expense reports. In addition, the identity of the client, amount of the fee, identification of payment by case file name, and general purpose of the work are usually not protected from disclosure by attorney-client privilege. However, the court noted that billing records which also reveal the motive of the client in seeking representation, strategy, or the specific nature of the records provided, such as researching a particular area of law, do fall within the attorney-client privilege. The Court concluded that billing records may fall within the attorney-client and work product exceptions to disclosure under Virginia's FOIA if the records reveal confidential information (including motive of the client in seeking representation), litigation strategy, analytical work product, or legal advice.

- ***Washington:***
  Washington Coalition for Open Government v. Pierce County
  (No. 50718-8-II, 2019 WL 761585 (Wash. Ct. App. Feb. 20, 2019)), review denied, 193 Wash. 2d 1020, 448 P.3d 66 (2019)

  An appellate court held that Pierce County met its burden of establishing that the work product exemption applied to records (e.g., draft pleadings, handwritten notes, legal research) requested that pertained to ongoing litigation. The work product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation . . . . Thus, the doctrine only applies to materials prepared in anticipation of completed, existing, or reasonably anticipated litigation."

  The requester argued that Pierce County had waived the work product doctrine exemption when it previously disclosed the records at issue to third parties. The court disagreed, finding that the requester improperly applied the doctrine of waiver (in the context of the attorney-client privilege) to the work product doctrine. A party only waives the work product privilege when work product is disclosed to third parties in circumstances in which there is a "significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." The work product doctrine permits the sharing of work product without waiving the privilege in certain contexts including with co-parties and others who are similarly aligned on a matter of common interest, as was the case herein.

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

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

➢ *Litigation:*

- ***Illinois:***
  Hosey v. City of Joliet
  (2019 IL App (3d) 180118, 124 N.E.3d 1075 (March 6, 2019))

  An appellate court found that the Illinois criminal code prohibits the inspection and production of any electronic recording of any statement by an accused person that is made during custodial interrogation and compiled by law enforcement.

  A reporter submitted four Freedom of Information Act ("FOIA") requests to the City of Joliet (the "City") to obtain videotaped police interviews of several individuals accused of murder. The City denied the requests.

  The court found that the records were exempt from inspection and production due to the rights of those accused of a crime. The court found that based on the clear language of the statute, the criminal code prohibits the transmission of any electronic recording of any statement by an accused during custodial interrogation and compiled by law enforcement.

  The court did not accept the requester's argument that when the defendants are no longer accused, the statute is no longer applicable, finding that this argument reads an element into the statute that the legislature did not include (i.e., that the tape loses its confidential and exempt status upon conviction or exoneration of the accused). The court found this argument troubling in that it would leave open the possibility of public disclosure of sensitive or embarrassing personal information of an innocent person that would not have been revealed but for the threat of prosecution.

- ***Louisiana:***
  Pardee v. Connick
  (No. 18-718 (La. App. 5 Cir.), 267 So. 3d 179 (March 15, 2019))

  An appeals court found that memoranda prepared by a district attorney's chief investigator were exempt from disclosure because of the possibility of further litigation of an underlying criminal case in which a request to vacate the underlying conviction and sentence was pending. The court concluded that because the records at issue pertain to a matter reasonably anticipated to lead to further criminal litigation, the investigator's memoranda are exempt from disclosure.

- ***Michigan:***
  Schlussel v. City of Ann Arbor
  (No. 341202, 2019 WL 1371504 (Mich. Ct. App. Mar. 26, 2019)), appeal denied, 933 N.W.2d 696 (Mich. 2019)

  An appeals court found that a statutory privacy exemption permits a public agency to withhold from disclosure information of a personal nature, if public disclosure would constitute a clearly unwarranted invasion of an individual's privacy.

The Ann Arbor Police Department reported that it was investigating recent hate crime accusations. However, it was later found that at least two reports were fabricated. A journalist contacted the Department to discover the identity of two women who were found by the Department to have filed fraudulent hate crime reports. The Department provided two redacted police reports. Both reports indicated that the women were referred to the prosecutor's office with a request to prosecute. The reporter filed a complaint alleging that the Department and City of Ann Arbor improperly denied her Freedom of Information Act ("FOIA") request and that disclosure of unredacted reports was necessary to ensure government accountability.

The court found that the state's statutory privacy exemption provides that a public body may withhold from disclosure information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. The Court applied a two-prong privacy test for the exemption: first, the information must be of a personal nature; and second, it must be the case that public disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy.

The first prong was satisfied because the redacted material contained the names of the complainant, her family and witnesses, as well as phone numbers, addresses, identifying information, and medical information. The second prong was also satisfied because the requester did not identify how the redacted information, if released, would help the public understand the investigation by the Department. The court concluded that the personal information in the record at issue was wholly unrelated to the public interest that the plaintiff asserted, and its release would be an unwarranted invasion of personal privacy.

- ***Ohio:***
  State ex rel. Rogers v. Department of Rehabilitation & Correction
  (2018-Ohio-5111, 155 Ohio St. 3d 545, 122 N.E.3d 1208 (December 20, 2018))

The Ohio Supreme Court concluded that security camera footage of a "use-of-force incident" that occurred in a correctional institution is neither an "infrastructure record," nor is it a "security record," exempt from disclosure under the Public Records Act ("PRA"), and therefore the footage must be disclosed to the requester.

