Freedom of Information Litigation and Legislation Update

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Freedom of Information
Litigation and Legislation Update

I. 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 2021. 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 and legislation enacted through September, 2022.

Sources for this report include *Access Reports,* the website for *The National Freedom of Information Coalition,* the website for *The New England First Amendment Coalition*, the website for *The Reporters Committee for Freedom of the Press,* and local online news websites.

Attorneys Zack Hyde, Danielle McGee, Paula Pearlman, and Mary-Kate Smith, counsel to the Connecticut Freedom of Information Commission, compiled and edited this year's report.

Special thanks to Harry Hammitt, editor, and publisher of *Access Reports*; Thomas Hennick, Mary Schwind, and Colleen Murphy at the Connecticut Freedom of Information Commission; and our open government colleagues who shared recent court decisions and new legislation from their respective states.

II. What is a "Public Record"? What is a "Public Agency"?

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

- ***Litigation.***

  - ***Arkansas:***
    Myers v. Fecher
    (2021 Ark. 230 (December 16, 2021))

    The Supreme Court of Arkansas overruled the lower court's determination that electronic messages between the former director of the Arkansas Department of Information Systems ("DIS") and his paramour were inextricably intertwined with the performance of public functions and, thus, must all be disclosed. The Supreme Court remanded the matter requiring the lower court to perform a detailed content-based analysis to determine which messages fell within the Arkansas Freedom of Information ("FOI") Act's definition of "public records."

    The former director of the DIS developed an intimate personal relationship as well as a business relationship with a woman ("Ms. Doe"). Ms. Doe was employed by a technology company that did business with the DIS. The two communicated via email and text, as well as through a private third-party cloud-based application.

    The Arkansas Democrat-Gazette, Inc. requested communications between the director and Ms. Doe. After the Secretary of Transformation and Shared Services notified the director that it planned to disclose the requested records, the director filed suit seeking a temporary restraining order and a declaratory judgment that the messages were not public documents and/or were exempt from disclosure. The director argued that the messages were private communications unrelated to the performance of official functions. The trial court disagreed holding that the business and personal matters were so intertwined that all of the messages were public records, and the public had a right to their content.

    The Supreme Court reversed, concluding that the lower court improperly failed to conduct an effective review regarding the classification of each of the messages, which were individual messages, sent on different days and at different times and were not all interrelated or inextricably intertwined. Thus, the Supreme Court ordered the lower court to review each of the emails separately and determine whether or not each related to the performance of official functions, thereby making them public records pursuant to the FOI Act.

- ***Connecticut:***
  Town of Avon v. Sastre
  (No. HHB-CV-21-6070256-S, 2022 WL 6421446 (Conn. Super. Ct. Sept. 20, 2022) (appeal pending))

  The Superior Court found that a log prepared by a managerial employee of the Town of Avon (the "Town") which described allegations of misconduct against the Chief of Police (the "log") and which the employee voluntarily provided to the Town Manager, was used in the conduct of the public's business and maintained or kept on file by the Town. Thus, the court held that it constituted a "public record" under the Connecticut Freedom of Information ("FOI") Act.

  A few months prior to a request for the log under the FOI Act, the employee met with the Town Manager to discuss certain incidents involving the Chief. Following that meeting, the Town Manager contacted the attorney for the Town to obtain legal advice about the concerns that had been relayed. The attorney asked the Town Manager to inquire whether the employee had any documentation about the incidents. The Town Manager so inquired and learned that the employee maintained a log detailing the incidents. The employee voluntarily gave the log to the Town Manager, who provided it to the Town attorney. A copy of the log was made and retained by the Town attorney, and the Town Manager returned the original to the employee. Thereafter, based on the employee's complaints, as set forth in detail in the log, the Town placed the Chief on administrative leave and, thereafter, the parties executed a severance agreement.

  The Superior Court concluded that the log satisfied the definition of a public record because it was both received and used by the Town. Under the FOI Act, "public records or files" are defined as "any recorded data or information relating to the conduct of the public's business, prepared, owned, used, received or retained by a public agency . . .." The court noted that the Town requested the log from the employee, who voluntarily provided it to the Town, and the Town used the log to assist in its "investigation and decision-making process" with regard to the Chief's employment status. The court also determined that the log was "maintained or kept on file" by the Town pursuant to the FOI Act because, although the log remained in the Town attorney's physical possession, the Town had access to it.

- ***Pennsylvania:***
  Campbell v. Pennsylvania Interscholastic Athletic Association et al.
  (268 A.3d 502 (Pa. Commw. Ct. 2021)(November 30, 2021), appeal granted sub nom. Pennsylvania Interscholastic Athletic Ass'n, Inc. v. Campbell, 280 A.3d 870 (Pa. 2022)(June 22, 2022))

  The Commonwealth Court of Pennsylvania held that the Pennsylvania Interscholastic Athletic Association ("PIAA") was subject to Pennsylvania's Right-to-Know Law ("RTKL").

After a requester sought various financial, banking and other records from the PIAA, it objected on the ground that it was a private, non-profit corporation and not a Commonwealth of Pennsylvania ("Commonwealth") entity subject to the RTKL. The PIAA argued that its designation in the RTKL as a "state-affiliated" entity that must comply with the RTKL constituted unconstitutional "special legislation" because the PIAA did not resemble a public entity. In support of its claim, the PIAA argued that it received no Commonwealth funding or tax dollars, was not granted any powers by the Commonwealth, was not administered or governed by any Commonwealth personnel and was not created by the General Assembly. The PIAA argued further that its inclusion in the RTKL lacked a rational relationship to the purpose of the law and improperly discriminated against the PIAA.

On appeal, the Commonwealth Court acknowledged that the Pennsylvania Constitution included a proscription against "special legislation," which prohibited legislation for particular localities, individuals or entities, or for private purposes. Nonetheless, the court noted that the legislature retained the power of classification, provided that the classifications "are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation." The court determined that the PIAA's classification as a "state-affiliated entity" for purposes of the RTKL was reasonable given that the PIAA engaged in "state action" by maintaining statewide control over high school athletics and given that it was funded primarily by public school districts. Thus, its classification by the legislature as a "state-affiliated entity" under the RTKL had a rational basis and "further[ed] a legitimate state interest in transparency in the PIAA's use of public funds in a manner that dramatically impacts students' lives."

- ***Vermont:***
  Human Rights Defense Center v. Correct Care Solutions, LLC
  (2021 VT 63 (Vt. 2021)(September 3, 2021))

  The Supreme Court of Vermont held that Wellpath LLC ("Wellpath"), a private company which provided medical care services to incarcerated individuals pursuant to a contract with the Vermont Department of Corrections ("DOC"), was an instrumentality of the state during its contract period and, thus, a "public agency" as defined in Vermont's Public Records Act ("PRA").

  Between 2010 and 2015, Wellpath was the sole means through which the DOC provided medical care to incarcerated persons. Under the contract, Wellpath's policies and procedures were both "subordinate to" those of the DOC and subject to the DOC's review to ensure compliance with relevant federal and state laws and regulations.

  The Human Rights Defense Center ("HRDC") requested from Wellpath any records relating to legal actions and settlements arising from medical care it provided to persons in state custody within Vermont. Wellpath refused to disclose the requested records, arguing that, as a private contractor, it was not subject to the PRA. The HRDC filed an

action seeking to compel disclosure of the records arguing that, by providing healthcare to inmates on behalf of the state, Wellpath became the "functional equivalent" of the DOC and was therefore subject to the PRA. The trial court entered judgment for Wellpath, holding that it was not the functional equivalent of a public agency because the provision of healthcare is not a governmental function.

