FREEDOM OF INFORMATION
STATE LITIGATION AND LEGISLATIVE UPDATE

2020 COGEL VIRTUAL CONFERENCE

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Prepared by
The Connecticut Freedom of Information Commission Staff

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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 2019. The report is not an all-inclusive study. It should, however, provide a picture of where states are standing on issues of government transparency. This year's report features court decisions issued through June 2020 and legislation enacted through July 2020.

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:*

- ***New Hampshire:***
  Martin v. City of Rochester
  (No. 2019-0150, 2020 WL 3053479 (N.H. June 9, 2020))

  The Supreme Court held that a "technical review group" (TRG) for the City of Rochester is not a public entity subject to the Right-to-Know Law's (RTKL) open meeting requirements.

  The City of Rochester created the TRG, consisting of a group of City employees, to review projects submitted for review to the planning board. The plaintiff brought suit and argued that the TRG is a "public body" under the RTKL because it is an "advisory committee," and therefore its meetings must be open to the public.
  Under the RTKL, a "public body" is (in relevant part) defined as "[a]ny legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto." An "advisory committee" is defined as "[a]ny committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority."

  The plaintiff argued that TRG is an "advisory committee" because its primary purpose is to consider land use applications and provide advice or recommendations on them to the planning board. The Court disagreed. The Court noted that the TRG "does not, as a group, render advice or make recommendations. Rather, each member reviews the application for compliance with the respective department codes and concerns… [T]he TRG's role is to apprise applicants of the relevant concerns of the municipal departments represented by its members. This process is meant to assist the applicant in preparing the application for the planning board, consistent with the city's constitutional obligation to provide assistance to all its citizens." The Court continued, "a body's consideration of issues designated by the appointing authority in and of itself is not determinative of whether the body is an advisory committee. Rather, it is the purpose of the body's consideration that is the deciding factor — i.e., whether the body's primary purpose is to consider issues 'designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation ....'" Therefore, the Court concluded, the TRG is not an "advisory committee."

- ***New Mexico:***
  New Mexico Found. for Open Gov't v. Corizon Health
  (2020-NMCA-014, 460 P.3d 43, cert. denied (Dec. 16, 2019))

  An appeals court concluded that settlement agreements between a private healthcare provider and the New Mexico Corrections Department (NMCD) are public records subject to disclosure under the New Mexico Inspection of Public Records Act (IPRA).

  Corizon Health, a private prison medical services provider, contracted with the NMCD to provide healthcare services to its incarcerated population. During the course of the contract, several civil claims were filed against Corizon Health alleging improper care and/or sexual assault. Corizon Health negotiated and settled many of these claims. Several requesters sought to inspect and copy the settlement agreements involving Corizon Health in its role as medical services contractor for NMCD. Corizon Health refused to produce the settlement agreements on the grounds that such agreements are not subject to the IPRA.

  The requesters brought an action in district court against Corizon Health, arguing that it is subject to the IPRA because the services it provided constitute a "public function" under New Mexico legal precedent. The requesters presented evidence that Corizon Health provided medical services in an "intertwined fashion" with NMCD; NMCD maintained extensive control over Corizon Health and approved its staffing decisions. The requesters argued that Corizon Health performed a "governmental function that NMCD would otherwise have performed itself."

  The court agreed and found that Corizon Health "was performing a public function and acting on behalf of the [NMCD] in providing medical services to New Mexico inmates and is therefore subject to the IPRA[.]" The district court concluded that the settlement agreements, which relate to Corizon Health's performance of a public function, are public records under the IPRA.

  Corizon Health appealed. The appeals court agreed with the lower court that settlement agreements entered into by third party entities that arise from the third party's performance of a public function are public records under the IPRA. The court reasoned that the settlement agreements were "plainly created and maintained in relation to a public business," and that the IPRA's purpose that "all persons are entitled to the greatest possible information regarding the affairs of government" would be thwarted if entities were able to circumvent a citizen's right of access by contract. In addition, the court noted that it previously determined that settlement agreements resulting from claims by inmates against county detention centers alleging sexual abuse by officers were public records subject to disclosure under the IPRA. The court concluded, "[r]egardless of whether [Corizon Health] was a third-party private entity, the settlement agreements at issue arose from allegations resulting from [its] performance of a public function . . . and as such, the settlement agreements resulted from the medical care provided to New Mexico inmates while under contract with the State."

  Dunn v. New Mexico Dep't of Game & Fish
  (2020-NMCA-026, 464 P.3d 129 (Jan. 31, 2020))

  An appeals court determined that email addresses collected in connection with the New Mexico Department of Game and Fish (NMDGF) licensing system constituted "public

records" under the IPRA, after the NMDGF improperly withheld the names and emails of individuals who applied for hunting licenses.

The NMDGF refused to comply with a request for the records, claiming that the requester sought "personal identifier information that did not constitute a public record subject to disclosure." The requester filed suit with the district court which concluded that the request did not fall under any disclosure exception in the IRPA.

The appeals court upheld the trial court's ruling, pointing out that "[i]f the Legislature intended to limit the materials subject to disclosure as the NMDGF suggests, then the Legislature could have qualified [the term] 'public business' in a manner that used language requiring the materials to relate to a public body's substantive decisions, rather than material that is kept for purely administrative purposes." The Legislature did not do so.

- ***Virginia:***
  Transparent GMU v. George Mason University
  (298 Va. 222, 835 S.E.2d 544 (Dec. 12, 2019))

  The Supreme Court held that a private foundation supporting a public institution is not a "public body" subject to the Virginia Freedom of Information (FOI) Act.

  Requesters sought from George Mason University (GMU) and the George Mason University Foundation (the Foundation) records of "any grants, cooperative agreements, gift agreements, contracts, or memoranda of understanding … involving a contribution to or for [GMU] from any of [several charitable foundations under Charles Koch, Claude R. Lambe, and David Koch]." GMU claimed that it did not maintain any responsive records, and the Foundation responded that it was not a public body and therefore was not subject to the FOI Act.

  The court, as a matter of first impression, considered whether a private foundation, which exists "for the primary purpose of supporting public institutions of higher education" is subject to the FOI Act, and concluded that the Foundation is not subject to the Act.

  The court found that the Foundation, a private non-stock corporation that serves as "caretaker and manager of funds from private donors intended to benefit GMU," is an independent entity, and not an "entity of" GMU. The court relied on evidence regarding the separate, distinct nature of the Foundation as an independent corporation (e.g., GMU has no supervisory powers and any dealings between the two entities are by contract; and the Foundation is not supported by public funds).

  The court also found the requester's argument that the Foundation operated as the "alter ego" of GMU to be unavailing; the record did not support such contention. There was no evidence in the record showing that the Foundation was "used as 'a device or sham' by GMU to disguise wrongs, obscure fraud, or conceal crime." In addition, the Court concluded that the Foundation was not an "agent" of GMU, and therefore GMU was not obligated to retrieve the records requested from the Foundation. Finally, the Court did not find the fact that the two entities shared a common employee to be persuasive; the relevant inquiry is "the position over which the corporation has control, not the person." The documents at issue belong to the Foundation and therefore are not subject to the FOI Act.

- ***Washington:***
  Associated Press v. Washington State Legislature
  (194 Wash. 2d 915, 454 P.3d 93 (Dec. 19, 2019))

  The Supreme Court held that while individual legislators are "agencies" subject to the Public Records Act (PRA) disclosure requirements, legislative bodies are not "agencies," and are only subject to the PRA's narrower public records disclosure mandate by and through each chambers' respective administrative officer.

  Several news media organizations brought an action under the PRA against Washington State's Senate, its House of Representatives, four legislative leaders in their official capacities, the legislature as a whole, and state agencies, all relating to alleged inadequate responses to the media's requests for records.

  The Court concluded that, under the plain meaning of the PRA, individual legislators are "agencies" subject, in full, to the PRA's general public records disclosure requirements. The Court examined a closely related statute, the campaign disclosure and contribution law (CDC), noting that both the CDC and PRA "share identical definitions of 'agency' and 'state agency'." Agency includes all state agencies, and state agency includes every state office. The CDC defines "state office" as including "state legislative office" and defines "legislative office" as "the office of a member of the state house of representatives or the office of a member of the state senate . . . Thus, the offices of individual legislators are unequivocally 'agencies' under the CDC." The Court therefore concluded that individual legislators' offices are plainly and unambiguously "agencies" for purposes of the PRA. The Court also examined the legislative history and concluded that it too supported such conclusion.

  The Court concluded, however, that institutional legislative bodies are not "agencies" for the purposes of the PRA because they are not included in the definition of "agency". Instead, they are subject to the PRA's narrower public records disclosure requirements through each chambers' respective administrative officer. The Court reasoned that, unlike individual legislators' offices, the senate, the house and the legislature itself are not included in the definition of an "agency" under the CDC, distinguishing legislative bodies from offices of individual legislators who are "agencies" subject to the PRA's public records disclosure requirements.

  The news media argued that legislative bodies should be considered "agencies" for purposes of the PRA because, under the state's ethics statute, "agency" includes the state legislature. However, the Court disagreed, concluding that the ethics statute is "not closely related to the PRA for purposes of disclosing legislative intent about the meaning of 'agency'." For example, the PRA and CDC were enacted as a single initiative and codified together for 35 years, while the ethics law was enacted independently and years later. The Court also found that the legislative history supported its conclusion.

