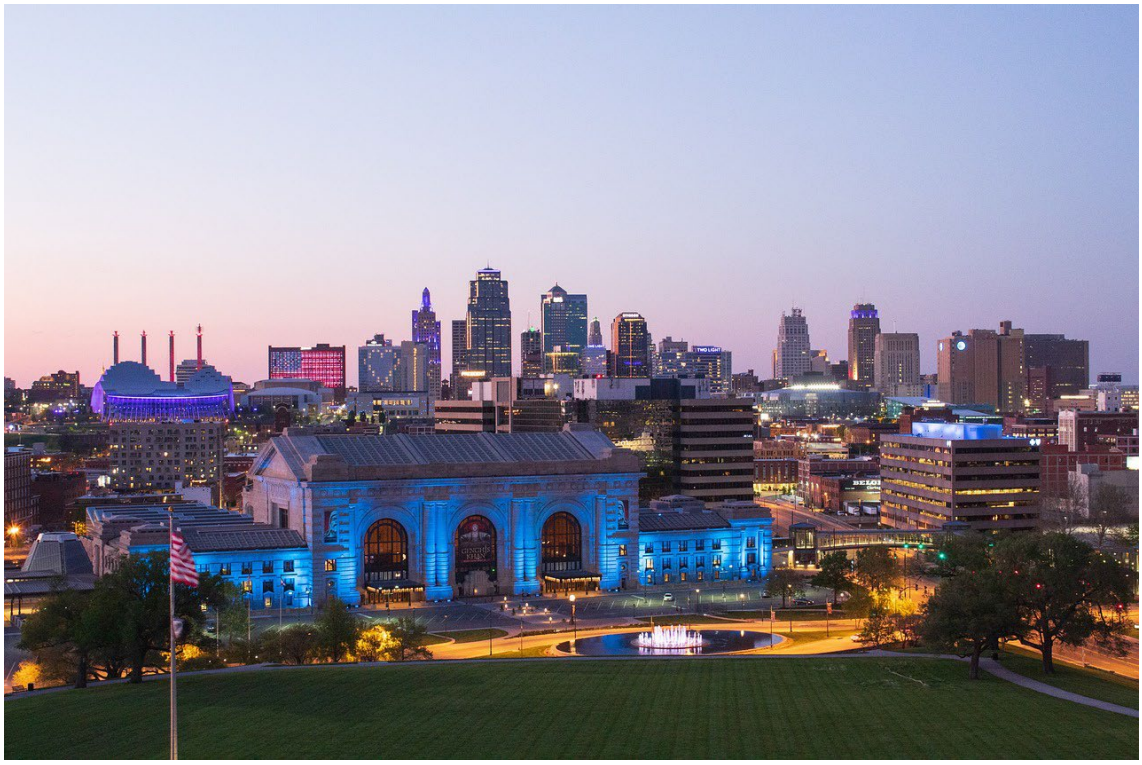
Freedom of Information
State Litigation and Legislation Update



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Prepared by

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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 2022. The report is not an all-inclusive study. It should, however, provide a picture of where states stand on issues of government transparency. This year's report features court decisions issued and legislation enacted through October 2023.

Sources for this report include Westlaw, 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 various other local sources.

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

Special thanks to Paula Pearlman 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.***

  - ***California:***

    Iloh v. Regents of University of California
    (87 Cal.App.5th 513) (January 13, 2023)

    The California Court of Appeals, Fourth District, Division 3, held that post-publication communications between a professor and several academic journals regarding retracted articles were disclosable public records under the California Public Records Act ("CPRA") and not exempt from disclosure under a "catchall" exemption nor a personnel files exemption.

    After a professor at the University of California Irvine ("UCI") submitted for publication several articles relating to her field of study to journals unaffiliated with the university, the academic journals retracted or corrected these articles due to concerns of plagiarism or inaccurate citation references. Soon thereafter the professor left her position. A third-party group, the Center for Scientific Integrity ("CSI"), submitted a records request to UCI seeking all correspondence between the professor, UCI, and the journals regarding the retracted articles. The professor filed an action with the court to prevent disclosure of the records.