The Department of Rehabilitation and Correction ("DRC") originally denied a request for the video, contending it was exempt under the infrastructure exemption because it "discloses the configuration of the department's critical systems, including security systems . . . [and] contains specific camera placement information that is directly used for protecting or maintaining the security of the department against attack, interference, sabotage, or to prevent, mitigate, or respond to acts of terrorism."

The Supreme Court found, however, that the video did not meet the definition of an infrastructure record. The court found that the video at issue captured "only the spatial relationship of the components of the building that would be revealed in a simple floor plan," and also found that the video did not disclose "the configuration of or network of security cameras," nor did it reveal the location of fire or other alarms, correctional-officer posts, or configuration of any critical system.

The court also did not agree that the video met the definition of a security record. The court found that the DRC failed to explain how the video at issue constitutes "information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," or was "assembled, prepared, or maintained by a public office to prevent, mitigate, or respond to acts of terrorism," as required by the exemption.

- ***Tennessee:***
  Scripps Media, Inc. v. Tennessee Department of Mental Health & Substance Abuse Services (No. M201802011COAR3CV, 2019 WL 3854298 (Tenn. Ct. App. Aug. 16, 2019))

  A court of appeals held that non-exempt, non-investigative records do not become exempt merely because they are later used as part of a criminal investigation.

  A reporter requested records from the Tennessee Department of Mental Health and Substance Abuse Services and the Tennessee Bureau of Investigation (collectively, "the State") "concerning an alleged affair between two State officials that may have involved public funds." The State refused, claiming that the records were part of an ongoing criminal investigation.

  The reporter filed a petition with the court seeking the records via the Tennessee Public Records Act ("TPRA"). However, before the petition was heard, the investigation ended and the State disclosed the records. "In point of fact, the case [was] moot." However, notwithstanding the mootness issue, the court found that the records were exempt from disclosure. The reporter appealed.

  On appeal, the court reversed, holding that "non-investigative public records made in the ordinary course of business, capable of being accessed from their inception by citizens of Tennessee, do not become exempt from disclosure because of the initiation of a criminal investigation in which they become relevant." The court explained, "there is a major difference between public records created in the ordinary course of business and materials found in an investigative file. The former encompasses the routine documentation of public business conducted by the government, the very sort of records for which the TPRA was enacted to allow citizens to inspect if they wish. The latter relates to criminal investigations and prosecutions, giving rise to the myriad concerns about constitutional rights, privacy, and a fair trial. [The reporter] . . . did not seek the contents of an investigative file. He sought non-investigative public records that were created in the ordinary course of business and kept by their respective agencies. Under the TPRA, he was entitled to inspect them. The State acknowledges that the records here would have been disclosed but for the criminal investigation and, in fact, actually were disclosed after the criminal investigation ended. Indeed, these records were accessible from their inception. That they later were relevant to a criminal investigation did not alter either their nature or where they are kept."

- ***Virginia***:
  Natalie Jacobsen, et. al. v. Department of State Police, et. al.
  (Case No. CL17-592, Circuit Court for the City of Charlottesville (2019)

  A Charlottesville circuit court ordered the release of a redacted version of the law enforcement safety plans devised for the violent and deadly "Unite the Right" rally that occurred in Charlottesville, Virginia, in August 2017.[2]

[2] https://www.rcfp.org/court-rules-safety-plans-public-information/.

Specifically, the circuit court ordered the release of "all portions of the record Petitioner requests that do not constitute a risk to the safety or security of law-enforcement personnel or the general public and do not contain information from the Virginia Fusion Intelligence Center." The circuit court also ordered the respondents to provide an unredacted copy of such record to the court for an in camera review to determine whether the redacted information may be withheld from disclosure.

- ***Washington:***
  Zabala v. Okanogan County
  (428 P.3d 124 (Wash. Ct. App. 2018) (October 2, 2018))

  Records pertaining to an inmate, including records prepared as a result of the person being incarcerated (whether created by the facility or another government agency), were found to be exempt from disclosure per state statute. A requester made five requests to the Okanogan County Sheriff's Office and prosecuting attorney for all records related to monitored or recorded phone calls of inmates in specified county jails.

  On appeal, the requester argued, among other things, that the agency violated the Public Records Act by failing to produce the records requested. The court found that a state statute that exempts from disclosure "records of a person confined in jail" includes records of an inmate that were "prepared as a result of the inmate being in jail." The court further found that the exemption extends to records that were forwarded to another government agency and to records created by the prosecuting attorney concerning the inmate.

  The court continued on to address the issue of whether the agency had an obligation to search for the requested records, doing so in a non-precedential portion of its decision. The court held that the agency's inability to perform a key word search in computer files did not excuse its responsibility to respond to a public records request. However, the court noted that part of the request in this case was for "any and all" records that "relate to jail inmate recordings." The court stated that requests must be made for identifiable records or a class of records, and concluded that the use of the words "any," "all," and "related to" in this case made the records sought unidentifiable.

- ***Legislation:***

  - ***Connecticut*:**
    Senate Bill 1105 (Public Act 19-43), ***An Act Concerning the Confidentiality of Law Enforcement Records Concerning the Victims of Sexual Assault and Family Violence***. (Signed)

    Senate Bill 1105 amends of the Freedom of Information Act to allow the withholding of identifying information of victims of sexual assault and family violence contained in law enforcement records.