McKee v. Paratransit Servs.
(13 Wash. App. 2d 483, 466 P.3d 1135 (June 30, 2020))

A court of appeals held that a private broker and its employees were not the functional equivalent of a government agency and therefore were not required to comply with the Public Records Act (PRA).

A patient utilized the services of Paratransit, a non-emergency medical transportation (NEMT) services broker. The patient sought records, which Paratransit provided, but the entity contended that it was not subject to the PRA. The patient filed suit, alleging that Paratransit violated PRA.

The trial court dismissed the suit, concluding that Paratransit is not subject to the PRA. The court of appeals affirmed, concluding that Paratransit is not the functional equivalent of a government agency because it does not meet the four-part functional equivalency test. Specifically, the court found that Paratransit does not perform a core government function; it receives funding from the state of Washington on a fee-for-service basis and reimbursement model; the government is not extensively involved in Paratransit's day-to-day activities; and Paratransit was not created by the government.

- ***Legislation:***

  - ***Idaho:***
    House Bill 601*, An Act Relating to the Public Records Act….*

    Among other provisions, the bill amends the definition of "public record" and provides that "personal notes created by a public official solely for his own use shall not be a public record as long as such personal notes are not shared with any other person or entity."

❖ 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:*

- ***Louisiana:***
  Deep S. Ctr. For Envtl. Justice v. Council of City of New Orleans
  (2019-0774 (La. App. 4 Cir. 2/12/20), 292 So. 3d 973 (Feb. 12, 2020))

  An appeals court held that the New Orleans City Council's Utility, Cable, Telecommunications and Technology Committee (the "Committee") violated the Open Meetings Law (OML) by holding a meeting which allowed certain constituents to speak publicly and excluded others from attending due to limited meeting space.

  Objectors filed a petition with the court to declare invalid the City Council's March 8, 2018 decision to adopt a resolution granting an energy company (Entergy) authorization to build a power station, based on alleged violations of the OML at a February 21, 2018 Committee meeting of the Council.

  The trial court concluded, and the appellate court agreed, that the Committee violated the OML by failing to follow its agenda, which provided for public comment to anyone during the open comment period. Instead, the Committee permitted those speaking favorably about Entergy to participate and comment, and barred comments from members of the public who were made to wait in the hallway. The unfavorable members of the public were also told that they could not fill out comment cards to provide comments unless they were in the meeting room. In addition, individuals whom Entergy had paid to attend the meeting and show support were not required to leave the meeting room once they made comments. The Committee violated the OML by prohibiting the public from "observ[ing] the meetings of their governing bodies and voic[ing] their opinions in the decision-making process…."

  The Appellate Court, however, found that the trial court erred in voiding the resolution adopted at the City Council Meeting. First, the City Council had not violated the OML. Second, the City Council was not bound by the actions of the Committee, and could "accept, modify, or reject any or all of the Committee's recommendations. Therefore, the trial court erred in determining that the Committee meeting was a 'necessary component' of the Resolution's passage, and violations that occurred at such meeting could render the Resolution voidable."

- ***Maryland:***
  Frazier v. McCarron
  (466 Md. 436, 221 A.3d 571 (2019), reconsideration denied (Jan. 23, 2020))

  A court of appeals granted certiorari to clarify the meaning of "willfully" for purposes of the Open Meetings Act (OMA) and whether violations of the OMA may be excused as technicalities or harmless error.

Petitioner filed suit against a City Council, alleging violations of the OMA and requesting that the court impose civil penalties, declare all actions taken at a closed meeting void, reimburse her for legal expenses and court fees, direct the City Council to unseal minutes of the meeting, and post the court's Order on the City's website.

The trial court found that the City Council did not act willfully and found that violations of the OMA were "technical" in nature and harmless. For example, the court found that the following violations of the OMA were "technical": failure to provide a written statement of the reason and citation of authority for closing the meeting, and a listing of the topics to be discussed; as well as the City Council's failure to timely prepare minutes and note the presence of the mayor in the meeting.

On appeal, the court "rejected the use of 'technicality' and harmless error as reasons, in effect, to excuse violations of OMA." The court noted that "willfulness, for OMA purposes, means a violation that is knowing and intentional. By 'intentional,' we mean deliberate – other than inadvertent – and by 'knowing' we mean knowledge that the act or omission violates a mandatory provision of the OMA…. This standard does not require that the violation be for any nefarious or corrupt purpose." While the appellate court found the conduct to be violative of the OMA, it nevertheless the trial court did not err in declining to order the remedies sought (e.g., civil penalties) as ordering such remedies were at the discretion of the court.

- ***Legislation:***

  - ***Maryland:***
    Senate Bill 363 (Chapter 203) and House Bill 421 (Chapter 202)*, An Act Concerning State Government – Open Meetings – Requirements and Application of Open Meetings Act.*

    Senate Bill 363 requires that certain State agencies (i.e., Maryland Stadium Authority, State Board of Elections, Emergency Number Systems Board in the Department of Public Safety and Correctional Services, Public Service Commission and Maryland Transportation Authority) make publicly available on their respective websites open meeting agendas, minutes and video and audio recordings for a certain number of years after certain meetings take place.

    House Bill 176 (Chapter 96)*, An Act Concerning St. Mary's County Open Meetings Act – Closed Sessions.*

    The bill permits a public agency in St. Mary's County to meet in a closed session to consider the investment of public funds, consult with counsel to obtain legal advice, and, under certain circumstances, discuss cybersecurity.

  - ***Oklahoma*:**
    Senate Bill 661*, An Act Relating to the Oklahoma Open Meeting Act….*

    Among other provisions, Senate Bill 661 allows a public agency to hold meetings by teleconference or videoconference if each member of the public body is audible or visible to each other and the public; requires that any materials shared electronically between members

of the public body during a meeting utilizing teleconferencing or videoconferencing be made immediately available to the public in the same form as shared with the members of the public body; and requires that all votes occurring during any meeting utilizing teleconference or videoconference must occur and be recorded by roll call votes. Public bodies may also conduct executive sessions by teleconference or videoconference.

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

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

➢ ***Litigation:***

- ***Alaska:***
  Basey v. Dep't of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations
  (462 P.3d 529 (April 24, 2020))

  The Supreme Court found that state employee disciplinary records are confidential personnel records under the State Personnel Act and are not subject to disclosure under the state Public Records Act (PRA), except where expressly provided for by statute.

  An individual who was arrested and convicted of federal crimes, filed a civil suit against state troopers based on their involvement in the underlying investigation which gave rise to his arrest and conviction. The individual filed two public records requests seeking, among other records, two troopers' disciplinary records.

  While the PRA establishes the right to inspect public agency records, such right is subject to certain exceptions, including when a record is "required to be kept confidential by a federal law or regulation or by state law." The state argued that the records at issue constituted trooper disciplinary records which are confidential "personnel records" under state law, and under that law only certain information is disclosable, including employee name, title, classification, employment dates, compensation, and "whether a state employee has been dismissed or disciplined for . . . interference or failure to cooperate with the Legislative Budget and Audit Committee…."

  The Court agreed with the state. In view of the plain language of the statute, the relevant legislative history, and the purpose of the Personnel Act, the Court concluded that the term "personnel records" is meant to be interpreted broadly to include disciplinary records. The Court noted that the state has a "legitimate policy" interest in "maintaining employee disciplinary records' confidentiality as a critical component of the 'evaluation and correction process'."

- ***Illinois:***
  City of Chicago v. Fraternal Order of Police
  (2020 IL 124831 (Supreme Court of Illinois, June 18, 2020))
  *Petition for Certiorari Docketed (November 16, 2020)

  The Supreme Court held that an arbitration award which violates "a well-defined and dominant public policy rooted in state law concerning the procedures for the proper retention and destruction of government records" is not enforceable.

  The Fraternal Order of Police (FOP) brought an action against the City of Chicago (City) for failing to destroy records of police misconduct as required under the collective bargaining agreement (CBA). The relevant provision of the CBA requires destruction of "'[a]ll disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary

record or summary of such record, other than records related to Police Board cases will be destroyed after five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer." The arbitrator concluded that the CBA should prevail and directed the parties to reach an agreement regarding the destruction of the records. The City sought to overturn the arbitration award and filed a petition to vacate. The FOP filed a counterpetition to enforce the arbitration award. The circuit court granted the City's petition on public policy grounds. The appellate court affirmed. The FOP appealed to the Supreme Court.

The Supreme Court has recognized that an arbitration award may be vacated under limited circumstances. "Under the public-policy exception, if an arbitration award is derived from the essence of the collective-bargaining agreement, this court will vacate the award if it 'is repugnant to established norms of public policy.' . . . The public-policy exception is a narrow one - one that is to be invoked only when a party clearly shows that enforcement of the contract . . . contravenes some explicit public policy."

The City cited to various provisions of the Local Records Act (LRA) to support its contention that the CBA's records destruction requirements directly conflict with the plain language of the Act. The FOP countered that there is no well-defined, dominant public policy that allows the courts to set aside a provision of the CBA mandating record destruction and the state law cited does not preclude the City from entering into a document destruction agreement.