    The Court of Appeals upheld the lower court's denial of the professor's motion for a preliminary injunction. The Court reasoned that the records sought by CSI were post-publication communications by a professor at a public university relating to her field of study at that university, some of which concerned whether the plaintiff committed plagiarism or otherwise violated university policies on academic integrity, and were, therefore, the "public's business."

  - ***New Jersey:***

    ACLU of New Jersey v. County Prosecutors Association of New Jersey
    (474 N.J.Super. 243) (December 22, 2022)

    The New Jersey Superior Court, Appellate Division, held that the County Prosecutors Association of New Jersey ("CPANJ") was not a public agency and, therefore, not subject to the public disclosure requirements under the Open Public Records Act ("OPRA"), nor the common law right of access. The plaintiff, the American Civil Liberties Union of New Jersey ("ACLU"), sought disclosure of various types of records from CPANJ, a voluntary nonprofit association comprised of the 21 county prosecutors of New Jersey. CPANJ denied the request, stating that it was not a public agency and, therefore, neither subject to the OPRA nor the common law right of access. The plaintiff

filed an action with the Superior Court seeking to compel disclosure. However, the court granted CPANJ's motion to dismiss, agreeing it was not a public agency. The plaintiff appealed.

The Appellate Division upheld the lower court's determination that CPANJ was not a public agency subject to the OPRA or the common law right of access. Under the OPRA, a public agency is defined to include "instrumentalit[ies] … created by a .. combination of political subdivisions." The Court rejected the ACLU's contention that CPANJ met this definition. Although the counties were political subdivisions, nothing in the record indicated that the counties were involved in creating CPANJ.

The Court also noted that county prosecutors were distinct from the counties they operated in. Furthermore, the county prosecutors' offices were not "political subdivisions" as they had not been designated as such by the legislature and lacked the governmental attributes commonly associated with political subdivisions.

Similarly, the Appellate Division concluded that CPANJ was not subject to the common law right of access. The Court rejected the ACLU's argument that the records are common law public records because they were "made by county prosecutors while conducting business related to or filed as a result of their public functions." The Court noted that CPANJ was a voluntary association created through independent action. Nothing required the prosecutors to be CPANJ members and they did not exercise any official prosecutorial powers when participating in CPANJ.

On March 23, 2023, the Supreme Court of New Jersey granted certification to review this case.

- ***Pennsylvania:***

  Penncrest School District v. Cagle
  (293 A.3d 783) (April 24, 2023)

  The Commonwealth Court of Pennsylvania, in a matter of first impression, established a framework of factors that must be considered to resolve whether social media activity constitutes an agency record subject to disclosure under Pennsylvania's Right-to-Know Law ("RTKL").

  An individual took photos of a high school library display of books addressing LGBTQ+ issues in anticipation of Pride Month, and subsequently posted the photograph on his Facebook page, commenting: "Hey Maplewood/PENNCREST parents...just a little pic of what is on display at Maplewood High School Library... I realize this makes me a hater, but I am totally ok with that label...[.]" A member of the local school board then publicly shared the post on his own personal Facebook account with an additional comment: "This is on display at Maplewood High School. Besides the point of being totally evil, this is not what we need to be teaching kids. They aren't at school to be brainwashed into thinking homosexuality is okay. Its [sic] actually being promoted to the point where it's even 'cool.'" Subsequently, the president of the board, publicly shared the original post without comment on his own personal Facebook

account. A local newspaper published an article about these social media posts and also stated that the board member intended to raise the issue at a board meeting. Thereafter, an individual requested Facebook posts and comments related to homosexuality. The Office of Open Records granted relief to the requester and the school district appealed. The Court of Common Pleas affirmed, and the school district appealed again.

On appeal, the school district contended that even though board members are public officials, they created the social media posts on their personal social media accounts in their personal capacities and, even if they reflect the board's activities, the social media posts do not meet the definition of a public record under the RTKL.