  - ***New Mexico:***
    Senate Bill 118 (Chapter 27), ***An Act Relating to Public Records; Protecting the Confidentiality of Certain Victims of and Witnesses to Certain Crimes.*** (Signed)

    Senate Bill 118 exempts from inspection portions of law enforcement records that reveal the name, address, contact information or protected personal identifier information of individuals

who are victims of or non-law enforcement witnesses to an alleged crime of: (1) assault with intent to commit a violent felony when the violent felony is criminal sexual penetration; (2) assault against a household member with intent to commit a violent felony when the violent felony is criminal sexual penetration; (3) stalking; (4) aggravated stalking; (5) criminal sexual penetration; or (6) criminal sexual contact.

- ***New York*:**
  Assembly Bill A3939/Senate Bill S5496, ***An Act to Amend the Public Officers Law….*** (Passed Senate & Assembly; not yet delivered to the Governor)

  Assembly Bill 3939/Senate Bill S5496 makes changes to the Freedom of Information Law ("FOIL") and to the Civil Rights Law. Among other changes, A3939/S5496 amends the law enforcement exception under FOIL to make clear that records prepared or created for law enforcement purposes cannot be withheld solely because they relate in some manner to a law enforcement investigation or criminal proceeding. The bill provides that when an agency is considering denying access to records under the law enforcement exception on the grounds that disclosure would interfere with a judicial proceeding, the agency must notify the judge presiding over that judicial proceeding who will then determine whether access to such records should be denied.

  The bill also amends the Civil Rights Law (§50-b) to clarify that only the portions of a report that identify any victim of a sex offense are exempt from disclosure.

  New York State Budget 2019-20 (Chapter 55). (Signed)

  Among other provisions, the state budget makes changes to FOIL by prohibiting the disclosure of law enforcement booking information about an individual, including booking photographs, unless public release of such information will serve a specific law enforcement purpose (e.g., to alert victims or witnesses to come forward to aid in a criminal investigation) and disclosure is not precluded by any state or federal laws.

❖ Access to Information Pertaining to Workplace Complaints and Investigations

Below are summaries of court decisions and legislation concerning access to information contained in personnel records:

➢ *Litigation:*

- ***Nevada:***
  Clark County School District v. Las Vegas Review-Journal
  (134 Nev. Adv. Op. 84, 429 P.3d 313 (October 25, 2018))

  Employees of the Clark County School District ("CCSD") complained that an elected trustee, whom they considered to be their boss, engaged in inappropriate behavior, including sexual harassment. The Las Vegas Review-Journal (the "Journal") made records requests under the Nevada Public Records Act ("NPRA"), and subsequently filed a petition for a writ of mandamus requesting that the district court compel disclosure when they alleged that the CCSD failed to timely respond.

  After a hearing and in camera inspection, the district court granted the Journal's request for an order to permit CCSD to redact only the names of direct victims of sexual harassment or alleged harassment, students, and support staff. This excluded teachers and witnesses who may be subject to stigma or backlash for speaking out during the investigation. CCSD appealed.

  The state Supreme Court held that the district court did not err in ordering disclosure. However, the Court adopted a two-part balancing test articulated in Cameranesi v. Dep't of Defense, 856 F.3d 626 (9th Cir. 2017). First, the government must establish a "personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or . . . more than de minimis," and second, "if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester 'must show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest.'" The court held that "Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA," and "adopted the test in Cameransi to balance the public's right to information against nontrivial personal privacy interests." The court reversed the redaction order and remanded for further proceedings.

- ***Washington:***
  Doe v. Washington State Dep't of Fish & Wildlife
  (No. 49186-9-II, 2018 WL 5013860 (Wash. Ct. App. Oct. 16, 2018), review denied sub nom. Doe v. Dep't of Fish & Wildlife, 193 Wash. 2d 1017, 441 P.3d 1197 (June 5, 2019))

  An appeals court affirmed a superior court decision to enjoin the Washington State Department of Fish and Wildlife (the "Department") from disclosing investigative records relating to cross-allegations of sexual harassment between two of its employees, without first redacting some references to the identity of "Jane Doe," a Department employee.

  Doe filed suit, seeking a permanent injunction that prohibited the Department from disclosing any responsive records without first redacting *every* reference to Doe by name, relationship, or association.

On appeal, the court addressed the exemption for "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy[.]" "In order to qualify for this exemption, the information must (1) contain personal information, (2) the person must have a privacy interest in that information, and (3) disclosure of that personal information must violate their right to privacy." A person's right to privacy is violated if "disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." The parties agreed that the records at issue contained personal information (i.e., identifying Doe by name, relationship, association). However, the parties disputed "whether every reference implicates Doe's privacy interest and is subject to redaction."

The court found that "not every reference in the responsive records to Doe's identity – by name, relationship, or association – concerns intimate matters of Doe's private life, such as sexual relations or details of her life in the home. Our review of the proposed redactions . . . shows that many of the references to Doe's identity did not concern her private life and merely disclose details about everyday life. These references do not connect Doe to alleged sexual conduct, concern intimate matters of her private life, or reveal unique facts about Doe. Therefore, these references do not implicate Doe's right to privacy…."

The court also opined that "[t]he emphasis is on the content of the records. Although a person may be able to figure out Doe's identity from references to her in the records that do not implicate her privacy interest, that does not mean that such references must be redacted as the contents of those records do not implicate Doe's privacy interest."