The Court disagreed with the FOP and concluded that the arbitrator's award violated the public policy established by the legislature and that the CBA violated explicit state law. The Court first pointed to provisions of the LRA, including that the LRA directs that local public records shall not be destroyed and that it is a Class 4 felony to "knowingly, without lawful authority and with the intent to defraud" destroy a public record; that the LRA requires that no public record be disposed of; and that the regulations of LRA provide a mechanism to establish procedures for record maintenance.

- ***Kentucky:***
  Dep't of Kentucky State Police v. Trageser
  (600 S.W.3d 749 (Ky. Ct. App. (March 27, 2020))

  An appeals court concluded that certain internal affairs records were exempt from disclosure as preliminary and to protect privacy interests of third parties who were not the subjects of the investigation.

  A requester sought to review disciplinary records of a Kentucky State Police (KSP) Officer pursuant to the Kentucky Open Records Act (KORA). The KSP withheld all internal affairs investigative records containing "preliminary materials" pursuant to an exception in the KORA. The requester appealed to the Attorney General, who determined that the KSP improperly withheld certain portions of the internal affairs records. The KSP appealed to the circuit court, which affirmed the Attorney General's decision. KSP again appealed, and the court of appeals affirmed the decision.

  On appeal, KSP argued "(1) that it should be able to exclude from disclosure files that did not lose preliminary status under [the Act]; (2) that … it should be able to exclude 'information of a personal nature' to avoid invasion of personal privacy by the public; and (3) that it

should be able to exclude public records protected by an enactment of the General Assembly, pursuant to [the Act]."

KSP argues that because its Office of Internal Affairs has no power to issue a binding decision concerning trooper discipline, its preliminary investigative materials can only be considered preliminary and are therefore exempt from disclosure under the KORA. The court disagreed. Nevertheless, based on precedent, the court also found that the KSP could withhold portions of the internal affairs file concerning disciplinary recommendations or opinions which were not relied upon in the final decision, indicating their preliminary nature.

KSP also argued that certain files should be withheld because such files contain "information relating to civilians." The court agreed in part, acknowledging that the Act "extends privacy rights to parties who are not the direct subject of an open records inquiry." The court concluded that certain information, such as social security numbers, home addresses, driver's license numbers, and phone numbers were personal in nature and undisclosable and would constitute an unwarranted invasion of privacy. Entire files, however, were not protected as personal in nature.

In addition, KSP unsuccessfully argued that the Act "inherently prevents the disclosure of preliminary materials created by disciplinary investigations of the Office of Internal Affairs (OIA)," and that disclosure would have a chilling effect upon civilians who might cooperate with an investigation. The court concluded that the Act already provides privacy protection for those individuals whose personal information is contained in internal affairs files, and therefore there was no basis to prevent disclosure of the full investigative files.

- ***Massachusetts:***
  Attorney Gen. v. Dist. Attorney for Plymouth Dist.
  (484 Mass. 260, 141 N.E.3d 429 (Mar. 12, 2020))

  A court held that the Criminal Offender Record Information (CORI) Act exempted data from disclosure only if the data included the criminal case docket number.

  The Boston Globe submitted records requests to each county district attorney's office, seeking information maintained in a state database regarding prosecuted cases, such as docket number, date of offense, description of crime, defendant race/ethnicity, gender, disposition, and sentence. The CORI Act "centralized the collection and dissemination of criminal record information in the Commonwealth … It created a unified management system for all criminal record information, . . . [and] also strictly limited dissemination of … State-compiled criminal histories to criminal justice agencies and other entities specifically granted access by statute."

  Two district attorney's offices did not respond to the request. Subsequently, the Attorney General's Office sued the local district attorney's offices on behalf of the Boston Globe. The Attorney General argued that the information sought did not constitute exempt CORI information because the name of the defendant would not be disclosed, and that CORI does not include "files in which individuals are not directly or indirectly identifiable."

  Ultimately, the Court agreed, but further held that docket numbers were not subject to disclosure because the identity of the defendant could be discerned, and disclosure of such

would be contrary to the legislature's policy of limiting access to this database information. Disclosure of docket numbers in this case, if produced, "would undermine the CORI statute by allowing the creation of criminal histories of individuals that would not otherwise be available to members of the public."

Bos. Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.
(484 Mass. 279, 140 N.E.3d 923 (March 12, 2020))

The Supreme Judicial Court ruled that disclosure of certain records pertaining to the arrest of police officers and a judge does not violate the CORI Act.

The Boston Globe sought booking photos and various reports of police officers arrested for drunk driving. The request was denied on the grounds that the records sought were "criminal offender record information." The trial court found for the Globe and the police officers appealed. While the case was pending, the legislature revised the statutory definition of "criminal offender record information" to exclude from the CORI Act information related to charges dismissed before arraignment.

The Court ruled on the case based on the amended CORI Act, and concluded that "the photographs are simply the product of the booking procedure arising from an arrest. Moreover, there is no suggestion in the record that any of the police officers or the judge was arraigned on charges arising from the incident reports, so both the incident reports and the booking photographs fail to satisfy that part of the CORI definition requiring that the records be recorded in a criminal proceeding where the defendant is arraigned."

The Court further opined that "the public has a substantial interest in ascertaining whether the case was not prosecuted because it lacked merit or because these public officials received favorable treatment arising from their position or relationships. Such matters implicate not only the integrity of the public officials who allegedly engaged in criminal conduct, but also the integrity of our criminal justice system." "There is substantial public interest in the disclosure of police incident reports regarding alleged offenses by police officers and public officials that do not result in arraignment. And disclosure of the booking photographs will eliminate confusion as to the identity of those arrested…."

- ***New Hampshire:***
  Seacoast Newspapers, Inc. v. City of Portsmouth
  (No. 2019-0135, 2020 WL 2791849 (N.H. May 29, 2020))

  The New Hampshire Supreme Court redefined what records fall under the "internal personnel practices" exemption and overruled its prior interpretation. The Court concluded that "only a narrow set of governmental records, namely those pertaining to an agency's internal rules and practices governing operations and employee relations, falls within that exemption." The Court held that the arbitration decision that was requested does not fall under the "internal personnel practices" exemption. The Court vacated the trial court's order and remanded the case for consideration of whether the arbitration decision is exempt as a personnel file.

  A newspaper owner filed a petition pursuant to the Right-to-Know Law (RTKL) for disclosure of an arbitration decision concerning the termination of a police officer by the City of Portsmouth for misconduct. The Superior Court denied the appeal, concluding that the

record was exempt from disclosure under the "internal personnel practices" exemption, which provides that "records pertaining to internal personnel practices" are exempt. The trial court reasoned that the arbitration grievance "'process was conducted internally and was performed for the benefit [of the police officer], and his former employer' and therefore bore 'all the hallmarks of an internal personnel practice."'

The Supreme Court reversed, holding that stare decisis factors compelled overruling the prior holding to the extent it broadly interpreted the internal personnel practices exemption of the RTKL and its progeny; internal personnel practices exemption of the RTKL applies narrowly to records pertaining to internal rules and practices governing an agency's operations and employee relations; and that the arbitration decision did not relate to the City's personnel rules or practices, and did not fall within the internal personnel practices exemption. Ultimately, the case was remanded to determine whether the arbitration decision is exempt as a personnel file.

Union Leader Corp. v. Town of Salem
(No. 2019-0206, 2020 WL 2791852 (N.H. May 29, 2020))

A newspaper and civil rights organization petitioned for the release of complete and unredacted copies of an audit report of a police department that included information about internal affairs complaint investigations.

The town made many redactions and such redactions were upheld by the trial court on the grounds that "they were required by the 'internal personnel practices' exemption to the Right-to-Know Law."

However, the Supreme Court held that "stare decisis factors weighed in favor of overruling prior decision that established a per se rule of exemption under Right-to-Know Law for records related to 'internal personnel practices,' and balancing test applicable to other exempt categories of records is applicable to records related to internal personnel practices."

The Court pointed out that it recently overruled its precedent "to the extent that it broadly interpreted the 'internal personnel practices' exemption and overruled [its] prior decisions to the extent that they relied on that broad interpretation." (See Seacoast Newspapers, Inc. v. City of Portsmouth, 2020 WL 2791849, supra). In this case, the Court overruled its precedent "to the extent that it decided that records related to 'internal personnel practices' are categorically exempt from disclosure under the Right-to-Know Law instead of being subject to a balancing test to determine whether such materials are exempt from disclosure." "Determining whether the exemption for records relating to 'internal personnel practices' applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy."

- ***Legislation:***

  - ***Colorado:***
    Senate Bill 20-217*, An Act Concerning Measures to Enhance Law Enforcement Integrity, and, in Connection Therewith, Making an Appropriation.*

    The bill requires that local law enforcement agencies and the Colorado State Patrol release all unedited video and audio recordings of all incidents in which there is a complaint of peace

officer misconduct by another peace officer, a civilian, or nonprofit organization, through notice to the law enforcement agency involved in the alleged misconduct. The video and audio recordings from body-worn cameras, dash cameras, or otherwise collected through investigation must be released to the public within 21 days after the local law enforcement agency or Colorado State Patrol receive the complaint of misconduct. Any video that raises "substantial privacy concerns" for criminal defendants, victims, witnesses, juveniles, or informants must be redacted or blurred to protect the "substantial privacy interest" while still allowing public release. Privacy concerns include, but are not limited to, video depicting nudity, sexual assault, medical emergencies, private medical information, explicit and gruesome bodily injury. A witness, victim, or criminal defendant may waive in writing the individual privacy interest. In addition, any video that would "substantially interfere with or jeopardize an active or ongoing investigation" may be withheld from the public; except, the video must be released no later than 45 days from the date of the allegation of misconduct.