The RTKL defines a "record" as information "that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency."

The Commonwealth Court disagreed with the trial court to the extent it suggested that merely because a board member expressed his views about board business in a social media post, he created a public record. Rather, the court developed a series of nonexclusive factors that must be considered in determining whether a school board member's public social media post documents a transaction or activity "of the agency", or is created in connection with a transaction, business, or activity "of the agency" as required by the RTKL. With respect to social media accounts, the following must be considered: the private or public status of the account; whether the account has the "trappings" of an official agency account; whether the school board member has an actual or apparent duty to operate the account; whether the authority of the public office itself is required to run the account; and the universe of responsive posts. With respect to the social media posts themselves, the following must be considered: whether such posts prove, support, or evidence a transaction or activity of the agency; and whether the posts were created, received, or retained by law or in connection with a transaction, business, or activity of the agency. Finally, the court stated that whether the information at issue was created, received or retained by public officials in their official capacity must also be determined.

Consequently, the Commonwealth Court remanded the case to the trial court to expand the record as necessary to determine whether the social media activity at issue constituted an agency record subject to disclosure based upon the framework announced by the Commonwealth Court.

- ***Rhode Island:***

Key Corp. v. Greenville Pub. Libr.
(288 A.3d 974) (February 17, 2023)

The Supreme Court of Rhode Island held that the Greenville Public Library (the "Library") was a "public body" for purposes of the Access to Public Records Act (the "APRA").

The requester submitted a public records request to the Library relating to the procurement, bidding and award process for the Library's parking lot project. The Library refused to produce any responsive records, maintaining that the Library was a private, nonprofit corporation, not a public body subject to the APRA. The requester filed a complaint in court, seeking, *inter alia*, a declaratory judgment. The requester contended that the Library was a public body or agency as defined by the APRA because it was a quasi-municipal corporation created by legislation in 1882 to provide public library services, it received 70 percent of its funding from the town, it was listed as a municipal department on the Town's website, and the Library was included in the town's annual budget and financial report. The trial court agreed with the requester and the Library appealed.

The Supreme Court upheld the lower court's determination that the Library was a public body subject to the APRA. After review of the undisputed facts (namely, that the Library is listed as a "public body" on the Secretary of State's open meetings website; the Library complies with the Open Meetings Act; the Library receives approximately 70 percent of its funding from the town and is included in the town's annual report; the contact information included in the solicitation for bids on the parking lot project listed the town and a town as the contact person for the bid; the Library is listed on the town's web pages as a department of the town; the town has included documentation of appropriations to the Library in its budget planning; and the Library is insured by the Rhode Island Interlocal Risk Management Trust (which covers municipal agencies)), there was no error by the court in determining that the Library was a "public body."

- ***Wyoming:***

Gates v. Mem'l Hosp. of Converse Cnty.
(533 P.3d 493) (August 8, 2023)

The Wyoming Supreme Court concluded that an insurance carrier's settlement of a previous medical malpractice claim against Memorial Hospital of Converse County (the "Hospital") was an "official public record" and was subject to the Wyoming Public Records Act ("WPRA"). Additionally, the Court determined that a district court lacks the inherent power to issue a protective order to restrict disclosure of or access to public records that the WPRA itself does not exempt.

This case arises out of a medical malpractice case filed by the requestors against the Hospital. The requestors made a WPRA request to the Hospital seeking, among other things, all governmental claims for medical malpractice filed against the Hospital and all settlements or payments regarding the same. The Hospital provided the requestors with documents related to two claims. Still, it noted that it would not produce any other settlement agreements between the Hospital and any other person or party. The Hospital averred that most of the other agreements were entered into by an insurance carrier and, therefore, were not documents subject to disclosure under the WPRA. Additionally, the Hospital indicated that the other settlement agreements included confidentiality provisions.