- ***Legislation:***

  - ***Colorado*:**
    Senate Bill 19-244, ***An Act Concerning Statutory Changes to Implement Changes to the Workplace Policies of the General Assembly….*** (Signed).

    Senate Bill 19-244 establishes an Office of Legislative Workplace Relations which shall provide services to the General Assembly including, but not limited to, the investigation of workplace harassment complaints. Among other provisions, the bill provides that records created and maintained by the Office that relate to workplace harassment complaints or investigations, or inquiries or requests concerning workplace harassment or conduct, whether or not the inquiries or requests lead to formal or informal complaints or resolution processes, are not public records and shall not be available for public inspection, with certain limitations.

    Senate Bill 19-244 does require that an executive summary of the investigation report, with the identity of the complainant and any witness redacted, to be made available to the public when the General Assembly's workplace harassment committee finds that the facts found more likely than not in the investigation establish a violation.

  - ***Washington:***
    House Bill 1692 (Chapter 373), ***An Act Relating to Protecting Information Concerning Agency Employees who have Filed a Claim of Harassment or Stalking….*** (Signed)

    House Bill 1692 prohibits a state agency from disclosing records concerning an agency employee who has made a claim, or is named as the victim, of a workplace sexual harassment

or stalking complaint to the person alleged in the complaint to have harassed or stalked the employee who is named as the victim in the claim.

If the requestor is someone other than the individual against whom the complaint was filed, the agency must immediately notify the agency employee who may bring an action in court to enjoin the agency from disclosing the records.

House Bill 2020 (Chapter 349)*, An Act Relating to Exempting the Disclosure of Names in Employment Investigation Records….* (Signed)

House Bill 2020 exempts from disclosure investigative records compiled by an employing agency in connection with an active and ongoing investigation of an agency's internal policies prohibiting harassment in employment. After the investigation is complete, the records may be disclosed only if the names of the complainants, other accusers, and witnesses (who have not consented to disclosure of their names) are redacted.

❖ Burdensome Requests

Below are summaries of court decisions concerning burdensome requests:

➢ *Litigation:*

- ***Illinois:***
  Sargent Shriver Nat'l Ctr. on Poverty Law, Inc. v. Bd. of Educ. of City of Chicago
  (2018 IL App (1st) 171846, 122 N.E.3d 729, appeal denied, 119 N.E.3d 1021 (Ill. 2019) (December 3, 2018))

  An appeals court held that when a public agency asserts that a Freedom of Information Act request is unduly burdensome, the agency must make a clear and convincing showing that the burden of compliance outweighs public interest in disclosure of the requested records. The court noted that an evidentiary hearing or the filing of detailed affidavits were not necessarily required. The court continued, "what constitutes a clear and convincing showing of undue burden will likely vary from case to case, depending on the broadness of the request, the level of detail provided in the public body's response, and the nature of the parties' exchange."

  In this case, "pre-suit communications attached to the complaint demonstrate that the public body . . . complied in good faith . . . by providing a written explanation for its noncompliance and has given the requesting party an opportunity to test the scope of that explanation by clarifying or narrowing its request." The requester declined to narrow or clarify its requests in this matter.

- ***New Jersey:***
  Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of New York & New Jersey
  (No. A-1810-16T3, 2018 WL 6683940 (N.J. Super. Ct. App. Div. Dec. 20, 2018))

  An appeals court held that a public agency is not obligated to respond to overbroad Open Public Records Act ("OPRA") requests.

  The requesters filed 58 OPRA requests with the Port Authority of New York and New Jersey ("Port Authority"). Of the 58 requests, the Port Authority argued that 38 were "overbroad" or "missing criteria" and did not warrant any response.

  The trial court found that the 38 requests were "overbroad and invalid under OPRA as they fail to properly identify the records being sought. The language used in the majority of the requests does not specifically and with reasonable clarity identify the records sought."

  The appeals court found that many of the requests at issue were "overbroad, ambiguous, and impose an impermissible burden on the custodian of records." For example, the court found that a requester's use of the term "concerning" in a request "'renders the request one for 'information generally,' rather than specific, identifiable records." The court also found that requests that lack any "specific subject matter" or date restriction, and "encompass a massive number of individuals and documents" fall outside the scope of OPRA. The court also noted that these types of requests "substantially disrupt an agency's operations" and therefore a custodian may deny such a request and work toward "a reasonable solution" with the requester "that accommodates the interests of the requestor and the agency."

The court did find that some of the requests were sufficiently clear and limited in scope (e.g. specific, identifiable documents, limited time span) and that the Port Authority should have responded to such requests.

❖ Trade Secrets, Commercial and Financial Information

Below are summaries of court decisions concerning access to records containing trade secrets, commercial, or financial information.

➢ *Litigation:*

- ***Connecticut:***
  Allco Renewable Energy Ltd. v. Freedom of Information Commission
  (No. HHBCV186043138S, 2019 WL 1875508 (Conn. Super. Ct. Mar. 18, 2019))

  A superior court sustained the decision of the Freedom of Information ("FOI") Commission that the Department of Energy and Environmental Protection ("DEEP") did not violate the FOI Act by "asserting the trade secret exemption for a document used by the department to evaluate responses to a request for proposals."

  Among other records, a requester sought a copy of an "answer key" that was developed by an independent consultant hired by the state to assist in evaluating proposals submitted for clean energy projects. DEEP withheld the answer key, claiming that it qualified as a trade secret and therefore exempt from disclosure. The FOI Commission agreed.