In reversing the trial court's decision, the Supreme Court of Vermont relied on the language of the Act, which defines "public agency" as "any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State." Unlike the trial court, the Supreme Court declined to consider whether Wellpath was the "functional equivalent" of a public agency because it concluded that Wellpath was an "instrumentality" of the DOC during the contract period and, therefore, it was a "public agency" as that term is defined in the PRA. The court found that providing medical care to incarcerated persons is a quintessential governmental function since the Constitution imposes upon the government an affirmative duty to care for and protect such individuals taken into its custody. The court also found that DOC crafted detailed policies governing when, whether, and how Wellpath was to deliver services to persons in custody, whereby Wellpath exercised the authority of the state in administering such policies.

Notably, the decision quotes John Adams:

> Liberty cannot be preserved without a general knowledge among the people, who have a right ... and a desire to know; but besides this, they have a right, an independent right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers.

J. Adams, A Dissertation on Canon and Feudal Law (1765).

III. 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.***

  - ***Florida:***
    Meyers v. Osceola County. and Board of Osceola County Commissioners
    (No. 2020-CA-001169-O (Fla. Cir. Ct. Nov. 22, 2021))

    A Florida Circuit Court determined that the meetings of an Executive Policy Group ("EPG") established to oversee policies regarding emergency preparedness and response were required to be open to the public in compliance with the state's Sunshine Law because the EPG performed "decision-making functions" during a state of emergency.

    Defendant Osceola County created the EPG along with the Emergency Management Working Group ("EMWG") to "promote the County's emergency preparedness, response, recovery, and mitigation through enhanced coordination and long-term planning." The County used the EPG and the EMWG to control its responses to emergencies and coordinate its responses among local entities. The EPG was specifically tasked with providing executive-level policy decisions in emergencies.

    After the County declared a public emergency in response to the COVID-19 pandemic, the EPG held closed meetings, wherein it adopted emergency orders requiring the use of masks, which had the force of law. No minutes or records were generated or kept for these meetings. However, the Florida Sunshine Law states "[a]ll meetings of any board or commission of any … authority of any county" where "official acts are to be taken are declared to be public meetings open to the public at all times." In addition, under Florida law, regardless of how a committee or a board is formed, its meetings and deliberations are subject to the Sunshine Law if that entity performs decision-making functions.

    The Circuit Court held that the EPG's meetings were subject to the Sunshine Law because the EPG enacted legally binding executive orders, which had the effect of law and were, by their very nature, "decision-making acts." The court also determined that the Sunshine Law and its open meetings requirements cannot be waived during a state of emergency. The court ordered that all future meetings of the EPG must comply with the Sunshine Law.

- ***Legislation.***

  - ***Connecticut:***
    House Bill 5459, PA. 22-109, ***An Act Requiring the Online Posting of Meeting Notices of State Public Agencies.***
    This bill amends the Freedom of Information Act and requires that state agencies post their schedule of regular meetings on the Secretary of State's Internet website and that the Secretary of State post special meeting notices of state agencies on its website.

  - ***Louisiana:***
    Senate Bill 478, P.A. 770, ***An Act to Amend and Reenact R.S. 44:1(A)(2)(a), 32(A), (C)(1)(a) and (D), 35(E)(2), and 37, Relative to Public Records…***
    Among other changes, this bill adds "electronically stored information" and information contained in databases to the definition of "public records" in Louisiana's public records statutes.

  - ***New York:***
    Assembly Bill 1228A / Senate Bill 1150A, Ch. 481, ***An Act to Amend the Public Officers Law, in Relation to Making Certain Documents Available for Open Meetings.***
    This bill requires that any proposed resolution, law, rule, regulation, policy, or any amendment thereto, that is scheduled to be the subject of discussion at an open meeting, must be available by request at least twenty-four hours prior to discussion at the open meeting. In the event that the agency maintains a routinely updated Internet website, any such records must also be posted to the website at least twenty-four hours prior to the meeting.

  - ***Oklahoma:***
    House Bill 3925, ***An Act Relating to … Creating the Cost Administration Implementation Committee …Subjecting the Committee to the Provisions of the Oklahoma Open Meeting Act and Oklahoma Open Records Act…***
    This bill creates the Cost Administration Implementation Committee within the Administrative Office of the Courts for the purpose of overseeing implementation of the bill's requirements related to the administration of court fines, fees, costs, and assessments. The bill also makes meetings of the Committee subject to Oklahoma's open meeting and open records statutes.

  - ***Virginia:***
    House Bill 444, Ch. 0597, ***An Act … Relating to the Virginia Freedom of Information Act; Meetings Conducted by Electronic Communication Means; Situations other than Declared States of Emergency.***

    This bill begins by creating two new definitions in Virginia's Freedom of Information Act. First, it defines an "all-virtual public meeting" as a public meeting using electronic means when all members of the public body participate remotely, and public access is provided through electronic means. It also defines "remote participation" as

participation by a member of a public body through electronic means during a public meeting where a quorum is physically assembled.

In addition, the bill requires that minutes taken at meetings conducted through electronic means identify those members of the public body who participate through electronic means, those who are physically assembled at a single location, and those members who are not present at that location but who monitored such meeting through electronic means.

The bill establishes rules and procedures for meetings held through electronic means in situations other than declared states of emergency. It encourages public bodies to provide public access both in person and through electronic means for such public meetings and to allow avenues for public comment. The bill also allows members of a public body to use remote participation at a meeting if, in advance of the meeting, the public body has adopted a policy regarding all-virtual public meetings and the member notifies the public body chair that he or she cannot attend for one of four permissible reasons. In addition, the public body is required to adopt a policy governing meetings held through electronic means prior to holding any such meetings.

The bill excepts local governing bodies, local school boards, planning commissions, architectural review boards, zoning appeals boards, and any board with the authority to deny, revoke, or suspend a professional or occupational license from the provisions that allow all other public bodies to conduct all-virtual public meetings.

The bill requires the Virginia Freedom of Information Advisory Council to convene a working group to develop recommendations and best practices for public bodies holding all-virtual public meetings.

IV. Access to Public Records

A. Access to Records Pertaining to Police and Correctional Officer Conduct

Below are summaries of court decisions and legislation concerning access to records pertaining to law enforcement officer conduct.

- ***Litigation.***

  - ***Maryland:***
    Baltimore Action Legal Team v. Office of State's Attorney of Baltimore City
    (253 Md. App. 360 (December 17, 2021))

    The Maryland Court of Special Appeals held that a list of 305 Baltimore City police officers with "questionable integrity," maintained by the Office of the State's Attorney for Baltimore City ("SAO") was not exempt from disclosure under the Maryland Public Information Act ("MPIA") as a personnel record.

    After a state's attorney publicly informed members of the State Commission to Restore Trust in Policing that her office maintained a list of officers with what she described as "credibility issues" ("Do Not Call List"), the Baltimore Action Legal Team ("BALT") requested a copy of the Do Not Call List. The SAO refused to produce the list and BALT filed a court action.

    The circuit court granted summary judgment in favor of the SAO, concluding that the Do Not Call List and information used to compile the list constituted confidential personnel records exempt under the MPIA's mandatory exemption prohibiting the disclosure of "a personnel record of an individual, including an application, performance rating or scholastic achievement information."

    The appeals court disagreed and reasoned that an agency cannot claim a personnel records exemption under the MPIA unless (1) the agency has supervisory authority over the records and the person who is the subject of the record; and (2) the records contain what would be considered "personnel issues," such as information related to performance. In this case, the SAO created the Do Not Call List, not the police department. Moreover, although the list might have been created utilizing personnel records, the list did not include any information related to the officers' job performance and, therefore, was not an exempt personnel record.