Counsel for the requestors then followed up with the Hospital regarding a specific settlement that purportedly used public funds – i.e., the "MB Settlement." The Hospital subsequently informed the requestors that it would not produce documents relating to the MB Settlement because that claim had not been filed as a formal governmental claim.

The requestors filed an action asking the district court to compel the Hospital to produce the requested records. With respect to the "MB Settlement", the district court concluded that because the case relating to such settlement was resolved before the filing of a notice of claim, the MB Settlement documents were not subject to production under the WPRA. The district court also concluded that the other settlement agreements were not exempt from disclosure. While the court ordered the disclosure of the other settlement agreements, it did so under a protective order, which, among other things, limited the requestor's use of the agreements in the underlying medical malpractice case.

The Wyoming Supreme Court reversed the decision of the district court. With respect to the "MB Settlement", although no formal notice of claim was filed in the case, the agreement was a public record. Under the WPRA, the definition of an "official public record" includes all agreements and contracts to which a governmental entity is a party and all documents relating to the use and disposition of all public property and public income. It was undisputed that the MB Settlement was a contract to which the Hospital was a party that involved the use of public funds. Accordingly, the settlement agreement was subject to disclosure under the WPRA.

The Court also concluded that the district court erred in imposing a protective order on the disclosed documents. The Court noted that the information contained in public records subject to production under the WPRA belongs to the citizens of Wyoming to do with as they so choose. Using a protective order to limit the use of public records that are not exempt under the WPRA is contrary to the law.

On remand, the district court was directed to consider whether information contained in the agreements may be redacted (e.g., personal information like the parties' names or settlement amounts)

- ***Legislation.***

  - ***Alabama:***

    Senate Bill 151, 2023-36, An Act Relating To Economic Development; . . . To Authorize The Joint Legislative Advisory Committee On Economic Development To Cause To Be Conducted A Certain Economic Incentive Evaluation . . . .

    This Act, in part, authorizes the Joint Legislative Advisory Committee on Economic Development to request that a third-party evaluation be conducted assessing the impacts of state economic development incentives in the form of an annual Executive Report. The Executive Report provided to the committee is not a public record under the state's inspection and copying of records statute.

- ***Arkansas:***

  House Bill 1780, An Act Concerning Cybersecurity . . . To Establish The Arkansas Self-Funded Cyber Response Program And The Arkansas Cyber Response Board . . . .

  This Act establishes the Arkansas Self-Funded Cyber Response Program Trust Fund (the "Program"). The Program is designed to be in lieu of, or in addition to, other cyber security insurance policies that governmental entities may procure, providing substantial savings in the cost of a response to a cyberattack. The Arkansas Cyber Response Board (the "Board") administers the Program. The Act provides that due to the potential threat to the security of participating governmental entities, all meetings, documents, and records of the Board, except for financial records, are exempt from disclosure under the state's Freedom of Information Act. However, all Board meetings, documents, records, and policy decisions are subject to review by the Joint Legislative Committee on Advanced Communications and Information Technology during a closed meeting.

- ***Kentucky:***

  House Bill 264, Ch. 122, An Act Relating To Regulatory Relief.

  This Act relates to the General Regulatory Sandbox Program (the "Program"), which allows a person to temporarily offer certain products, production methods, or services under a waiver or suspension of one or more administrative regulations. The General Regulatory Sandbox Advisory Committee is tasked with advising and making recommendations to the Kentucky Office of Regulatory Relief concerning the implementation and administration of the Program. Under this Act, the advisory committee meetings are not subject to disclosure under the state's Open Records Act. Applications to participate in the Program and any related information the applicant provides are likewise exempt from disclosure under the state's Open Records Act.

- ***North Carolina:***

  House Bill 259, Session Law 2023-134, An Act To Make Base Budget Appropriations For Current Operations Of State Agencies, Departments, And Institutions.

  North Carolina's budget bill for the current and upcoming fiscal years includes several changes to the state's Public Records Law.