- ***Connecticut***:
  House Bill 6004 (July 2020 Special Session, Public Act 20-1), ***An Act Concerning Police Accountability.***

  Under prior law, a term of a collective bargaining agreement or arbitration award between the State of Connecticut and Connecticut state employees may supersede a statute, including the Freedom of Information (FOI) Act, provided that the appropriate statutory procedure was followed.

  House Bill 6004 prohibits such agreements or awards from containing provisions superseding the FOI Act with respect "to the disclosure of disciplinary matters or alleged misconduct." The bill also contains a provision barring any collective bargaining agreement or arbitration award between the state and any State Police bargaining unit from prohibiting "the disclosure of any disciplinary action based on a violation of the code of ethics" contained in a sworn member's personnel file. The provisions apply to contracts approved before, on or after the effective date of the bill.

- ***Hawaii***:
  House Bill 285 (HD1 SD2 CD1), ***A Bill for An Act Relating to Public Safety.***

  The bill allows for the disclosure of the identities of police officers who have been suspended or discharged.

- ***New York:***
  Senate Bill 8496, ***An Act to Amend the Civil Rights Law and the Public Officers Law, in relation to the Disclosure of Law Enforcement Disciplinary Records; and to Repeal Section 50-a of the Civil Rights Law Relating Thereto.***

  The bill makes "law enforcement disciplinary records" including, but not limited to, complaints against officers, transcripts and dispositions of any disciplinary proceeding, and the final written opinion or memorandum supporting the disposition and discipline imposed, subject to disclosure, with certain exceptions.

❖ Access to Records Maintained by Public Educational Institutions

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

➢ *Litigation:*

- ***Michigan:***
  Kalamazoo Transportation Ass'n v. Kalamazoo Pub. Sch.
  (No. 349031, 2019 WL 6888666 (Mich. Ct. App. Dec. 17, 2019))

  An appeals court held that under both the Family Educational Rights and Privacy Act (FERPA) and the state Freedom of Information (FOI) Act, a school district could redact certain information from student education records that identified the student prior to disclosure.

  Requesters representing an association of bus drivers made an FOI request to a school district seeking certain bus discipline-referral forms which were completed by bus drivers to document student misconduct and sent to administrators for consideration of disciplinary action. The school district denied the request claiming that the forms were student education records under FERPA. In addition, the school district would not release the records with redaction of personally identifying information, arguing that the records were protected in their entirety as confidential student records under the state FOI Act.

  The appeals court affirmed the trial court in that the discipline-referral forms directly related to a student in that the forms "document a student's discipline-warranting behavior and the school district's corresponding action. Because the subject of the forms at issue is an individual student, there can be no question that the forms directly relate to individual students." The appeals court found, however, that the trial court erred in concluding that the exemption under the FOI Act for education records applies to the entirety of the record as opposed to only those parts containing sensitive educational information directly related to the student. The court concluded, "by its unambiguous terms, the stated exemption purports only to exempt '*information* that, if released, would prevent the public body from complying with'" FERPA, not the entire record . . . Accordingly, the school district was 'assigned the responsibility… [to] facilitate a separation of exempt from nonexempt information.'"

- ***North Carolina:***
  DTH Media Corp. v. Folt
  (374 N.C. 292, 841 S.E.2d 251 (May 1, 2020))

  The Supreme Court ruled that disciplinary records of students at the University of North Carolina at Chapel Hill who were found to have violated university sexual assault policy are public records that must be disclosed to the media because such records fall within an exception to the non-disclosure restrictions contained in the Family Educational Rights and Privacy Act (FERPA).

  The university claimed that the records were protected by FERPA as exempt student education records. The trial court found that FERPA's provisions protecting student education records qualified as an exception "otherwise specifically provided by law" and that

federal law preempted state open records law. The plaintiffs appealed and the appellate court affirmed.

The Supreme Court held that the university is required to release certain disciplinary records of its students who have been found to have violated sexual assault policy; the university does not have discretion to withhold the information sought here, which is authorized by, and specified in FERPA as subject to release. FERPA does not grant any implied discretion to the university to decide whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or sexual misconduct charges in the absence of language expressly granting such discretion. Accordingly, as an agency of the state, [the university] must comply with the [PRA] and allow [the requesters'] to have access to the name of the student, the violation committed, and any sanction imposed by the University on that student in response to plaintiffs' records request."

- ***Ohio:***
  State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Sch.,
  (2019-Ohio-4187, 134 N.E.3d 268 (October 2, 2019))

  A court of appeals held that a school district was not required to disclose records requested under the Public Records Act (PRA) and concluded that the Ohio Student Privacy Act (OSPA) does not include an exception for the death of an adult former student.

  A requester sought records pertaining to 24-year-old former student Connor Betts, who killed nine people and injured 27 more during a mass shooting in which he was also killed. The school district released some records (directory information), but otherwise denied the request.

  The requester filed suit asking the court to compel disclosure and asserted that the records they requested from the school district are public records under the PRA and that the student's right to privacy in his school records terminated upon his death. The school district argued that the records are not public records, but confidential education records, the release of which is prohibited by the OSPA. The OSPA is recognized to except education records from disclosure under the PRA.

  The appeals court concluded that the requester did not show that the school district had a "clear legal duty" to release the records. The court agreed with the school district that the records at issue contain "personally identifiable information" concerning a student, the disclosure of which is prohibited by the OSPA unless otherwise specified.

  The requester asked the court to conclude that a person's privacy rights under the OSPA terminate upon death and relied on common law principles concerning the right to recover for wrongful invasion of privacy which, in many cases, lapses upon death. However, the court concluded that this principle is not well settled and the matter before it was not an action in tort: "[w]e are not convinced that the inability of a deceased person or his/her family members to maintain an actionable common law tort claim necessarily means that anyone with a public records request can overcome the clear, codified rights of a deceased adult former student." The question is less about the individual's rights, and more about the school district's legal duties under the PRA and OSPA.

❖ Access to Records Relating to Attorney-Client Privilege

Below are summaries of court decisions concerning the attorney-client privilege :

➢ *Litigation:*

- ***Hawaii:***
  Honolulu Civil Beat Inc. v. Dep't of Attorney Gen.
  (146 Haw. 285, 463 P.3d 942 (Mar. 11, 2020))

  The Supreme Court held that an investigative report prepared by the Attorney General's Office (AG) about an investigation of the Office of the Auditor is not protected by the attorney-client privilege because the AG was not acting within a lawyer-client relationship.

  Civil Beat, a news organization, requested an investigation report prepared following an investigation into the Office of the Auditor in response to a complaint by a state legislator. The AG withheld the report claiming, among other exceptions, that the report was protected by the attorney-client privilege. Civil Beat filed suit, and the trial court agreed with the AG. On appeal, the Supreme Court reversed.

  "In order for a document to be protected from disclosure pursuant to the lawyer-client privilege . . . the document must contain information communicated within the context of a lawyer-client relationship. [State statute] provides for an evidentiary privilege for confidential lawyer-client communications: '[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the lawyer or the lawyer's representative. . . ."

  The Court noted that, although the AG and the legislature could, and have in the past, entered a lawyer-client relationship, in this case, the AG failed to prove that it was acting in a lawyer-client relationship with the legislature…. The Court opined, "[n]otwithstanding the Department's conclusory claims that the report was privileged and confidential, the record before this court—including the contents of the sealed investigative report, its attached documents, and information about the circumstances under which it arose and was communicated to the legislature—fails to establish that the Department was acting pursuant to a lawyer-client relationship when it prepared the report and provided it to the legislature." The evidence presented did not suggest that the legislator who requested the investigation, or the legislature as a whole, believed that the report was privileged; the record contained no evidence of any request for legal advice or legal representation; and a request for an investigation is not necessarily a request for legal services. Furthermore, the content of the report is factual in nature implying that it was not intended to serve as legal advice.

- ***Oregon:***
  City of Portland v. Bartlett
  (468 P.3d 980 (Or. Ct. App. June 10, 2020))

  A court of appeals held that public records that are subject to the attorney-client privilege and are more than 25 years old must be disclosed pursuant to the public records law.

A requester sought four documents: three city attorney opinions and one memorandum, each of which was more than 25 years old. Portland withheld all four documents, claiming they were attorney-client privileged. The district attorney however ordered them disclosed because they were more than 25 years old, and the public records law unambiguously requires disclosure of records more than 25 years old, notwithstanding any claim of privilege by Portland. Portland filed suit. The trial court ruled in the City's favor, finding the documents "remained privileged". The requester appealed.

The court of appeals found that the public records law "unambiguously states that records that are older than 25 years *shall* be disclosed *notwithstanding* the exemptions from disclosure contained in [the statute]." "[T]he legislature chose to except only a limited number of documents from the 25-year sunset on exemptions from public disclosure; the exceptions did not include attorney-client privileged public records."