  The FOI Act defines trade secrets as "information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy . . . ."

  The court concluded "that the [Freedom of Information Commission's] decision is supported by substantial evidence and is consistent with the law." The court found that the "answer key is a compilation of information that includes confidential and commercially sensitive information, received from others and as well as information developed by the department itself concerning the viability, the costs, and the benefits of proposed projects." The court also found that "the resources expended on developing the information at issue, the value of the resulting projects to ratepayers, and the value of the information to businesses in a highly competitive market can properly be deemed to be substantial evidence of the economic value of the information to the department . . . [T]he information at issue has independent economic value derived from its secrecy."

  Requester appealed, and such appeal is pending.

- ***Indiana:***
  Scott v. Indiana Financial Authority
  (131 N.E.3d 221 (Ind. Ct. App. 2019) July 30, 2019))

  An appeals court found that the Indiana Finance Authority ("Authority") did not violate the Access to Public Records Act ("APRA") when the Authority withheld records containing "confidential financial information" that came into the possession of the Authority only as a result of the Internal Revenue Service's ("IRS") requests during its examination" of a 2004

swap of bonds that were issued in 1993 on behalf of Union Hospital, a private, nonprofit corporation. The swap transaction was between the Hospital and a separate financial institution. The Authority was not involved in the transaction.

The Authority received a document request from the IRS, which it forwarded to the Hospital. During the examination period by the IRS, a requester filed a request under the APRA for all records related to the IRS examination. The Authority denied the records request relating to the Hospital's swap transaction, claiming the records were protected by the "confidential financial information" exemption.

On appeal, the court relied on evidence that demonstrated that the swap transaction was between a private entity and a financial institution that were not subject to the APRA; a sworn statement attesting that the records requested contained confidential financial information, including that the Hospital maintained the confidentiality of the information contained within the records at issue and that such were only provided to the Authority to respond to the IRS' request.

Relying on this evidence, the court concluded that "the documents relating to the swap transaction contain confidential financial information belonging to the Hospital. The Hospital provided these documents to the Authority in response to the IRS's request for information. As such, the documents are not properly the subject of a records request under APRA."

- ***Kentucky:***
  Louisville/Jefferson County Metro Gov't v. Courier-Journal, Inc.
  (No. 2018-CA-001560-ME, 2019 WL 3756332 (Ky. Ct. App. Aug. 9, 2019))

  A court of appeals held that an economic development proposal (the "Proposal") submitted by Louisville/Jefferson County Metro Government ("Louisville Metro") to Amazon.com, Inc., lost its status as "preliminary" when Amazon did not accept the Proposal, and was therefore not exempt from disclosure pursuant to the "preliminary" exception in the Open Records Act ("ORA").

  The Louisville Courier-Journal (the "Journal") requested a copy of the Proposal submitted to Amazon after Amazon announced its finalists, which did not include Louisville Metro. Louisville Metro disclosed a heavily redacted proposal, claiming that much of the information contained therein (e.g., economic incentives, prospective headquarter locations) was "preliminary in nature" and pertained to "the prospective locations of a business or industry where no previous disclosures have been made of the business' or industry's interest in locating within the Commonwealth," and therefore exempt from disclosure.

  The Journal filed suit, and the trial court found in favor of the Journal. The trial court found that the Proposal "was no longer exempt as preliminary after Amazon announced that Louisville Metro was no longer in consideration" and that "Amazon's interest in relocating was publicly disclosed and well-known." The trial court's decision was affirmed.

  With respect to the claim that the information was exempt as "preliminary," the court concluded that the Proposal was not preliminary in nature. The court reasoned that "once Amazon excluded Louisville Metro from its list of finalists, the Proposal was no longer subject to change" and was final under the ORA. "Any possible re-opening of the bid process would require a new Proposal." The court concluded "that the final action occurred at that point. Therefore, the preliminary recommendations in the Proposal lost their exempt status once the

final action occurred." The court noted that "final action occurs when the ultimate issue is definitely resolved, either by action or a decision not to take action."

- ***Mississippi:***
  Morgan v. XLK International, LLC
  (255 So. 3d 1271 (Miss. 2018) (October 25, 2018))

  The state Supreme Court found that certain documents, submitted by XLK International, LLC ("XLK") in response to the Mississippi State Hospital's ("MSH") request for proposals, were not subject to disclosure.

  The MSH sought proposals for administration of group insurance plans for state employees. MSH awarded the contract to XLK. An unsuccessful bidder sought all documents that XLK submitted in response to MSH's request for proposal. The request was denied, and the unsuccessful bidder appealed.

  The court found that certain records submitted by XLK contained trade secrets, confidential commercial, and financial information, including insurance quotes, charts showing cost savings, and other marketing materials. In finding in MSH's favor, the court relied on an affidavit submitted by XLK's president attesting that disclosure of the documents would reveal trade secrets, confidential commercial and financial information of a proprietary nature which belong to XLK and were developed by XLK, and that divulgence of this information to the public and XLK's competitors would harm XLK's ability to compete in the insurance administration business.