  The state's Public Records Law excludes records relating to the proposed expansion or location of specific business or industrial projects if the inspection, examination, or copying of such records would frustrate the purpose for which they were created. The amendments in the budget bill expand this exemption to include records relating to the potential location, evaluation, and acquisition of qualifying sites for potential businesses or industry expansion, provided that the inspection, examination, or copying of such records would frustrate the purpose for which they were created.

The budget bill also adds a new subsection to the Public Records and Archives Law, providing the General Assembly with the discretion to determine whether a record in its possession is a "public record" and whether to turn the record over to the Department of Natural and Cultural Resources, retain the record, or otherwise dispose of it.

[See Section V. (page 32) for changes contained in the budget bill pertaining to the attorney-client privilege exemption to disclosure under the state's Public Records Law.]

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.***
  - ***Arizona:***

    Puente v. Ariz. State Legislature
    (254 Ariz. 265) (December 30, 2022)

    The Arizona Supreme Court held that whether the state legislature violated the state's open meetings law ("OML") was a political question unsuitable for judicial review.

    The complainants brought an action against the state legislature alleging that 26 Republican legislators, who comprised quorums for five legislative committees, were threatening to violate the OML by attending a three-day summit hosted by the American Legislative Exchange Council ("ALEC"). ALEC is a "nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism." At ALEC summits, state legislators and private participants from around the country meet to discuss and draft "model bills" for introduction in state legislatures. These sessions are closed to the public. The complainants argued that by attending this closed summit, the state legislators would violate the OML, which requires legislative committees to conduct meetings publicly.

    The Court determined that because the state constitution grants to the legislature exclusive authority to determine its own internal rules, including how to hold its meetings, the courts were precluded from adjudicating alleged violations of those rules under the political questions doctrine. Rooted in separation-of powers principles, the political questions doctrine prohibits courts from reviewing matters that have been constitutionally committed to the discretion of another branch of government.

    The Court noted that through this constitutional grant of authority, the legislature can interpret, amend, enforce, or disregard its internal rules with almost limitless impunity. The OML does not displace the legislature's constitutional authority to establish its procedures. Although the OML has provisions requiring the legislature to hold open meetings, they constitute procedural rules, which it is free to disregard. The state constitution does not require the legislature to adopt or adhere to any specific procedures and standards. Accordingly, the judiciary lacks standards for assessing the legislature's exercise of its constitutional authority to permit members to disregard procedural rules, including the OML.

- ***Kentucky:***

  Campell Cnty. Bd. of Educ. v. Moellman
  (2023 WL 5491580) (August 25, 2023)

  The Kentucky Court of Appeals held that the Campbell Board of Education (the "Board") violated the state's Open Meetings Act ("OMA") when it required all in-person attendees to wear masks and other facial coverings during several Board meetings in August and September 2021. Nevertheless, the Court determined that the violations were not willful; thus, fines and attorney fees were not warranted. Additionally, the Court refused to void the actions taken at those meetings as the OMA did not allow for such a remedy under the circumstances of this case.

  Two individuals filed suit against the Board when, in response to the COVID-19 pandemic, it required any in-person meeting attendees to wear face masks. The Board denied that the mask requirement was a violation of the OMA, noting that masks were needed to maintain order and that the Board was following various executive orders, court orders, regulations, and the school's COVID-19 operational plan. Furthermore, the meetings could be viewed via live stream. The lower court found that, except for the two meetings during which there was a valid executive order requiring face masks, the Board violated the OMA by conditioning in-person attendance of Board meetings on wearing face masks. The lower court found that the Board's violation of the OMA was willful. Accordingly, the lower court assessed fines, awarded attorney's fees, and voided all actions taken at the meetings where the Board violated the OMA.

  The Board appealed to the Kentucky Court of Appeals, which upheld the lower court's determination that the Board violated the OMA. However, the Court disagreed that the violation was willful.

  The Court disagreed with the Board that the mask requirement fell under the scope of conditions required to maintain order as contemplated by the OMA. The Court noted that the OMA does not provide a separate legal basis for conditioning attendance at in-person meetings on wearing masks. Therefore, during the time when the executive order requiring masks was operational, the Board was permitted to require masks. Once, however, that executive order was no longer in effect, the Board could no longer condition in-person attendance on whether an individual wears a mask.