Portland also argued that the Portland City Code created an independent basis for the attorney -client privilege for the documents at issue. The court disagreed, noting "we see no conflict in the state legislature deciding public records should be disclosed after 25 years even if the documents are otherwise subject to the attorney-client privilege under state law."

❖ Records Maintained by a Law Enforcement Agency

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

➢ *Litigation:*

- ***Michigan:***
  Michigan Open Carry, Inc. v. Dep't of State Police
  (No. 348487, 2019 WL 6881745 (Mich. Ct. App. Dec. 17, 2019))

  A court held that firearm records maintained by the Michigan Department of State Police (the Department) are exempt from disclosure under the FOI Act.

  Michigan Open Carry, Inc. (MOCI), a gun rights organization, sought certain records pertaining to firearm licenses. The Department referred MOCI to its "Concealed Pistol Licenses Reports" which is available on its website. MOCI considered the response a denial and filed an administrative appeal, alleging that the Department did not provide responsive information and such response essentially amounted to a denial. A FOI Act Appeals Officer for the Department issued a letter stating that the request was not denied, and the information provided was a summary of the information that the Department maintained. MOCI appealed to the court, which found in favor of the Department on the grounds that the actual records sought were exempt from disclosure.

  On appeal, MOCI argued that the Department violated the FOI Act because the agency decision was not made by "the head of the public body," and that the Department erred in failing to disclose responsive records. MOCI also argued that the Department waived its right to assert an exemption to the FOIA request in the lower court by failing to claim an exemption as part of its final decision on MOCI's appeal within the Department.

  The court disagreed with MOCI, finding that nothing in the FOI Act "prohibits the head of a public body from employing personnel to act on behalf and under the authority of the head of the public body." The court also disagreed with MOCI's argument that the Department waived its right to assert an exemption in the lower court. Prior court precedent already established that a public body can assert defenses on appeal, despite not raising such defenses at the administrative level. In addition, the court held that the information requested by MOCI was exempt from disclosure because of a statutory prohibition on disclosure of such information. The court found that the requested information was maintained in two computer databases that can only be accessed by certain authorized personnel, and that Michigan law prohibits disclosure of the information in these databases except where authorized by law.

- ***Nevada:***
  Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't
  (136 Nev. 28, 458 P.3d 328 (Feb. 20, 2020))

  A police department's failure to timely respond to a request for records does not waive its right to assert that the records are non-disclosable confidential juvenile justice information.

  The Las Vegas Metro Police Department (LVMPD) responded to a disturbance and arrested several juveniles. One juvenile was the son of a prominent state senator. The senator

subsequently arrived at the scene along with other parents and was recorded on police bodycam footage.

The Republican Attorneys General Association (RAGA) made a request for records to the LVMPD seeking records related to the incident, specifically the senator's interactions with the police. LVMPD denied the request, refusing to provide records because the investigation involved juvenile suspects and arrestees.

RAGA filed a petition seeking the police bodycam footage and other records relating to the incident. The district court found that the bodycam footage of the senator directly relates to the investigation of a juvenile-involved incident, and therefore was exempt from disclosure. The court made no findings with respect to the other records. RAGA appealed.

The Supreme Court concluded that the district court did not err as to the bodycam footage at issue. The bodycam footage is subject to a confidentiality provision in statute which protects "juvenile justice information." While police bodycam footage is a public record, the Public Records Act (PRA) "expressly yields to confidentiality provisions." Furthermore, the court reasoned that the PRA also "yields" to another statute which limits the public's access to body camera footage by only allowing the public to inspect. Even portions of the footage containing the senator constitute "juvenile justice information" because it relates to a juvenile-involved incident and the arrest of juveniles. "Any information directly related to the arrest of juveniles therefore constitutes juvenile information."

Ultimately, the matter was remanded because the court found that the district court abused its discretion in declining to address the denial with respect to the other requested records.

- ***New Jersey:***
  Digital First Media v. Ewing Twp.
  (462 N.J. Super. 389, 226 A.3d 1214 (App. Div. Feb. 19, 2020), cert. denied, No. 084250, 2020 WL 3843639 (N.J. July 2, 2020))

  Concluding that a police use of force report (UFR) pertaining to a juvenile is "not a record pertaining to juveniles charged with delinquency," but "a record pertaining to police misconduct," an appeals court held that a report of police use of force against a minor charged as a delinquent was not exempt from disclosure under the Open Public Records Act (OPRA).

  A newspaper filed a complaint seeking an order of production of police UFRs involving minors charged as delinquents. The City denied access on the basis that the records contained "confidential information pertaining to a juvenile charged as a delinquent" and therefore such records are exempt from disclosure. The appeals court disagreed, noting that the UFR is intended to capture information about police conduct, not the person against whom force was used. UFRs are public records and the fact that the "subject" is a minor does not change that fact. The court reasoned that the agency could delete the subject's name to protect his or her privacy. "[W]hen police employ force against a minor charged as a delinquent, redaction of his or her name on the UFR satisfies both the public's right to access important information regarding police conduct and a juvenile's right to privacy, which is mandated by statute and court rule."

- ***Washington:***
  West v. City of Tacoma
  (12 Wash. App. 2d 45, 456 P.3d 894 (Jan. 28, 2020))

  A court of appeals held that a public agency failed to meet its burden of proof that certain information about the City's surveillance technology is exempt from public disclosure under the state's "specific intelligence" exemption.

  The City of Tacoma (City) purchased surveillance technology. The City entered a nondisclosure agreement with the FBI precluding it from disclosing the existence of the technology to the public. Under the nondisclosure agreement, the City was also precluded from disclosing any information about the technology without prior approval from the FBI. A requester sought records related to the technology. The City provided records, but redacted information about the make, model, and pricing of the equipment, claiming that it was exempt under the "specific intelligence information" exemption in the Public Records Act (PRA). The requester brought suit alleging the City violated the PRA by failing to produce all responsive records and redacting information regarding its surveillance technology.

  The appeal court held, inter alia, that the City failed to meet its burden of proof that the information redacted from the records was exempt under the "specific intelligence" exemption. The court narrowly defined "intelligence" as defined "gathering or distributing secret information, information about an enemy, or conclusions drawn from such information" and "specific" as "disclosing particular methods or procedures, or gathering or analyzing intelligence information." The court concluded that the make, model and pricing information did not meet this definition, and therefore the redactions were improper.

➢ ***Legislation:***

- ***Minnesota:***
  Senate File 3072 (Chapter 82), ***An Act Relating to Public Safety….***

  Among other provisions, the bill contains provisions governing a law enforcement agency's use of unmanned aerial vehicles (UAVs) and the data that is collected, created, or maintained by such agency. It classifies data collected by UAVs as "private data" on individuals or "nonpublic data," subject to certain conditions (e.g., if the individual requests a copy of the recording, data on other individuals who do not consent to its release must be redacted from the copy). The bill also requires law enforcement agencies, prior to the operation of a UAV, to establish and enforce a written policy governing its use. An agency must provide for public comment and input on the policy. The written policy must also be posted on the agency's website, if available.

❖ Access to Information Contained in Personnel Records

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

➢ *Litigation:*

- ***Washington:***

Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss (194 Wash. 2d 484, 450 P.3d 601 (October 24, 2019))

The Supreme Court determined that state employees do not have a protected privacy interest against disclosure of public records containing their birth dates associated with their names in that neither the Public Records Act (PRA) nor the state Constitution preclude disclosure.

Requesters sought from several state agencies records for its employees which included full names and dates of birth. Upon review, the agencies determined that all of the information was subject to disclosure and, absent a court order, they intended to release the records. Several unions filed motions for preliminary and permanent injunctions to prevent disclosure of the records. The court concluded that there was no PRA exemption applicable. The unions appealed, and the appeals court reversed and remanded on the grounds that the state Constitution creates a privacy interest against public disclosure of state employees' full names associated with their birth dates. The requester petitioned the Supreme Court for review, and such petition was granted.

The Court noted that the PRA contains no exemption for the birth date of state employees contained in personnel and employment records. The Union argued that the PRA exemption pertaining to nondisclosure of information provided to obtain a state identification card (such as age) should apply to dates of birth in employment records. The Court disagreed and opined that it must read the PRA for "what it is" and not as "an illustrative description of a broader, implied exemption for all personal information." The Court also dismissed the Union's argument that disclosure of the information violates an employee's right to privacy. The Court noted that no prior Washington court has ever held that employee birth dates associated with names are private; the privacy protection is a narrow one and applies only to privacy in '"matter[s] concerning [their] private life."'

The Union also argued that there is a strong public policy in preventing identity theft and the misuse of personal information; however, the Court noted that it must exercise judicial restraint and leave it to the legislature to address such concerns. The Court also dismissed the constitutional challenges.

Church of the Divine Earth v. City of Tacoma
(13 Wash. App. 2d 497, 466 P.3d 789 (June 23, 2020))

A court of appeals held that information contained in certain job performance evaluations was not subject to disclosure because disclosure would violate the employees' right to privacy.

The Church of the Divine Earth (Church) sought records from the City of Tacoma (City) consisting of five years of performance evaluations for directors of the Department of Planning and Development Services and the Department of Public Works. The City provided

records with the following information redacted: ratings and specific examples; goals listed by the employee and steps toward that goal; employee and supervisor comments; and employee's overall performance rating. The City claimed that the records contained "personal information" the disclosure of which would violate the employees' right to privacy.