❖ Other Noteworthy Litigation and Legislation

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

- ***Accident Reports & Personal Information*:**

  - ***Tennessee***:
    Senate Bill 111 (Public Chapter 111), ***An Act to Amend Tennessee Code Annotated…Relative to Disclosure of Personal Information.*** (Signed)

    Senate Bill 1346 limits access to personally identifying information (i.e., street addresses and zip codes, telephone numbers, driver license numbers and insurance information) of any person named in any motor vehicle accident report. Other information in the accident reports (e.g., name, age, county/city of residence of a person involved in an accident) remains subject to disclosure. The bill also permits a law enforcement entity from releasing information about traffic accidents to the public when the law enforcement entity determines "such release is in the best interest of the agency and for the public good."

- ***Adequacy of Search Conducted to Identify Responsive Records:***

  - ***Arizona:***
    Woodward v. Arizona Corp. Comm'n
    (No. 1 CA-CC 17-0003, 2018 WL 6498615 (Ariz. Ct. App. Dec. 11, 2018), review denied (Apr. 22, 2019))

    At issue on appeal was whether the Arizona Corporation Commission ("ACC") adequately searched for responsive records and made a good faith effort to comply with the plaintiff's records request, and whether the ACC had met its burden of proof.

    The ACC argued that it had satisfied the search and production requirements consistent with Arizona law, and submitted an affidavit from a paralegal describing the process used to respond to the request. The plaintiff challenged the court's reliance on the affidavit.

    The appeals court noted that the affidavit showed the length of the paralegal's employment, that the paralegal was familiar with Arizona public records requests, that ACC sent several agency-wide email requests for responsive documents within two days of receipt, and the paralegal used email and file archiving software.

- ***Concert & Entertainment Events:***

  - ***Texas:***
    House Bill 81, ***An Act Relating to the Disclosure under the Public Information Law of Certain Information Related to Parades, Concerts, or Other Entertainment Events Open to the General Public that are Paid for with Public Funds*.** (Signed).

    House Bill 81 requires the disclosure of information related to a governmental body's receipt or expenditure of funds in connection with a publicly funded entertainment event. In addition, the bill provides that contracts related to such events are prohibited from including

any provisions preventing disclosure of such information, and any such provision is void.

- ***Contracting Information*:**

  - ***Texas*:**
    Senate Bill 943*, An Act Relating to the Disclosure of Certain Contracting Information under the Public Information Act.* (Signed)

    Senate Bill 943 requires greater disclosure of government contracting information, with exceptions. Among other requirements, the bill requires that key contract information such as the following be made available: any term describing the overall or total price the governmental body will or could potentially pay; description of the items or services to be delivered (e.g., delivery and service deadlines, remedies for breach of contract, identity of all parties to the contract, identity of all subcontractors in a contract); information indicating whether a vendor, contractor, potential vendor, or potential contractor performed its duties under a contract (e.g., breach of contract, any amendment to a contract, a remedial action, progress reports).

    Among other exceptions, information is excepted from disclosure if "a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future."

- ***Cost for Public Records**:*

  - ***Nevada*:**
    Senate Bill 287 (Chapter 612), *An Act Relating to Public Records….* (Signed)

    Senate Bill 287, in part, clarifies that the "actual cost" incurred by a governmental entity in the provision of a public record includes such direct costs as the cost of ink, toner, paper, media and postage.

    The bill also eliminates the authority of a governmental entity to charge an additional fee if a request for a copy of a public record would require a governmental entity to make "extraordinary use" of its personnel or technological resources (i.e., any information, information system or information service, acquired, developed, operated, maintained or otherwise used by a governmental entity).

- ***Court Appeals Process – Preference for Proceedings Regarding Records Requests:***

  - ***New York:***
    Assembly Bill A414A/ Senate Bill S4685A, *An Act to Amend the Public Officers Law and the Civil Practice Law and Rules, in Relation to Preference Given to an Appeal to the Appellate Division of the Supreme Court Regarding a Denial of an Exception from Disclosure.* (Passed Senate & Assembly; not yet delivered to the Governor)

The bill requires that a proceeding brought by a person seeking an exception from disclosure of a record be given preference by the courts.

- ***Database - Records Maintained:***

  - ***Nevada:***
    Pub. Employees' Ret. Sys. of Nevada v. Nevada Policy Research Inst., Inc.
    (134 Nev. 669, 429 P.3d 280 (October 18, 2018))

    The state Supreme Court held that under the Public Records Act ("PRA"), a public agency is required to disclose "certain employment and pension information about its government retirees held in its computer database."

    A requester filed a petition for a writ of mandamus "seeking retiree name, payroll amount, date of retirement, years of service, last employer, retirement type, original retirement amount, and COLA increases" from the Public Employees Retirement System ("PERS") after PERS refused its request. The requester argued that the "information is not confidential because it is a public record and is easily accessible through an electronic search of the PERS database." Following an evidentiary hearing, the lower court found that "the requested information was not confidential, that the risks posed by disclosure did not outweigh the benefits of the public's interest in access to these records, and that PERS had a duty to create a document with the requested information." The court ordered PERS to disclose "retiree name, years of service credit, gross pension benefit amount, year of retirement, and last employer."

    On appeal to the state Supreme Court, PERS argued that the court erred because the information at issue was confidential and "the risks posed by disclosure outweigh the benefits of the public's interest in access to the records." PERS also argued that the court erred because "there is no duty 'to create new documents or customized reports by searching for and compiling information from individuals' files or other records.'''