  - ***New Jersey:***
    Libertarians for Transparent Government v. Cumberland County
    (250 N.J. 46, 269 A.3d 427 (March 7, 2022))

    Pursuant to New Jersey's Open Public Records Act ("OPRA"), the Supreme Court of New Jersey held that the trial court properly ordered disclosure of a redacted settlement agreement between Cumberland County and a former corrections officer, relating to

his termination of employment after he admitted that he had inappropriate relationships with two inmates and brought contraband into the jail.

In a separate lawsuit, an inmate at the Cumberland County Jail accused the corrections officer of forcing her to engage in non-consensual sex acts in prison on a regular basis. To learn more about the allegations, Libertarians for Transparent Government ("Libertarians") obtained minutes of a public meeting of the Board of the Police and Firemen's Retirement System, during which the Board considered the corrections officer's application for special retirement. The minutes showed that the corrections officer had been charged with improper fraternization with inmates and introduction of contraband into the facility. The minutes also showed that he admitted to having inappropriate relationships with two inmates and to bringing contraband into the facility. In addition, the minutes revealed that, although the county initially had sought to terminate the officer, the county agreed to dismiss the disciplinary charges and allow him to retire in good standing with a reduced pension, after he agreed to cooperate with the County's investigation of four other officers suspected of similar misconduct.

At issue in the case was Libertarians' request for a copy of the settlement agreement, which the County refused to produce even with redactions, claiming it was a personnel record exempt from disclosure. Instead of providing the redacted agreement, the County provided certain details in writing, including a statement that the officer had been "charged with a disciplinary infraction and was terminated," which was not true, as the officer was allowed to retire in good standing, with a reduced pension.

The trial court ordered the County to produce a redacted version of the settlement agreement. The County appealed and the Appellate Division reversed. On further appeal, the Supreme Court reinstated the trial court's order.

Although most personnel records are exempt from disclosure under OPRA, the Supreme Court of New Jersey noted that the statute requires the disclosure of certain information including, but not limited to "the date of separation and the reason therefore." The Supreme Court determined that, if a document contains such information that is required to be disclosed, OPRA requires the document to be disclosed with any appropriate redactions. Since part of the settlement agreement contained information, which was required to be disclosed by OPRA, the document itself (not a summary) was subject to disclosure after it was redacted. The court noted that the case highlighted the importance of government transparency, accountability, and candor, and stated that, "[w]ithout access to actual documents in cases like this, the public can be left with incomplete or incorrect information."

Rivera v. Union County Prosecutor's Office
(250 N.J. 124, 270 A.3d 362 (March 14, 2022))

The New Jersey Supreme Court held that, although the Open Public Records Act ("OPRA") does not permit access to police internal affairs reports, these records may and should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality.

After an investigation found that the former director of the Elizabeth New Jersey Police Department engaged in racist and sexist behavior while in office, the plaintiff sought access to the internal affairs report. The Prosecutor's Office denied the request claiming, in large part, that it was an exempt personnel and/or internal affairs record. The plaintiff filed a complaint in court, and the trial court concluded that the internal affairs report should be made available.

The Appellate Division reversed, determining that the Internal Affairs Policy and Procedures manual ("IAPP") issued by the Attorney General required internal affairs records to remain confidential (with some exceptions). The court reasoned that the IAPP had the effect of law and, thus, the internal affairs report was exempt from disclosure under Section 9(b) of OPRA, which provides that OPRA "shall not abrogate or erode any ... grant of confidentiality ... recognized by ... statute." In addition, the Appellate Division went on to hold that the common law did not require the disclosure of the report, even though the trial court had not reached this issue.

On appeal, the Supreme Court agreed with the Appellate Division that the report was exempt under Section 9(b) of OPRA. Nevertheless, the Supreme Court determined that, where an internal affairs investigation confirmed that the civilian head of a police department had engaged in racist and sexist conduct for many years, the public interest in disclosure of the report was great and, thus, it should be disclosed pursuant to the common law right of access. Because the trial court did not review the common law claim, the Supreme Court lacked a complete record to determine the scope of information required to be released. Thus, the court remanded the case to the trial court to review the report and redact the portions that raise legitimate confidentiality concerns.

The Supreme Court noted that the key issue in the case was balancing the need for confidentiality in internal affairs investigations with the public's interest in transparency. Prior to this case, existing case law focused on how to evaluate the need for confidentiality of public records. The court's discussion is notable because it outlines several factors to assist courts in evaluating the need for public disclosure of internal affairs reports under the common law right of access, which include: the nature and seriousness of the alleged misconduct, whether it was substantiated, the discipline imposed, the nature of the official's position, and the person's record of misconduct.

- ***New York:***
  Gannett Co., Inc. d/b/a Democrat & Chronicle v. Herkimer Police Department
  (76 Misc. 3d 557, 169 N.Y.S.3d 503 (N.Y. Sup. Ct. 2022) (June 22, 2022))

  The New York Supreme Court held that the disclosure of records related to unsubstantiated disciplinary claims would constitute an unwarranted invasion of police officers' personal privacy, and that the repeal of Civil Rights Law § 50-a, the statute making personnel records of police officers and other first responders confidential, did not have retroactive effect.

  A news organization brought an action challenging a police department's refusal to provide records related to unsubstantiated claims of police misconduct, and certain personnel records in existence prior to the date that Civil Rights Law § 50-a was repealed (June 12, 2020).

  The court was "particularly unsettled" by a portion of a court decision rendered in a case cited by the petitioner, which suggested that "the veracity of an allegation is an utterly immaterial consideration in determining whether the disclosure of records related to that allegation is appropriate." The court instead adopted the reasoning espoused in New York Civil Liberties Union v. City of Syracuse, 72 Misc. 3d 458, 148 N.Y.S.3d 866 (N.Y. Sup. Ct. 2021), which held that "the public interest in the release of unsubstantiated claims does not outweigh the privacy concerns of individual officers."[1] The court also relied on multiple advisory opinions issued by the Committee on Open Government (the New York agency charged with administering the state's Freedom of Information Law) which take the position that, "when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may be withheld" on the ground that "disclosure would result in an unwarranted invasion of personal privacy." Accordingly, the court held that the disclosure of records relating to unsubstantiated claims would constitute an unwarranted invasion of personal privacy.

  The court also held that the repeal of Civil Rights Law § 50-a may not be applied retroactively and, thus, any records that pre-dated the repeal may be withheld. The court

[1] We note that the New York Appellate Division, Fourth Department, on November 10, 2022, held that the Supreme Court, in New York Civil Liberties Union v. City of Syracuse, 72 Misc. 3d 458, 148 N.Y.S.3d 866 (N.Y. Sup. Ct. 2021)(the case upon which the Court relied in Gannett Co., Inc v. Herkimer Police Department described herein), erred in determining that the law enforcement disciplinary records concerning open complaints were categorically exempt from disclosure and may be withheld in their entirety. The court ruled that, even in cases where a Freedom of Information Law request concerns release of unsubstantiated allegations, the respondents must review each responsive record and determine whether any portion of the record is exempt as an invasion of personal privacy and, to the extent that any portion of law enforcement disciplinary records concerning an open or unsubstantiated complaint of misconduct can be disclosed without resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt portion of the record to the requester. See New York Civil Liberties Union v. City of Syracuse, No. 21-00796, 2022 WL 16848033 (N.Y. App. Div. Nov. 10, 2022).

reasoned that it would be improper to impair the police officers' substantial rights and protections which had accrued prior to the repeal of the statute.