The Church filed suit, and the lower court agreed with the City. The trial court reviewed the performance evaluations at issue and concluded that the "redactions made were not of public concern and disclosure would risk detrimental effects."

The Appellate Court affirmed the trial court decision, finding that performance evaluations are "personal information" pursuant to precedent. Having found that the performance evaluations are personal information, the court then considered whether the disclosure of such information would violate the employees' right to privacy. An employee's right to privacy is "invaded or violated only if disclosure of the information about the person (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." The court relying on precedent determined that the disclosure of the performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive. The court held that such presumption could not be overcome by redacting the employee identifying information because the request was for the evaluations of two specific employees. The court further held that "[i]n balancing the public's interest in disclosure against the public's interest in efficient administrati[on] of government…no legitimate public concern justifies disclosure. Preventing disclosure of [the employees] performance evaluations protects the vital functions of effective government."

- ***Legislation:***

  - ***Washington:***
    House Bill 1888 (Chapter 106), ***An Act Relating to Protecting Employee Information from Public Disclosure….***

    The bill exempts from disclosure information concerning public employees' payroll deductions including the amount and identification of the deduction; and voluntarily submitted information collected and maintained by a state agency or higher education institution that identifies an individual state employee's personal demographic details (i.e., race or ethnicity, sexual orientation, immigration status, natural origin, or status as a person with a disability). The bill also exempts from disclosure photographs and month and year of birth contained in the personnel files of employees or volunteers of a public agency, with limited exception for the "news media." In addition, the bill also requires that when a request is made for information located exclusively in an employee's personnel, payroll, supervisor, or training file, the agency must provide notice of such request to the employee and union representative, and of the employee's right to seek to enjoin the release of the records.

  - ***Washington:***
    House Bill 2327 (Chapter 335), ***An Act Relating to Addressing Sexual Misconduct at Postsecondary Educational Institutions….***

    The bill exempts from disclosure personal identifying information in an employee personnel file, student file, investigation file, settlement agreement, or other files held by a postsecondary educational institution that reveals the identity of witnesses to or victims of sexual misconduct committed by an employee of the institution.

❖ Other Noteworthy Litigation and Legislation

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

- ***Access to Public Records During Disaster Declaration:***

  - ***Pennsylvania***
    House Bill 2463, ***An Act Amending the Act of April 9, 1929….***

    The bill, which became law without the Governor of Pennsylvania's signature, requires state agencies to respond to records requests made during a disaster declaration even if the agency's physical location has been closed. State agencies may only deny a request for records during a disaster declaration for reasons authorized under the Right-to-Know Law.

- ***Adequacy of Search and Maintenance of Public Records****:*

  - ***New Jersey*****:**
    Lawyers Comm. For 9/11 Inquiry v. New Jersey State Police
    (No. A-1204-18T1, 2020 WL 91279 (N.J. Super. Ct. App. Div. Jan. 8, 2020))

    A court of appeals ruled in favor of the New Jersey State Police (NJSP) and found that the NJSP's determination that it maintained no records responsive to a request pertaining to a police stop, was reasonable and its search for records adequate.

    The Lawyers Committee for 9/11 Inquiry submitted requests for records pertaining to a police stop, particularly photos and film negatives pertaining to the investigation of the vehicle and all records related to samples taken from the vehicle. The requester relied on declassified FBI records in making its requests. The NJSP denied the request on the basis that it did not maintain records responsive to the request. The requester filed suit.

    The trial court found for the NJSP on the basis that the State Police provided several affidavits which explained the search conducted and that no responsive records were found; although the NJSP dispatched officers to the scene, they did not assist the FBI in the investigation and no evidence taken from the scene was maintained by the department. The plaintiff argued that a logbook, which was found by the NJSP, was in fact responsive to the request and should have been produced prior to litigation. The court disagreed, finding that the logbook was not responsive to the request and that the agency made a reasonable search for records. The Court found that the NJSP had '"looked in the most logical places where anything related to the 911 inquiry would be.'" The plaintiff appealed.

    The appeals court affirmed the lower court. The court noted that the NJSP submitted multiple certifications attesting to the steps taken by the NJSP to locate responsive records, and that the plaintiff offered no proof to refute such certifications. Furthermore, the lower court did not err in concluding that the logbook entry was not responsive, entitling plaintiff to legal fees.

- ***Missouri*:**
  Harper v. Missouri State Highway Patrol
  (592 S.W.3d 32 (Mo. Ct. App. 2019), reh'g and/or transfer denied (Dec. 12, 2019), transfer denied (Feb. 18, 2020))

  An appeals court held that the written-narratives of a highway patrol officer and copies of FBI reports in the possession of the Missouri State Highway Patrol (MSHP) are not exempt from disclosure under the Federal Freedom of Information Act (FOIA) and are public records subject to disclosure under the state Sunshine Law.

  After a law enforcement officer was shot in his home, both the MSHP and the FBI investigated the shooting. The daughter and widow of the deceased filed a request with the MSHP for all records pertaining to the death of the deceased officer. The family brought an action against the MSHP after it refused the records. Later, the MSHP disclosed several records, but withheld their reports and the FBI reports, arguing that they lacked jurisdiction to disclose the records. On appeal, MSHP argued that the federal FOI Act preempts the MSHP from disclosing the reports under the state Sunshine Law.

  The appeals court disagreed. The Court concluded that the records at issue are retained by the MSHP, not the federal government. The reports by the MSHP are not created or maintained by the FBI nor were they in the FBI's possession.

- ***Agency Discretion*:**

  - ***Connecticut***:
    Godbout v. Freedom of Info. Comm'n
    (No. HHBCV195025125S, 2019 WL 5172357 (Conn. Super. Ct. Sept. 23, 2019))

    A court denied a plaintiff's request for an order compelling the Connecticut Freedom of Information (FOI) Commission to schedule an administrative hearing after the Commission voted not to schedule a hearing on a complaint filed by the plaintiff against then-Governor Dannel Malloy.

    The complainant sought records from the Governor pertaining to the mass shooting in Las Vegas, NV and the metadata of any emails sent by the Governor to any other person. The plaintiff then filed a complaint with the FOI Commission alleging that the Governor violated the FOI Act by failing to respond to his request and sought as his only relief a referral of the case to a state's attorney for criminal prosecution.

    The Commission's Executive Director advised the FOI Commission that she had reason to believe that the complaint, if scheduled for a hearing, would constitute an abuse of the Commission's administrative process and requested that the Commission summarily deny leave to schedule a hearing. The Commission voted to deny leave to schedule a hearing, and the plaintiff appealed.

    The court concluded that the FOI Commission was justified in denying leave to schedule a hearing. The FOI Act permits the Commission to deny leave to schedule a hearing where the appeal presents a claim beyond the Commission's jurisdiction; would perpetrate an injustice; or would constitute an abuse of the Commission's administrative process. Factors which the Commission may consider include, but are not limited to, the nature

content, language or subject matter of the request or appeal, or of contemporaneous requests or appeals taken by the person; the nature, content, language or subject matter of communications with the agency; any history of nonappearance before the Commission or disruption of its process; and refusal to participate in settlement conferences with the Commission ombudsman. The court concluded that the Commission's decision to not schedule a hearing was justified and specifically noted the following as grounds: the only request for relief set forth in the complaint was not one that is authorized by the FOI Act; the plaintiff's attempt to use the Commission's process to initiate a criminal prosecution was misguided; the volume of the plaintiff's prior filings with the Commission (i.e., 385 complaints); and the plaintiff's prior attacks on the Commission and its Executive Director.

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

  - ***Nevada*:**
    <u>Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.</u>
    (136 Nev. Adv. Op. 15, 460 P.3d 952 (April 2, 2020))

    As a matter of first impression, the Supreme Court was asked to determine whether a requesting party prevails for purposes of an award of attorney fees and costs when the parties reach an agreement that affords the requesting party access to the requested record before the court enters a judgment on the merits. The Court, applying the "catalyst theory", found that attorney fees may be awarded "even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation."

    The Center for Investigative Reporting (CIR) submitted a public records request to the Las Vegas Metropolitan Police Department (LVMPD) under the Nevada Public Records Act (NPRA), seeking records related to rapper Tupac Shakur's murder within city police department's custody and control. Shakur was shot and killed at an intersection in Las Vegas. The case is still an open investigation.

    The LVMPD claimed that certain records in the investigation file were not public records, subject to the "law enforcement privilege," and protected from disclosure because "law enforcement's policy justifications for nondisclosure outweigh the public's interest in access to the records." When the LVMPD failed to produce all records, the requester filed a petition for writ of mandamus. However, prior to an in-camera evidentiary hearing, the parties reached an agreement that the LVMPD would produce certain records along with an index identifying and describing any redacted or withheld records. Subsequently, the requester asserted that it was a prevailing party for purposes of an award of attorney fees and costs, and following argument on the issue, the district court agreed that the requester was the prevailing party because filing the petition caused the police department to produce the records. The LVMPD appealed.