    The Supreme Court disagreed with PERS. First, although the PRA exempts from disclosure "the files of individual members or retired employees," the "scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files." The court agreed that PERS failed to "identif[y] any statute, rule, or case law that would foreclose production of the requested information." Second, the court found no error in the lower court's conclusion that the "risks posed by disclosure of the requested information do not clearly outweigh the benefits of the public's interest in access." The court found that PERS' arguments about identity theft and cybercrime against retirees was "merely hypothetical and speculative and did not clearly outweigh the public interest in disclosure." Finally, the court concluded that the information requested does not require the creation of a new record, finding that the PRA "requires a state agency to query and search its database to identify, retrieve, and produce responsive records for inspection if the agency maintains public records in an electronic database." The court continued, "[s]imilarly, if there is confidential information within the requested information, disclosure with the appropriate redactions would not constitute the creation of a new document or customized report."

    The matter was remanded for further proceedings because the record demonstrated that PERS potentially could no longer obtain the requested records using the then-existent database.

- ***Pennsylvania:***
  Feldman v. Pennsylvania Comm'n on Crime & Delinquency
  (208 A.3d 167 (Pa. Commw. Ct.) (April 18, 2019)) appeal denied, 218 A.3d 374 (Pa. 2019)

  A requester sought "aggregate data" relating to the reason a person was denied access to a victims' compensation assistance program (race/ethnicity, gender, age, zip code, and county of residence). The agency provided only isolated data points. The requester appealed, claiming that the records produced were not responsive to his request for aggregate data.

  On appeal, the agency argued that it is not required to "gather data, link it, match it, connect it, and coordinate it in order to respond to a request under the Right to Know Law."

  The court opined that providing data contained in an agency database does not constitute creating a record and that such data must be accessible to requesters, but only in a format available to the agency. To the extent that the data exists in some format, the agency must provide it.

  Ultimately, however, the court found that the information requested was exempt from disclosure pursuant to statute, finding that the Crime Victims Act provides a clear prohibition against disclosing any victim information during the processing of a claim, including the disclosure of aggregate data.

- ***Government Settlement Agreements & Identity of Individuals:***

  - ***Tennessee*:**
    House Bill 594 (Public Chapter 425), ***An Act to Amend Tennessee Code Annotated… Relative to Settlement Agreements*.** (Signed)

    House Bill 594 provides that "any provision of a settlement agreement entered into by a governmental entity that has the effect of prohibiting the disclosure of the identities of persons relating to a claim by any of the parties is void and unenforceable as contrary to the public policy of [Tennessee]," with certain exceptions. An exception includes the nondisclosure of identifying information concerning a person who is a victim of sexual harassment until the individual authorizes disclosure.

- ***"Internal and Predecisional Deliberations"***

  - ***Pennsylvania:***
    Finnerty v. Pennsylvania Dep't of Cmty. & Economic Development
    (208 A.3d 178 (Pa. Commw. Ct. 2019) (April 25, 2019))

    An appellate court found that records exchanged between a public agency and an independent contractor may fall within the "internal and predecisional deliberations exception" to the Right-to-Know-Law ("RTKL").

    A requester sought copies of records, including documents exchanged between the Department of Community and Economic Development (the "Department"), EConsult (an

outside consultant responsible for implementing a "Recovery Plan" for the city), Fairmount Capital Advisors (a financial consultant on the Recovery Plan), and McNees, Wallace and Nurick (legal counsel for the Recovery Plan) all of which related to the city's financial problems. The Department withheld some responsive records, claiming that the records constitute "internal, predecisional deliberations" consisting of "internal staff and contractor recommendations, comments to documents, draft proposals, and discussions that played a role in the Department's . . . decision making process."

On appeal, the Office of Open Records ("OOR") found that some of the records were properly withheld under the internal, predecisional deliberations exception because of the shared contractual relationship.

The requester filed suit, arguing that the OOR "erred in concluding that the Department properly invoked the internal, predecisional deliberation exception because records shared with outside contractors cannot be considered internal to the agency."

To invoke the "internal, predecisional deliberation" exception a public agency must show "(1) the information is internal to the agency; (2) the information is deliberative in character; and, (3) the information is prior to a related decision, and thus 'predecisional.'" The parties agreed that the second and third factors were not at issue, arguing only over whether the information was "internal to the" Department.

The court found that, as a matter of first impression, "predecisional, deliberative information" shared between a department and a contractor constituted information "internal to the agency" under RTKL. The court found that the record clearly established a contractual relationship between the Department and EConsult, McNees, and Fairmount for the purposes of implementing the Recovery Plan, and that "it serves, rather than hinders, the RTKL to interpret 'internal to the agency' as including the predecisional, deliberative information that was exchanged between [them]." The court further noted that "the administrative decision making process is facilitated when agency officials and expert outside contractors can have a 'frank exchange of ideas and opinions' . . . In order to promote the frank exchange of ideas and opinions under those circumstances, we interpret 'internal to the agency' as including the circumstances presented here.'"

- ***Legislative Privilege*:**

  - ***Texas*:**
    House Bill 4181, *An Act Relating to the Organization and Efficient Operation of the Legislative Branch of State Government.* (Filed without the Governor's Signature).

    House Bill 4181, in part, provides for the confidentiality of certain communications relating to the legislature. For example, the bill provides that "communications, including conversations, correspondence, and electronic communications, between a member, officer, or employee of the legislative branch and a parliamentarian appointed by the presiding officer of either house that relate to a request by the member, officer, or employee for information, advice, or opinions from a parliamentarian are confidential and subject to legislative privilege. Information, advice, and opinions given privately by a parliamentarian to a member, officer, or employee of the legislative branch, acting in the member's, officer's, or employee's official capacity, are confidential and subject to legislative

privilege." Notably, the member, officer, or employee of the legislative branch may choose to disclose the information to which the legislative privilege applies.