- ***Legislation.***

  - ***Maryland:***
    Senate Bill 0178, Ch. 62, ***An Act Concerning Maryland Police Accountability Act of 2021 – Search Warrants and Inspection of Records Relating to Police Misconduct (Anton's Law)***

    In addition to changing the procedures necessary for no-knock search warrants, this bill eliminates the mandatory exemption for all police officer misconduct records by removing such records from the definition of a "personnel record," unless such misconduct record is a technical infraction. The custodian of such disciplinary records may only deny inspection of the requested records under certain circumstances (e.g. disclosure would prejudice an investigation, constitute an unwarranted invasion of personal privacy, interfere with a legal proceeding, reveal confidential sources or investigative techniques) and must redact other protected information (e.g. medical information of the subject of the record, personal contact information of the subject of the record or witnesses, or information relating to the family of the subject of the record) in records that are approved for inspection. The custodian must also notify the subject of the record being inspected but may not disclose the identity of the requester to the subject of the record.

    SB 0178 was initially vetoed by Governor Hogan, but the House and the Senate overrode the Gubernatorial Veto to enact passage of the bill (effective October 1, 2021).

B. Records Maintained by a Law Enforcement Agency or Department of Correction

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

- ***Litigation.***

  - ***Connecticut:***
    Braasch v. Freedom of Information Commission
    (No. HHBCV206062369, 2021 WL 4906047 (Conn. Super. Ct. Sept. 21, 2021) (appeal pending))

    The Superior Court determined that body camera video footage maintained by the Yale University Police Department ("YPD") documenting its investigation of a student's report of a suspicious person in the common room of a residence hall was exempt from disclosure under the Freedom of Information ("FOI") Act because the video contained uncorroborated allegations of criminal activity.

    The requester, Braasch, who was also the student who initiated the call to the police, sought body camera video footage ("Video") documenting her interactions with the police. Braasch had called the YPD around 1:40 a.m. and reported that she was a Yale student and that a stranger was sleeping in a common room of her residence hall. She further reported that she had never seen the sleeping woman before, she had no idea who the sleeping woman was, and the woman should not be there. As a result of that call, the YPD dispatched several officers. Upon arrival, the YPD officers activated their body cameras and began to investigate the complaint by interviewing Braasch and the stranger. During her interview, Braasch told the YPD officer that the stranger was harassing her. Upon completion of its investigation, the YPD concluded that the stranger was a Yale student who had a right to be in the common room and that she had not harassed Braasch. The YPD prepared a report of the incident, in which it determined that no criminal activity had occurred.

    YPD denied the request for the Video, claiming that it was exempt under the FOI Act because it was "created in connection with an uncorroborated allegation of a crime." Under the FOI Act, disclosure is not required of "[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of ... uncorroborated allegations subject to destruction . . . ." Braasch appealed to the FOI Commission, and the Commission dismissed the appeal on the ground that the record was exempt under the uncorroborated allegations exemption.

    On appeal, the Superior Court affirmed the FOI Commission's decision. The court noted that the Video was compiled by the YPD in connection with its investigation of allegations of both trespass and harassment. The Video contained the student's allegations against the stranger, which were ultimately deemed to be uncorroborated

when the stranger was identified as a student and resident of the residence hall herself, and that she was not harassing Braasch. An appeal is currently pending with the Connecticut Appellate Court.

- ***Illinois:***
  Sun-Times v. Chicago Transit Authority
  (2021 IL App (1st) 192028, appeal denied sub nom. Chicago Sun-Times v. Chicago Transit Auth., 175 N.E.3d 116 (Ill. 2021) (June 24, 2021))

  The Illinois Appellate Court held that the Chicago Transit Authority ("CTA") and the Chicago Police Department ("CPD") demonstrated that disclosure of surveillance camera footage of a subway platform could reasonably be expected to jeopardize the effectiveness of the CTA's surveillance system and, thus, was exempt from disclosure under the Illinois Freedom of Information Act.

  The Chicago Sun-Times ("Sun-Times") sought disclosure of surveillance video of a subway platform that showed one customer pushing another customer off the platform. The lower court ordered disclosure of the video. On appeal, the CTA argued that disclosing the camera footage at issue could disclose the CTA's video surveillance network's vulnerabilities and, thus, jeopardize its effectiveness. According to the CTA, this information, in the wrong hands, could be used to plant explosive devices, jeopardize rescue personnel, and help criminals evade detection and capture.

  The court determined that the very broad language of the security measures exemption only requires a government agency "to demonstrate that release of a document 'could reasonably be expected to' jeopardize the effectiveness of its security measures—not that it *would* jeopardize them." The court determined that the CTA met this standard, particularly given its expert's affidavit testimony that the video revealed the quality, resolution, field of view, and blind spots of the CTA's surveillance cameras, and that information could enable individuals to evade these security devices when targeting passengers, planning attacks, or evading law enforcement.

- ***Legislation.***

  - ***Florida:***
    House Bill 873, Ch. 2022-115, *An Act Relating to Public Records…*
    This bill creates a public records exemption for information or records that could identify or reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in a state execution, including those who administer, compound, dispense, distribute, maintain, manufacture, order, prepare, prescribe, provide, purchase, or supply drugs, chemicals, supplies, or equipment needed to conduct an execution. The bill is subject to Florida's Open Government Sunset Review Act and is automatically repealed on October 2, 2027, unless reviewed and reenacted by the legislature.

Senate Bill 1046, Ch. 2022-107, *An Act Relating to Public Records…*
The bill creates an exemption from public disclosure for "law enforcement geolocation information" held by a law enforcement agency. The bill defines the term "law enforcement geolocation information" as information "collected using a global positioning system or another mapping, locational, or directional information system that allows tracking of the location or movement of a law enforcement officer or a law enforcement vehicle" ("geolocation information"). The exemption applies to such information held by an agency before, on, or after the effective date of the exemption. The exemption does not apply to uniform traffic citations, crash reports, homicide reports, arrest reports, incident reports, or any other official report issued by an agency which contain geolocation information.

The bill also requires a law enforcement agency to disclose geolocation information in the following instances:

- Upon a request from a state or federal law enforcement agency;
- When a person files a petition with the circuit court in the jurisdiction where the agency having custody of the requested geolocation information is located specifying the reasons for requesting such information and the court, upon a showing of good cause, issues an order authorizing the release of the geolocation information; or
- When geolocation information is requested for use in a criminal, civil, or administrative proceeding.

In addition, the bill specifies that geolocation information released pursuant to a petition-initiated court order must be viewed or copied under the direct supervision of the custodian of the record or his or her designee. The bill also specifies that the exception to the exemption for use of such information in a criminal, civil, or administrative proceeding does not prohibit a court in such proceeding, upon a showing of good cause, from restricting or otherwise controlling the disclosure of such information. The bill is subject to Florida's Open Government Sunset Review Act and is automatically repealed on October 2, 2027, unless reviewed and reenacted by the legislature.

- ***Illinois:***
  Senate Bill 3939, P.A. 102-753, *An Act Concerning Cybersecurity.*
  This bill amends Illinois' Freedom of Information Act to include cybersecurity vulnerabilities to the list of information exempt from disclosure. It also removes language from the security exemption that required a finding that a "clear and present danger to the health or safety of the community" could reasonably be expected to result from the disclosure of vulnerability assessments, security measures, or response policies or plans.