    The Supreme Court interpreted what it meant for a requester to "prevail" for purposes of recovering his or her costs and reasonable attorney's fees when the entity voluntarily produces the requested records before the court enters an order on the merits. The Court noted that the legislature used the broad term "prevails" in drafting the law, and noted that other states, like NJ, which utilized such broad language, adhere to the "catalyst theory"

for the reason that it chills the possibility of government abuse. The Court agreed with this policy reason, and that this interpretation promotes the intent behind the Act for public access to information. Under the "catalyst theory", a requester prevails when its public records suit causes the agency to substantially change its behavior in the manner sought by the requester; there must be a "causal nexus between the litigation and the voluntary disclosure or change in position by the Government."

- ***Autopsy Records**:*

  - ***Nevada*:**
    Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal
    (136 Nev. 44, 458 P.3d 1048 (Feb. 27, 2020))

    The Las Vegas Review Journal (Newspaper) requested from the Coroner's Office autopsy reports, notes, and other documentation for all autopsies performed on decedents under the age of 18 at the time of death during a defined period of time. The Coroner's Office denied the request on the grounds that the records contained "confidential medical information" relying on advice set forth in an Attorney General Opinion. Instead, the Coroner provided a spreadsheet containing certain information about the decedents (i.e. name, age, race, gender and cause, manner, and location of death). Pursuant to discussions between representatives of the Newspaper and the Coroner's Office, the Coroner determined that the Newspaper sought autopsy reports and records of decedents who were involved with the Department of Child and Family Services and added as a reason for nondisclosure that the records are confidential "information acquired by a [Child Death Review] team."

    The Newspaper petitioned the court, seeking an order requiring the Coroner's Office to disclose all juvenile autopsy reports from the previous five years under the PRA. The district court ordered the Coroner's Office to produce unredacted juvenile autopsy reports under the PRA. The Coroner's Office appealed.

    The Coroner's Office argued that it may refuse to disclose a juvenile autopsy report once it has provided the report to a Child Death Review (CDR) team under a separate state statute. CDRs are multidisciplinary entities formed to "[r]eview the records of selected cases of deaths of children under 18 years of age..." and are made up of representatives from various public agencies. CDR teams have access to certain records and information regarding the death of a child, including autopsy reports. State law provides that "information acquired by, and the records of, a [CDR team] ... are confidential, must not be disclosed, and are not subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding."

    The Court interpreted the provision more narrowly than the Coroner's Office, concluding that it applies exclusively to the CDR team as a whole and may not be invoked by individual agencies within a CDR team to limit access to information the agency holds outside of its role on the team. "By its plain language, [the statute] makes confidential only the records or information 'acquired by' the 'team.'" The Court concluded therefore that only a CDR team may invoke this privilege to withhold information. However, the Court agreed with the Coroner's Office that juvenile autopsy reports may include sensitive, private information and that such information may be redacted. Therefore, the Court remanded the matter for the district court "to assess the extent to which the reports

may contain private information and medical or other health-related information that should be redacted."

- ***Burden of Proof**:*

  - ***New York*:**
    New York Civil Liberties Union v. Suffolk Cty. Police Dep't.
    (67 Misc. 3d 1222(A), 127 N.Y.S.3d 701 (N.Y. Sup. Ct. May 18, 2020))

    A trial court ruled that the Suffolk County Police Department (SCPD) failed to prove that it only maintained certain records responsive to a request for records pertaining to the agency's identification of suspected gang members and communications between the agency and federal US Immigration and Customs Enforcement.

    The NY Civil Liberties Union and Latino Justice requested records related "to the police department's current practices and policies involving the identification of individuals alleged to be 'suspected gang members' and to communications between it, the Department of Immigration and Customs Enforcement ("ICE") or any other "branch" of the Department of Homeland Security ("DHS"), and the South Country Central School District ("SCCSD")." The department failed to respond within the statutory time limit, and the requesters filed suit.

    The court found that the police department failed to justify its claim that it had a few responsive records, noting that "it is virtually inconceivable that the [police department] would have no tangible record reflecting the flow of information it has developed or otherwise obtained concerning these young people, its assessment of that information and its sharing of that information with governmental entities and their agents and employees." The court added that "[in] any event, the materials submitted and cited by [the requesters] provide a more than ample factual basis for its contention that the SCPD has in its custody or under its control material that is responsive to the August 1, 2017 [Freedom of Information Law] FOIL request." For example, the requesters demonstrated that the results of the search were inconsistent with prior public statements made and documents promulgated by others, indicating more responsive non-exempt materials existed.

    The police department argued, among other things, that "any inference that additional records may exist is overcome by the [department's] Freedom of Information Officer's certification that a diligent search was conducted, and that no further responsive records exist." The court countered that "although mere speculation that documents may exist is insufficient to support a challenge to the failure to release information in the face of an agency's contrary certification…here, the party requesting the records 'can articulate'… 'a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [agency's] control'." The court continued, "[h]ere, in view of the substantial documentary record tendered by the [requesters]. . .it is virtually inconceivable, if not entirely improbable, that the [police department] did not have and has not maintained any records beyond a single, nine-page set of procedural provisions, that constitute, document, reflect or otherwise bear on its many efforts to address gangs and gang-related activity in Suffolk County and in Suffolk County schools and that are responsive to the…[requesters'] August 1, 2017 FOIL request."

- ***Claims against Governmental Entities:***

  - ***New Mexico:***
    Senate Bill 64, *An Act Relating to Risk Management….*

    Senate Bill 64 provides that certain records pertaining to claims for damages or other relief against any government entity or public officer or employee are confidential; however, such records shall be subject to public inspection on and after the earliest of: (a) the date a final judgment is issued resolving the claim and all appeals and rights to appeal have been exhausted; or (2) the date a settlement agreement is signed by all of the parties.

- ***Copies via Mobile Device****:*

  - ***Arkansas*:**
    Motal v. City of Little Rock
    (Ark. App. 308, 603 S.W.3d 557 (May 13, 2020))

    The court concluded that "copy" under the Freedom of Information Act includes taking a photograph of a public record.

    Requesters may use their phone to photograph public records. The requester filed an action alleging that the City violated his rights under the Act by refusing to allow him to inspect and copy an accident report by taking a photograph using his personal cell phone. The court concluded that the Act provides requesters the right to make their own copies, and that the term "copy" should be broadly construed to include the taking of a photograph.

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

  - ***California*:**
    Nat'l Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward
    (9 Cal. 5th 488, 464 P.3d 594 (May 28, 2020))

    Government agencies may not charge requesters for the time their employees spend editing videos to redact exempt, but otherwise producible, data.

    Several civil rights groups brought an action against the City of Hayward (City) after filing requests for police body-camera footage related to protests on UC Berkeley's campus following the deaths of Eric Garner and Michael Brown. The police agreed to release the footage but invoiced the requesters $2,938.58 ($$1 for a thumb drive containing the edited video copies and the remainder for 40.2 hours of staff time spent preparing the videos for production). The requesters paid the invoiced amount under protest and received the videos.

    The Court concluded that public agencies cannot recover costs for time spent searching for electronic records, just as they cannot recover costs for searching for paper records. Data "extraction" under the California Public Records Act refers to a technical process of retrieving data from government data stores to produce records. Extraction does not include the cost for time spent searching for responsive, electronically stored records. The

Court further acknowledged that such charges could be a prohibitive barrier to the public's right to access records.

- ***Vermont*:**
  Doyle v. City of Burlington Police Dep't
  (2019 VT 66, 219 A.3d 326 (Sept. 13, 2019))

  The Supreme Court held that a provision of the Public Records Act (PRA), which permits a public agency to charge and collect a fee for staff time accrued fulfilling requests for copies of public records, does not apply to requests for inspection.

  The Court pointed to the plain language of the statute, which authorizes charges only for copies. The Court noted that throughout the statute it is clear that the Legislature intended to distinguish requests to inspect from requests to copy, and that provisions pertaining to fees are associated only with requests for copies.

- ***Deliberative Process Exemption**:*

  - ***New York*:**
    New York Times Co. v. City of New York Office of Mayor
    (66 Misc. 3d 1209(A), 120 N.Y.S.3d 717 (N.Y. Sup. Ct. Jan 15, 2020))

    A trial court ordered the New York City Office of the Mayor (Mayor) to disclose all outstanding records.

    The New York Times Company sought an order to compel the City to produce a warning letter sent to the Mayor following an investigation into Mayor Bill de Blasio's fundraising for a nonprofit group founded to advance the mayor's political initiatives. The investigation found that the mayor potentially violated conflicts of interest laws by soliciting contributions for the nonprofit from individuals with business before the city. The City denied the request, claiming the letter was not subject to disclosure as a confidential record of the Conflict Board and pursuant to a "deliberative process" exemption in the Freedom of Information Law.

    With respect to the exemption for records maintained by the Conflict Board, such exemption provides that "records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny," the parties dispute whether the language "of the board" refers to records that the Conflict Board controls or possesses, or whether it applies to any records created by the Conflict Board. The court, relying on precedent, concluded that the analysis turns on which agency possesses the document sought, and therefore, "of the board" pertains to documents in the possession of the Conflict Board. Here, the request was made to the Mayor's Office, which was claiming a confidentiality exemption to a document that it merely received.

    With respect to the deliberative process exemption, such exemption provides that "pre-decisional inter-agency or intra-agency materials may be protected from disclosure." It does not apply to "final agency policy or determinations." The Mayor argued that the letter is not final in that it makes no final determination or conclusion regarding violations of fundraising laws. However, the court noted that the Conflict Board indicated that the letter is its final course of action and referred to the letter as the "disposition of the case."