The bill also provides that "[t]o protect the public's interest in the proper performance of the deliberative and policymaking responsibilities of the legislature and to preserve the legislative branch's independence under the fundamental principle of separation of powers, as guaranteed by…[the] Texas Constitution, a communication is confidential and subject to legislative privilege if the communication: (1) is given privately; (2) concerns a legislative activity or function; and (3) is among or between any of the following: (A) a member of the house or senate; (B) the lieutenant governor; (C) an officer of the house or senate; (D) a member of the governing body of a legislative agency; or (E) a legislative employee.

- ***Legislative Process for Adopting Exemptions:***

  - ***Tennessee:***
    House Bill 86 (Public Chapter 221), ***An Act to Amend Tennessee Code Annotated…Relative to Public Records.*** (Signed)

    House Bill 86 establishes a new process for adopting exemptions to the Tennessee Public Records Act to allow for additional scrutiny of proposed exemptions. The bill requires, in part, that "[a]ny legislation of the house of representatives that creates an exception to the open records requirement…deeming records of public entities to be open for inspection by the public must be referred to the government operations committee according to the rules of the house of representatives." After review, the government operations committee of the House must give the legislation "a positive, neutral, or negative recommendation." Notably, the new law only affects the process in the House, and not the Senate.

- ***Lottery Winners:***

  - ***Virginia:***
    Senate Bill 1060 (Chapter 163), ***An Act…Relating to Virginia Lottery; Disclosure of Identity of Winners.*** (Signed)

    Senate Bill 1060 prohibits the disclosure of the identity of an individual lottery winner if the value of the prize won by the winner exceeds $10 million, unless the winner consents in writing to such disclosure.

- ***Museum Donors***:

  - ***Tennessee*:**
    Senate Bill 313 (Public Chapter 81), ***An Act to Amend Tennessee Code Annotated… Relative to the State Museum*.** (Signed)

    Under Senate Bill 313, museum donors may request that certain personal information (i.e., residential information, home and personal cellphone numbers, social security number, email address, taxpayer identification number) be withheld from the public. The name of the donor and amount of donation remain open to the public.

- ***Prepayment of Fee and Commercial Look-Up Services:***

  - ***Michigan:***
    Buckmaster v. Department of State
    (No. 343931, 2019 WL 1574941 (Mich. Ct. App. Apr. 11, 2019))

    A requester sought vehicle registration and licensing records under Michigan's Freedom of Information Act ("FOIA"). The Department's FOIA coordinator denied the request, stating that the requester needed to utilize the commercial record look-up service provided by the Secretary of State, and pay the associated look up fees in advance. The requester appealed the denial.

    The court reasoned that the FOIA and the Michigan Motor Vehicle Code ("MVC") have been interpreted to allow the request of motor vehicle records through either the FOIA or the MVC. Requesters are not required to use the commercial look-up service because the plain language of the statute only requires that the records request be made on the proper form if the request is made through the commercial look up service. The statute does not mandate use of the commercial look up service.

    However, the court found that the MVC's fee provision applies whether the request for motor vehicle records is made through the FOIA or the MVC. The court held that the Department could require advance payment of fees because the plain language of the statute sets forth that the records are not to be provided unless the fees are paid.

- ***Private Cellphone & Email Accounts of Government Officials – Preservation of Information:***

  - ***Texas*:**
    Senate Bill 944, *An Act Relating to the Public Information Law*. (Signed)

    Among other requirements, Senate Bill 944 requires that public information on a privately owned device of a current or former officer or employee of a governmental body is transferred to the governmental body or appropriately preserved.

- ***Records Requests – Method of Making Request*:**

  - ***Kentucky:***
    Senate Bill 230 (KY Acts Ch. 064), *An Act Relating to Open Records*. (Signed)

    The bill allows an application for inspection of public records to be by email and facsimile.

  - ***Texas*:**
    Senate Bill 944, *An Act Relating to the Public Information Law*. (Signed)

    Among other requirements, Senate Bill 944 authorizes a person to make a written request for public information only by delivering the request by one of the following methods to the applicable officer for public information or a person designated by that officer: (1) mail; (2) email; (3) hand delivery; or (4) any other appropriate method approved by the governmental body (e.g., facsimile, submission through governmental body's website).

- ***Scanning Public Records*:**

  - ***California:***
    Assembly Bill 1819, *An Act…relating to Public Records*. (Signed).

    The bill provides that "a requester who inspects a disclosable record on the premises of the agency has the right to use the requester's equipment…without being charged any fees or costs, to photograph or otherwise copy or reproduce the record in a manner that does not require the equipment to make physical contact with the records…."

    The bill authorizes an agency to limit the use of such equipment if "the means of copy or reproduction would result in…damage to the record [or]…unauthorized access to the agency's computer systems or secured networks…." The agency may also impose "any reasonable limits" on the use of the requester's equipment that are necessary to "protect the safety of the records", "prevent the copying of records from being an unreasonable burden to the orderly function of the agency and its employees" and "maintain the integrity of, or ensure the long-term preservation of, historic or high-value records."