- ***Kansas:***
  Senate Bill 434, ***An Act Concerning Public Records…***
  This bill amends Kansas' Open Records Act to require requests for records that contain captured license plate data or that pertain to the location of an "automated license plate recognition system" (ALPRS) submitted to a state or local law enforcement agency or governmental agency to be directed to the agency that owns, leases, or contracts for the ALPRS. The bill also makes such records exempt from mandatory disclosure, except to the extent disclosure is otherwise required by law.

- ***Oklahoma:***
  Senate Bill 968, ***An Act Relating to the Oklahoma Open Records Act…***
  This bill exempts from disclosure audio or video recordings that depict the death of a law enforcement officer acting in his or her official duties, including any related acts or events immediately before or after that relate to the officer's death. However, the bill also provides an exception to the exemption when a court finds that the public interest or the interest of an individual outweighs the reason for denial. In addition, the bill provides that a law enforcement agency may allow a family member of the decedent to listen to or view such recordings.

- ***Tennessee:***
  House Bill 1957, Ch. 916, ***An Act to Amend Tennessee Code Annotated, Title 10, Chapter 7 and Title 38, Relative to Law Enforcement Body Camera Video.***
  This bill extends the date for repeal of current law exempting from disclosure law enforcement body camera videos that depict: (1) minors in a school that services grades K-12; (2) the interior of a licensed health facility; or (3) the interior of a private residence that is not being investigated as a crime scene. The bill also makes body camera videos that depict minors in a childcare agency, childcare program, preschool, or nursery school confidential.

- ***Utah:***
  Senate Bill 0254, ***Government Records Access Revisions.***
  Section 1 of this bill amends the exemption from disclosure for records regarding security measures designed for the protection of persons or property, public or private. The section clarifies that a "security plan" under this section, includes a plan: (1) to prepare for or mitigate terrorist activity; or (2) for emergency and disaster response and recovery. The section also adds the "results of, or data collected from, an agency's assessment or security audit" to the exemption. Last, the section creates an exception to the exemption for a certification that a community water system has conducted a risk and resilience assessment.

  Section 2 of the bill adds the following records of a drinking water or wastewater facility to the list of records exempt from disclosure: (1) an engineering or architectural drawing of such facility; and (2) a record "detailing tools or processes" such facility "uses to secure, or prohibit access to, records" regarding engineering or architectural drawings of the facility.

House Bill 0406, *Jail Photo Distribution Prohibition.*
This bill adds to the list of circumstances where an image taken of an individual during the booking process is not a protected record. The bill provides that such image is not confidential where it is disclosed to a potential witness or other individual with direct knowledge of events relevant to a criminal investigation or proceeding, for the purpose of identifying or locating an individual in connection with the investigation or proceeding.

- ***Washington, D.C.:***
  B24-0705, P.A. 24-403, *An Act to Provide, on a Temporary Basis, for Comprehensive Policing and Justice Reform for District Residents and Visitors, and for other Purposes.*
  Subtitle B of this bill increases access to body camera recordings worn by members of the Metropolitan Police Department. The bill requires that within five business days of a request for any such video from the Chairperson of the Council Committee with jurisdiction over the police department, unredacted copies must be provided to the chairperson. The bill also requires the Mayor to: (a) within five days of an officer-involved death or serious use of force, publicly release the names and body camera recordings of all officers who committed an officer-involved death or serious use of force; and (b) publicly release the names and body camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program launched in October 1, 2014. In addition, the bill provides that such recordings shall not be released where the decedent's next of kin or the individual against whom serious use of force was used do not consent to its release. When there is disagreement between the parties who must consent to the release, the Mayor shall seek a resolution in the superior court, and the court shall order release of the recording where it finds that the release is "in the interests of justice".

  Lastly, Subtitle B mandates that prior to publicly releasing a body camera recording, the police department must: (1) consult with an organization with expertise in trauma and grief on best practices for making such video available for viewing by the decedent's next of kin; (2) notify the decedent's next of kin of the date such recording will be released; and (3) offer the decedent's next of kin an opportunity to view the recording privately.

C. Privacy Exemptions

Below are summaries of cases and legislation concerning exemptions the purpose of which is to protect against the disclosure of information that could harm the privacy of individuals.

- ***Litigation.***

  - ***Michigan:***
    Mackinac Center for Public Policy v. Board of Regents, University of Michigan
    (Case. No. 21-000026-MZ, Michigan Court of Claims (July 12, 2021))

    The Michigan Court of Claims ordered the University of Michigan Board of Regents to produce all records related to the base salary, bonuses, overtime pay and all other forms of monetary compensation of certain employees, holding that the term "salary records", under the Michigan Freedom of Information Act ("FOI") Act, was not limited to records concerning solely "base" salaries.

    The plaintiff, Mackinac Center for Public Policy, requested that the university provide records related to the total gross salaries, including base salary, overtime, bonuses, and the like, for every employee working in the university's Office of Institutional Equity for certain years. The FOI Act requires institutions of higher education to make available to the public "the salary records of an employee or other official…." The university produced only the base salary information for the relevant employees, arguing that the FOI Act did not require it to produce records related to other forms of compensation, such as bonuses or overtime pay. The university also averred that the public disclosure of the information would constitute an unwarranted invasion of the employee's privacy.

    The Court of Claims disagreed with both arguments. According to the court, "salary records", meant more than just "salary," but rather all documents reflecting the amount of money or other compensation disbursed to an employee in exchange for the employee's work. With respect to the invasion of privacy claim, the FOI Act permits a public agency to exempt from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." The court reasoned that the names and salaries, including bonuses and overtime pay, do not constitute "intimate details of a highly personal nature" and disclosure of the information fulfills the policy objectives of the FOI Act because it "allows the taxpayers to learn how the people's money was spent…."

  - ***Pennsylvania:***
    Pennsylvania Department of Health v. Mahon
    (No. 1066 C.D. 2021, 2022 WL 3569574 (Pa. Commw. Ct. 2022)(Aug. 19, 2022))

    The Commonwealth Court of Pennsylvania held that data regarding the number of patients certified to receive medical marijuana under the Medical Marijuana Act

("MMA") for specific conditions did not constitute protected "patient information" and, thus, was subject to disclosure under the Right-to-Know Law ("RTKL").

The requesters sought from the Department of Health ("DOH") "[a]ggregate data for the number of medical marijuana certification issues [sic] for each of the eligible qualifying conditions." The DOH denied the request on the ground that responsive records are confidential patient information under the MMA.

On appeal, the court interpreted the MMA as rendering confidential only information obtained by the DOH "relating to patients," who were defined by the MMA to be "individual[s]." Thus, the court concluded that the aggregated data requested was not patient information and was, therefore, subject to disclosure.

PublicSource v. Pennsylvania Department of Health (Off. of Open Recs.)
(268 A.3d 1130 (Pa. Commw. Ct. 2021)(November 9, 2021))

The Commonwealth Court of Pennsylvania held that the confidentiality provisions of the state's Vital Statistics Law ("VSL") strictly prohibited the Pennsylvania Department of Health ("Department") from disclosing raw data from death records showing the pneumonia and influenza deaths for the years 2019 and 2020.

A request was made under the state's Right-to-Know Law to the Department for copies of public records showing pneumonia and influenza deaths in Pennsylvania by county and date for 2019 and 2020. After the Department denied the request, the requesters appealed to the Pennsylvania Office of Open Records ("OOR"). The OOR upheld the denial, ruling that the raw data for 2019 and 2020 had not yet been aggregated and, thus, included individually identifiable health and personal information which was confidential under the VSL.