The court found that the document is the Board's final determination of the investigation, and therefore is not subject to the deliberative process exemption.

- ***Description of Records Requested:***

  - ***Idaho:***
    House Bill 601, ***An Act Relating to the Public Records Act….***

    The bill requires, in part, that a public records request specifically describe the subject matter and records sought, including a specific date range for when the records sought were created. The request must describe the records sought in sufficient detail to enable the public body to locate such records with reasonable effort.

  - ***New York:***
    Jewish Press, Inc. v. New York City Dep't of Educ.
    (183 A.D.3d 731, 122 N.Y.S.3d 679 (May 13, 2020))

    A court of appeals ruled that the NYC Department of Education (DOE) improperly denied a request for copies of forms used by its employees to request absences for religious observances (where such request was denied), on the basis that the requested records were not reasonably described. The DOE contended that since there were more than 100,000 potentially responsive records, that the request was too broad. The trial court agreed. However, on appeal, the court disagreed on the grounds that the requirement that a Freedom of Information Law (FOIL) request "reasonably describe" the records sought, is to enable the agency to locate the records in question.

    Here, the DOE's responses demonstrated that it knew where the records were located and in fact conceded as such. The DOE thus "conflated the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner's request." The court found that the request is not open-ended and does not require a manual search of every document.

    The court found that the request contained a reasonable description of the records sought and was sufficiently detailed, and therefore the DOE could not deny the request on the basis of overbreadth.

- ***Doctrine of Exhaustion****:*

  - ***Washington*****:**
    Kilduff v. San Juan Cty.
    (194 Wash. 2d 859, 453 P.3d 719 (Dec. 12, 2019))

    The Supreme Court ruled that nothing in the Washington Public Records Act (PRA) gives local governments the right to create an additional layer of administrative review, or to require administrative exhaustion, before the public may seek judicial review.

    A requester sought records pertaining to a wetlands classification dispute and investigation. While some public records were produced, the requester filed suit against the San Juan County and public records officer (who also served as a member of the

county council) for violating the PRA, alleging that they failed to conduct a reasonable search for responsive records and withheld records without claiming an exemption. The agency raised the affirmative defense that the requester failed to exhaust administrative remedies required by the San Juan County Code (SJCC) and that the requester never received a final decision regarding his records request.

The SJCC provides, in relevant part, that "[a]dministrative remedies shall not be considered exhausted until the prosecuting attorney has made a written decision, or until the close of the second business day following receipt of the written request for [the prosecuting attorney's] review of the action of the public records officer, whichever occurs first" and "[n]o lawsuit to review the action taken, compel the production of a public record, or impose a penalty or attorney fees shall be brought before the administrative remedies set out in this section have been exhausted by the party seeking the record."

The trial court agreed with the County and dismissed the claim on the basis that the County never issued a final decision on the request, and therefore there was no final decision for the court to review. The court also found the claim frivolous and sanctioned the requester and his attorneys.

The requester appealed, and the Supreme Court reversed the trial court's dismissal and award of sanctions. The Court held that the above-cited provision in the SJCC is invalid because the PRA does not authorize counties to require public records requesters to exhaust administrative remedies before filing suit. The court noted that the PRA requires timely disclosure of public records unless exempt, a written explanation when a request is denied, and established mechanisms for prompt review of denials; permitting a public agency to delay compliance and precluding a requester to appeal runs contrary to the PRA. The Court also concluded that the trial court abused its discretion when it imposed fees and sanctions on the requester.

- ***Invasion of Personal Privacy****:*

  - ***Illinois*****:**
    Timpone v. Illinois Student Assistance Comm'n
    (2019 IL App (1st) 181115, appeal denied, No. 125664, 2020 WL 1488597 (Ill. Mar. 25, 2020))

    A requester filed a Freedom of Information (FOI) Act request with the Illinois Student Assistance Commission (ISAC) seeking "the names of all students who received grants in 2015 through the State's Monetary Award Program (MAP), as well as the name of the college or university that each student attended." ISAC denied the request to produce the student names, citing privacy concerns, but provided a spreadsheet containing various other data about the funding. The requester filed an action with the court seeking it to compel ISAC to disclose each student's name. The court ordered disclosure and ISAC appealed.

    The appeals court reversed, holding that the student names constituted "personally identifiable information" that under state law and regulations was confidential and not subject to disclosure for any purpose other than permitted by law. The court also

concluded that the information was exempt from disclosure under the FOI Act exemption for "private information" which includes a person's social security number, driver's license number, employee identification number, home address, and other identifiers set forth in the FOI Act. Although the statute does not specifically state that the names of students receiving financial aid is exempt, the court reached this conclusion by review of legal precedent. The court concluded that "given the detailed personal income information of MAP applicants and recipients that has been disclosed and is maintained on ISAC's public website . . . the further disclosure of the names of MAP grant recipients would invade the privacy of these individuals."

- ***Oklahoma*:**
  House Bill 3613, ***An Act…Creating the Personal Privacy Protection Act.***

  The bill provides that "personal affiliation information" is exempt from the disclosure requirements of the Oklahoma Open Records Act. "Personal affiliation information" means "any list, record, register, registry, roll, roster or other compilation of data of any kind that directly or indirectly identifies a person as a member, supporter, or volunteer of, or donor of financial or nonfinancial support to, any entity organized pursuant to Section 501(c) of the United States Internal Revenue Code."

- ***Legislative Immunity:***

  - ***Kentucky*:**
    Harilson v. Lexington H-L Servs., Inc.
    (No. 2018-CA-001857-MR, 2019 WL 6222913 (Ky. Ct. App. Nov. 22, 2019))

    An appeals court held that records maintained by Kentucky's Legislative Research Commission (LRC) are not protected from disclosure pursuant to legislative immunity.

    A reporter sought records related to a complaint by an LCR staffer against a member of the Kentucky General Assembly. The LRC refused to provide responsive records, making several claims including that legislative immunity applies and therefore the records were exempt from disclosure.

    The LRC argued on appeal that the lower court erred "in failing to conclude that: 1) legislative immunity applies to shield disclosure of the requested records, and 2) legislative immunity was not waived as to the requested records. Appellants contend that the LRC and its staff are functionally equivalent to the General Assembly members for purposes of legislative immunity, that legislative immunity applies to investigations into General Assembly member conduct, and that the requested records were related to a constitutionally provided investigation into the governance of member conduct and are not subject to compulsory disclosure. As to their claim that legislative immunity was not waived as to the requested records, Appellants contend that . . . the Kentucky Constitution is an individual grant of immunity, that the relevant statutory sections contain no language related to waiver, and that the history of the General Assembly's enactments demonstrate a reassertion of legislative immunity and independence over legislative records."

    The appeals court, however, agreed with the lower court that the General Assembly expressly waived legislative immunity as to open records requests submitted to the LRC. The court pointed out that the General Assembly established a mechanism for seeking

open records and providing for judicial review of adverse decisions of the Director and LRC, thereby waiving legislative immunity under the facts of this case.

- ***Legislative Services Records:***

  - ***Idaho:***
    House Bill 601, ***An Act Relating to the Public Records Act….***

    Among other provisions, the bill exempts from disclosure the following: requests for research or analysis submitted to the legislative services office by a legislator and any documents related to such request; personal communications of legislator(s) that do not relate to the conduct or administration of the public's business; personally identifying information relating to a private citizen contained in a writing to or from a legislator; records consisting of or related to the work papers in the possession of the director of legislative performance evaluations prior to the release of the final performance evaluation; records consisting of or related to the work papers in the possession of the division of legislative audits prior to release of the related final audit.

- ***Responding to Records Requests During State of Emergency:***

  - ***Kentucky:***
    Senate Bill 150*, An Act Relating to the State of Emergency in Response to COVID-19 and Declaring an Emergency.*

    Among other provisions, Senate Bill 150 requires that a public agency respond to a request to inspect or receive copies of public records within 10 days of its receipt. The public agency may delay on-site inspection during the pendency of the state of emergency. In addition, a public agency may conduct any meeting by live audio or live video teleconference during the period of the state of emergency.

- ***Voter Registration Records:***

  - ***Minnesota***:
    Cilek v. Office of Minnesota Sec'y of State
    (941 N.W.2d 411 (Minn. April 8, 2020))

    The Supreme Court held that state statute limits access to the voter registration lists contained in a statewide voter registration system, and therefore the Secretary of the State (Secretary) was not required to disclose voter status, reasons for challenges to registration, and information related to unregistered voters.

    A voter sought information in the Statewide Voter Registration System containing Minnesota's statewide voter registration list. The Secretary declined to provide information on voter status, the reasons for challenges to voter registration, and information related to individuals who were not currently registered voters. The voter filed suit against the Secretary, alleging violations of the Minnesota Government Data Practices Act (DPA) and seeking an order to compel production of the requested data. The district court ordered the Secretary to produce the data, and the appellate court affirmed. The Secretary then filed a petition for further review, which was granted.

The Court concluded that the plain language of the DPA and the Minnesota Election Law clearly limits access to registered voter lists, and gives Minnesota voters access only to "public information lists" (containing voter name, address, year of birth, voting history, telephone number and voting district), as well as information provided by the Secretary at his or her discretion.