On appeal, the court agreed. Pursuant to the VSL, death records, and the information contained therein, may only be disclosed to family members, research institutions and government agencies conducting an official duty. Aside from those three classes of persons, death records are confidential and not open to public inspection pursuant to the VSL. Until the Department prepares aggregated cause of death statistics, the only Department records that contain cause of death information are decedents' death records, which are confidential under the VSL. The Department had not yet aggregated the 2019 and 2020 data into general cause of death reports and, therefore, only had the raw data contained in the death records. The court held that the Department was strictly prohibited by the VSL from disclosing the 2019 and 2020 data and that the Department was not required to manipulate the data in order to make it disclosable. The court also noted that the Department would make the requested information public once it was properly aggregated.

- ***Texas:***
  Douglas Lamb v. Texas Secretary of State
  (628 S.W.3d 339 (Tex. App. 2021)(June 17, 2021))

  A Texas Court of Appeals determined that the trial court properly found that the email addresses of the Texas presidential electors were properly withheld from disclosure under the "member of the public" email address exception to the Texas Public Information Act ("PIA").

  Days after the 2016 presidential election, the appellant requested from the Texas Secretary of State ("the Secretary of State") the names, telephone numbers, and email addresses of Texas' 38 presidential electors in 2016. The Secretary of State ultimately released the electors' names and phone numbers but withheld email addresses on the basis that they were excepted from disclosure under the PIA, which protects disclosure of "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body." After the trial court agreed with the Secretary of State, the appellant appealed.

  The Texas Court of Appeals affirmed, holding, as a matter of first impression, that "member of the public" means "those persons who do not make up or belong to a state governmental body." The court concluded that Texas presidential electors were not part of any state governmental body but, rather, were members of their respective political parties, here, the Texas Republican Party. Therefore, the court determined that the presidential electors were "members of the public," and their email addresses were exempt from disclosure.

- ***Legislation.***

  - ***Connecticut:***
    House Bill 5393, P.A. 22-26, *An Act Concerning Court Operations and the Uniform Commercial Real Estate Receivership Act.*
    Section 58 of the bill adds a state marshal appointed by the State Marshal Commission to the list of classifications of state employees whose home addresses are exempt from disclosure under the Freedom of Information Act, pursuant to Conn. Gen. Stat. §1-217.

  - ***Florida:***
    Senate Bill 1614, Ch. 2022-198, *An Act Relating to Public Records.…*
    This bill makes crash reports that reveal personal information concerning parties involved in a crash and the computerized crash report data confidential and exempt from disclosure. The bill also makes any person who obtains or knowingly discloses a crash report or crash data, or uses the personal information revealed therein for any purpose not otherwise permitted under 18 U.S.C. §2721 (b), Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records, liable for damages and attorney fees and litigation costs.

Additionally, the bill exempts from disclosure driver information contained in "uniform traffic citations" held by an agency. However, the bill does permit agencies to provide summary reports of crashes to radio, television, newspapers and other news media outlets. The majority of the bill, with the exception of the newly created liability related to crash reports, is subject to Florida's Open Government Sunset Review Act and is automatically repealed on October 2, 2027, unless reviewed and reenacted by the legislature.

D. Attorney-Client Privilege

Below are summaries of court decisions concerning access to records which were claimed to be subject to the attorney-client privilege.

- ***Litigation.***

  - ***Michigan:***
    Detroit News, Inc. v. Independent Citizens Redistricting Commission
    (No. 163823, 2021 WL 6058031 (Mich. Dec. 20, 2021))

    As a matter of first impression, the Supreme Court of Michigan held that a closed-session meeting of the Independent Citizens Redistricting Commission ("the Commission"), where the Commission reviewed legal memoranda and received legal advice from its attorneys, violated the Michigan Constitution, which required that the Commission conduct all of its business in open meetings. The court concluded that this constitutional requirement preempted the common law attorney-client privilege.

    In 2018, the voters of Michigan elected to vest responsibility for redistricting in the Commission, an independent body consisting of thirteen commissioners randomly selected from a pool of applicants. The Commission was charged with drawing redistricting plans for the state and federal legislative offices. Pursuant to the state constitution, the Commission was required to conduct all of its business at open meetings and to publish the proposed plans and any supporting materials used to develop the plans.

    A group of news and media organizations sued to obtain a recording from a closed-session meeting the Commission held with its attorneys, as well as ten legal memoranda that the Commission claimed were privileged attorney-client communications. The Commission argued the meeting was properly held in secret because it was receiving legal advice concerning litigation risks related to certain redistricting criteria and, thus, protected by the attorney-client privilege.

    The Supreme Court held that the meeting concerned the adoption of redistricting plans that complied with the Voting Rights Act and other laws, which constituted the Commission's "core business" under the state Constitution. The court also determined that seven of the ten legal memoranda were supporting materials required to be published pursuant to the Constitution because they concerned the content of the maps or the process by which the maps were developed.

- ***Ohio:***
  State ex rel. Hicks v. Fraley
  (166 Ohio St. 3d 141(August 12, 2021))

  The Supreme Court of Ohio ordered the Clermont County Auditor ("Auditor") to produce a 2004 legal-opinion letter that she received from the Clermont County Prosecutor's Office because she waived any attorney-client privilege that attached to the letter when she voluntarily disclosed it to a special prosecutor, who was appointed to investigate her.

  The Auditor's opponent in the 2018 Republican primary election, Christopher R. Hicks ("Hicks"), filed a private-citizen affidavit (permitted under Ohio statute), asserting that the Auditor had committed a crime by employing her stepson in her office. The Clermont County Municipal Court held a hearing and dismissed the charged offenses. During the hearing, the special prosecutor referred to a 2004 opinion letter from the Clermont County Prosecutor's Office ("Prosecutor's Office") to the Auditor. Such letter was filed under seal with the court.

  Hicks made a public records request for the opinion letter to the Prosecutor's Office. The request was denied on the basis that the legal opinion was exempt from disclosure under the attorney-client privilege exception to the Ohio Public Records Act ("PRA").

  The court disagreed with the denial. Although the Prosecutor's Office acted as the Auditor's legal counsel with respect to the 2004 opinion letter, the special prosecutor was appointed to investigate her after the Clermont County prosecutor recused himself due to the inherent conflict in prosecuting his statutory client. Thus, the special prosecutor's relationship to the Auditor was adversarial. Accordingly, the court held that, when the Auditor voluntarily disclosed the opinion letter to the special prosecutor, she disclosed it to an adverse party and, thus, waived the privilege, making it no longer exempt under the PRA.

V. Other Noteworthy Litigation and Legislation

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

- ***Collective Bargaining Agreements.***

  - ***Colorado:***
    Senate Bill 22-230, Ch. 260, *An Act Concerning the Expansion of County Employees' Rights to Collective Bargaining, and, In Connection Therewith, Making an Appropriation*.
    The bill expands the right to collective bargaining for employees of a county with a population of 7,500 people or more. Additionally, §8-3.3-114 of the bill makes all documents, proposals, and tentative agreements drafted or exchanged during the negotiation of a collective bargaining agreement confidential and exempt from the Colorado Open Records Act.

- ***Copying Fees and Access to Records.***

  - ***Connecticut:***
    Cooke v. Freedom of Information Commission
    (No. HHB-CV19-5026783, 2022 WL 1059571 (Conn. Super. Ct. February 23, 2022))

    The Superior Court held that the public's right to inspect records, under the Freedom of Information Act ("FOI") Act, is a right to inspect records at the agency's regular office or place of business during regular business hours.

    The requester, who at all relevant times, was an inmate in Department of Correction's ("DOC") custody, requested to inspect certain records maintained by the DOC. The DOC offered to provide the plaintiff with copies of the requested records upon payment of a copy fee. However, the plaintiff refused to obtain the offered copies and instead demanded to personally inspect the original records, for which no fee could be charged. The DOC asserted that they maintained the requested records at DOC's administrative offices. Because the plaintiff was incarcerated, he was unable to visit DOC headquarters to inspect the documents. The plaintiff filed a complaint with the FOI Commission alleging that the DOC violated the FOI Act by not providing the requested records to the plaintiff at his location of incarceration for inspection. The FOI Commission concluded that the DOC had not violated the FOI Act in connection with the DOC's handling of the plaintiff's FOI request, and the plaintiff appealed.

    Agreeing with the FOI Commission, the Superior Court found that the FOI Act did not require the DOC to bring the records to the inmate so that he could inspect them in prison. Based upon the language of the statute, the court held that the plaintiff's right to inspect the requested records depended upon his ability to do so at the DOC's regular

office or place of business. The FOI Act required each agency to keep and maintain all public records at its "regular office or place of business in an accessible place." The public's ability to inspect records is limited to "regular office or business hours." The court further reasoned that requiring agencies to transfer or move records at a member of the public's request "would interfere with the ability of other members of the public to inspect the same records, and with the ability of the agency to safeguard and maintain such records."

- ***New Mexico:***
  Open Access NM v. Koluncich
  (No. A-1-CA-39157, 2021 WL 4552391 (N.M. Ct. App. 2021)(Oct. 5, 2021))

  The Court of Appeals of New Mexico held that the New Mexico Inspection of Public Records Act ("IPRA") permitted the New Mexico State Land Office to charge $26.50 to provide requested public records via Dropbox.

  The custodian of records claimed that the fee covered the staff time to upload approximately 2,160 pages of responsive records to Dropbox, an electronic file-sharing platform. The requester refused to pay the fee and filed a lawsuit.

  The IPRA allows a state agency to charge "the actual costs associated with downloading copies of public records to a computer disk or storage device[.]" The Court of Appeals determined that uploading files to Dropbox was not much different, if at all, from downloading records to a computer disk or storage device. Based on the records custodian's estimation of the volume of records retrieved and the amount of time it took to upload individual files from the agency's network servers, the court concluded that $26.50 represented the actual cost associated with making the requested public records available for download.

- ***Iowa:***
  Senate File 2322, Ch. 1039, *An Act Relating to the Assessment of Fees when a Person Requests Examination and Copying of Public Records.*
  The bill requires the custodian of a public record to provide copies of requested records to the requester at no cost other than copying costs, where it takes less than thirty minutes to produce such copies of requested public records. When additional expenses are necessary, they must be "reasonable" and communicated to the requester upon receipt of the request. The bill does not define or provide examples of what costs are "reasonable." The bill also allows a requester to contest the reasonableness of the custodian's expenses. Last, the bill provides that costs for legal services may be included as "reasonable expenses" but should only be utilized for the redaction or review of legally protected confidential information.

- ***Louisiana:***
  Senate Bill 473, P.A. 337, ***An Act to Amend and Reenact R.S. 44:32(C)(1)(a), Relative to Public Records…***
  This bill adds "the transmission of electronic copies of public records" to the act of copying public records, for which the custodian of public records may establish and collect reasonable fees. The bill does not define or provide examples of what costs are "reasonable."

- ***Virginia:***
  House Bill 307, Ch. 756, ***An Act to Amend and Reenact §§ 2.2-3704 and 2.2-3704.1 of the Code of Virginia, Relating to the Virginia Freedom of Information Act; Estimated Charges.***
  This bill amends the provisions of Virginia's Freedom of Information Act regarding costs. The bill requires that a public body make all reasonable efforts to supply records requested by a citizen at the lowest possible cost. The bill also provides that no such public body shall charge for the provision of scholastic records that must be made available under the federal Family Educational Rights Privacy Act to a parent or legal guardian of a minor student or a student who is 18 years of age or older.

  In addition, the bill requires a public body, prior to conducting a search for records, to notify the requester in writing of the public body's right to assess reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for such records and to inquire whether such requester would like a cost estimate in advance of supplying the requested records.

  Finally, the bill provides that any costs incurred by a public body in estimating the cost of supplying requested records shall be applied toward the overall charges to be paid by the requester for supplying such records.

➢ ***COVID-19.***

- ***California:***
  Voice of San Diego v. Superior Court of San Diego County; County of San Diego
  (66 Cal. App. 5th 669, 280 Cal. Rptr. 3d 906 (2021), as modified (July 27, 2021), review denied (Oct. 27, 2021))

  A California appeals court denied a petition directed at obtaining an order requiring the County of San Diego ("County") to produce the "Location" and "Location Address" columns on a spreadsheet showing each confirmed COVID-19 outbreak in the county, which the County had redacted. The court held that the County properly withheld the exact location of disease outbreaks during the COVID-19 pandemic pursuant to a catchall exemption under the California Public Records Act ("PRA") allowing a government agency to withhold a public record if it can demonstrate that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The County maintained a spreadsheet showing each outbreak of COVID-19 in the County, which included the dates of the outbreak, the city where it occurred, the number of people involved, and whether the outbreak occurred in a community setting, a skilled nursing facility or a non-skilled congregate living facility. When releasing the spreadsheet to the public, the County redacted the columns that would show the specific name and address of each outbreak location. The appeals court credited the County's uncontradicted evidence that disclosure of the exact name and address of an outbreak location would have a chilling effect on the public's willingness to cooperate with contact tracing efforts. The court concluded that the County's ability to conduct effective contact tracing in the midst of a deadly pandemic outweighed the public's interest in obtaining information about the exact outbreak locations.

- ***Facility Security.***

  - ***Pennsylvania:***
    McKelvey v. Pennsylvania Department of Health
    (255 A.3d 385 (Pa. 2021)(July 21, 2021))

    The Supreme Court of Pennsylvania held that applications to the Department of Health ("DOH") for permits to grow, process or dispense medical marijuana, made pursuant to the Pennsylvania Medical Marijuana Act are public records that must be disclosed under Pennsylvania's Right-to-Know Law ("RTKL"). Nevertheless, the Supreme Court held that information relating to facility security could be redacted.

    Pursuant to the RTKL, reporters requested copies of all medical marijuana business permit applications submitted to the DOH. Such applications contained extensive information, including financial and operational capabilities; site and facility plans; the applicant's principals, operators, financial backers and employees; and security information. Applicants were required to submit redacted and unredacted versions of their applications. The DOH accepted, without review, all redactions as the applicants deemed fit and posted those versions on the DOH website, and denied, in large part, the request and referred the requesters to the redacted applications posted on the website. Thereafter, the requesters filed a complaint with the Office of Open Records ("OOR"). OOR ordered the DOH to disclose most of the information after finding the appellants (DOH and intervening permit applicants) failed to prove the applicability of any claimed exemptions.

    On appeal, the Commonwealth Court, in relevant part, determined that the locations of security and surveillance measures and the description of the processes for transmitting patient data and transporting products, may be redacted under the "facility security exemption" because disclosing such information had a reasonable likelihood of endangering security of facilities engaged in the legal cannabis industry. The Supreme Court upheld, in relevant part, the Commonwealth Court's determination that industry-wide information may be used to support the facility security exemption. The case also

addressed various other issues, including whether certain information constituted trade secrets.

- ***FOI Training Requirements.***

  - ***Connecticut:***
    Senate Bill 18, P.A. 22-16, ***An Act Concerning Various Revisions to the Higher Education Statutes.***
    This bill concerns various revisions to Connecticut's Higher Education statutes. Among other requirements, the bill mandates that board members of the Board of Regents for Higher Education and the Board of Trustees of the University of Connecticut adopt a policy requiring that any new board member receive and complete instruction and training in the provisions of the Freedom of Information Act not later than one year after being appointed or elected to the board.

- ***Justification for Denial of Access to Public Records.***

  - ***New York:***
    Assembly Bill 5470/Senate Bill 6017, Ch. 808, ***An Act to Amend the Public Officers Law…***
    This bill requires a "particularized and specific justification" for denial of access to records under New York's Freedom of Information Law, making the required justification consistent with New York caselaw. The bill does not define or provide examples of what constitutes a "particularized and specific justification."

    The bill also requires that, if an agency is considering denying access to a record because it would interfere with a judicial proceeding, such agency must notify the judge before whom the proceeding is pending. The judge must inform the requester and give such requester a reasonable opportunity to be heard and then make a ruling on whether the request should be denied.

- ***Motor Vehicle Registration Records Exemption.***

  - ***Florida:***
    Senate Bill 0598, Ch. 2022-196, ***An Act Relating to Public Records…***
    The bill expands a public records exemption for a registration certificate and registration license plate or decal issued under a fictitious name to include records pertaining to an application submitted by any office of criminal conflict and civil regional counsel. The bill is subject to Florida's Open Government Sunset Review Act and is automatically repealed on October 2, 2027, unless reviewed and reenacted by the legislature.

- ***Open Data Formats and Data Sharing.***

  - ***Hawaii:***
    House Bill 1885, P.A 167, ***An Act Relating to Government Data.***
    This bill establishes a chief data officer and data task force within the State's Office of Enterprise Technology Services to develop, implement, and manage statewide data policies, procedures, and standards and to facilitate data sharing across state agencies. The chief data officer, with the help of the data task force, is charged with developing the policies, procedures, and standards that agencies must follow in making data sets maintained by such agencies available to the public.

  - ***New York:***
    Assembly Bill 1442B / Senate Bill 4625A, Ch. 482, ***An Act to Amend the Public Authorities Law, in Relation to Enacting the Metropolitan Transportation Authority [MTA] Open Data Act.***
    The bill requires data from the MTA, and its subsidiaries and affiliates, to be published in open data formats that are easily accessible to the public. This information would require MTA's budget, finances, routes and services to be published on its own website, as well as on the state's open data portal. The MTA must also publish a schedule for complying with the bill and designate a "data coordinator" to be responsible for the agency's compliance with its open data requirements.

- ***Procedures for Making and Responding to Records Requests.***

  - ***Arizona:***
    House Bill 2587, Ch. 142, ***An Act Amending Title 39, Chapter 1, Arizona Revised Statutes, by Adding Article 5; Relating to Public Records.***
    This bill requires a public agency to provide to a requester the name, telephone number and email address of an employee or department that is authorized to provide the requested information or able to forward the request to the correct employee or department. This contact information must also be posted on the agency's Internet website. In addition, the bill requires the authorized employee or department to acknowledge receipt of the request within five business days, unless the agency maintains a centralized online portal for records requests that provides an automatic receipt upon submission of a request.

  - ***Idaho:***
    House Bill 0811, Ch. 306, ***An Act Relating to Public Records … .***
    The bill requires that public records requests be made to the designated custodian of such records and provides that no public agency or employee is under any obligation to respond to a public records request that fails to comply with such requirement. The bill also requires that if a public agency has an Internet website, it must note the name and contact information of its custodian of records on such website and promptly update any changes.

In addition, section 14 of the bill sets forth the procedures for making a public records request to the Idaho Legislature, the House of Representatives, the Senate, and an individual legislator. It further provides that no chamber or legislator is under any obligation to respond to a records request that does not comply with the outlined procedures.

- ***Louisiana:***
  Senate Bill 478, P.A. 770, ***An Act to Amend and Reenact R.S. 44:1(A)(2)(a), 32(A), (C)(1)(a) and (D), 35(E)(2), and 37, Relative to Public Records…***
  The bill makes the following changes, among others, to Louisiana's public records statutes. The bill allows the records custodian to ask the requester for specificity or clarification regarding a records request if, upon initial review, the custodian cannot ascertain what records are being requested. In addition, the bill allows the custodian, only after reasonable attempts to narrow or specify the request, to deny access if it would "substantially disrupt required government operations." Additionally, this bill makes clear that a custodian is under no obligation to provide copies of requested records to a requestor who has been notified of the copying fee in advance of production and has failed to pay an outstanding balance. It also requires the custodian of a record who questions whether a requested record is a "public record," to notify the requester within five days of the custodian's determination and reasons therefor. Last, the bill limits fines or possible imprisonment only to those records custodians who "arbitrarily or capriciously" violate the public records statutes.

- ***"Protected Records" and Modifications to Government Immunity.***

  - ***Utah:***
    House Bill 0399, ***Government Record Amendments.***
    Section 1 of this bill adds to the list of what records can be classified as "protected records" a statement given by a governmental employee as part of a governmental entity's investigation into possible wrongdoing, where the governmental entity: (a) requires the statement under threat of disciplinary action; and (b) provides the employee assurance that the statement cannot be used against the employee in a criminal proceeding.

    The bill also modifies governmental immunity provisions relating to claims for attorney fees and costs under the Government Records Access and Management Act and exempts those claims from the Governmental Immunity Act of Utah. Additionally, the bill includes costs in what can be claimed in certain proceedings under the Governmental Records Access and Management Act and modifies jurisdiction of the Court of Appeals to exclude an "informal adjudicative proceeding" that precedes judicial review.

- ***Records Related to Investigations of Price Gouging during Declared States of Emergency.***

  - ***Kentucky:***
    House Bill 282, Ch. 110, ***An Act Relating to Health Care Services Agencies.***
    Section 6(3) of this bill requires a health care services agency to disclose certain information upon request from the Attorney General during the Attorney General's investigation of an alleged or suspected violation of price gouging during declared states of emergency.

    Section 6(4) of the bill makes any information disclosed to the Attorney General pursuant to §6(3) exempt from Kentucky's open records laws.

- ***State Contracts – Online Posting Requirement.***

  - ***Connecticut:***
    House Bill 5453, P.A. 22-65, ***An Act Requiring the Online Posting of Certain State Contracts.***
    This bill requires that contracts entered into by the state without being subject to competitive bidding or competitive negotiation requirements be posted on the Internet website of the Department of Administrative Services.

- ***Trade Secrets, Commercial and Financial Information.***

  - ***Connecticut:***
    Allco Renewable Energy Ltd. v. Freedom of Information Commission
    (205 Conn. App. 144 (2021) (June 8, 2021))

    The Connecticut Appellate Court upheld the trial court's decision finding that an answer key document maintained by the Department of Energy and Environmental Protection ("DEEP"), which was created to analyze request for proposals responses, was a trade secret exempt from disclosure under the Freedom of Information ("FOI") Act.

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

    On appeal, the requesters argued, in part, that the answer key cannot be a trade secret because DEEP did not engage in "trade." The court disagreed, concluding that a "public agency may hold a trade secret regardless of whether it regularly engages in trade, so long as the nature and accessibility of the document at issue qualifies it as a trade secret." The court also held that the document required confidentiality because "[t]he

record as a whole reflects that the answer key's entire benefit relies on the department holding it in confidence in order to ensure the integrity of the undertaking for public benefit." As a matter of first impression, the Appellate Court also upheld the FOI Commission's interpretation of the term "given in confidence," within the statute exempting from public disclosure "commercial or financial information given in confidence, not required by statute," as requiring:

> an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the public from any other source, or where the information is such that [it] would not customarily be disclosed by the person who provided it.