  Finally, the Court also disagreed that it had authorization under the OMA to void the actions taken at the meetings where the Board violated the OMA. The Court concluded that the OMA only authorized the voiding of actions taken at meetings violating the act under certain circumstances. The unlawful preconditioning of meeting attendance was not one of those circumstances.

- ***Virginia:***

  Suffolk City Sch. Bd. v. Wahlstrom
  (886 S.E.2d 244) (April 27, 2023)

  The Supreme Court of Virginia held that the Virginia Freedom of Information Act ("VFOIA") requires that the public be allowed to be physically present at a public meeting; thus, providing only a virtual means for the public to view a public meeting violates the VFOIA.

  A resident sued the Suffolk City School Board (the "Board") and some of its members for violating the VFOIA, when they refused to allow her to attend a public meeting in person. The Board advertised the meeting as a public meeting, but gave no notice that members of the public would not be allowed to attend the meeting in the same room as the Board. Although there was sufficient space for socially distanced public seating, the Board required the public to view the meeting virtually in a separate space within the building. The Board's IT staff set up a camera feed from the meeting room to a large projector screen in the lobby, where members of the public were allowed to sit and view the meeting in real time. Two rooms adjacent to the lobby were also reserved for public viewing in case of overflow. The IT staff member, who attended the meeting in the actual meeting room, controlled the camera feed to the lobby throughout the meeting. The IT staff member was able to manipulate the cameras and resulting display by zooming in and out, focusing on individual speakers, or showing the whiteboard when it was in use. As a result, the IT staff member ultimately determined what the public could see on the video feed at any given time.

  After the resident went to the room where the meeting was being held, she was told that members of the public were not permitted in the meeting room and could only view a video feed of the meeting from a different location within the building. When the resident refused to leave, the police were called, and the resident was required to leave with a police escort.

  Defendants argued that the VFOIA allows a public body to conduct all its meetings with no members of the public physically present in the meeting room so long as it provides some method for the public to view electronic video and audio feeds of the meeting. The Supreme Court disagreed. The VFOIA provides that "every meeting shall be open to the public" and no "meeting [shall be] closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law." To advance this policy goal, the VFOIA requires that "the people of the Commonwealth" are granted "free entry to" meetings of public bodies wherein the business of the people is being conducted and defines "open meeting" and "public meeting" as "a meeting at which the public may be present."

  The court concluded that the plain and ordinary meaning of the language of the VFOIA "affords citizens the opportunity to attend public meetings in person by actually entering into the physical space where the meeting is being conducted." In this case, the meeting room had sufficient space for the public to attend in person, with at least

six feet of social distancing. Therefore, no COVID precautions or logistical concerns prevented the resident from attending the meeting. The court concluded that, instead, it was the Board that decided to deny the public free entry to the meeting room. Thus, the Board violated VFOIA.

- ***Legislation.***

  - ***Arkansas:***

    Senate Bill 543, An Act To Amend Arkansas Law Concerning School District Boards of Directors . . . .

    This Act expands the circumstances in which an executive session is permitted under the state's Freedom of Information Act to include pre-litigation discussions, litigation updates, discussion and consideration of settlement offers, discussion and consideration of contract disputes with the superintendent of the school district, and discussions pertaining to real property.

    Additionally, the Act provides that the school district's superintendent and the school district's attorney may be present during executive sessions upon the invitation of the board of directors.

  - ***Kentucky:***

    House Bill 39, Ch. 125*, *An Act Relating to the Kentucky Horse Park.

    This Act, in part, designates the Kentucky Horse Park Commission as a public agency subject to the state's open meetings requirements.

  - ***Virginia:***

    House Bill 1738, Ch. 536, An Act to Amend and Reenact [§] 2.2-3707 . . . of the Code of Virginia, Relating to the Virginia Freedom of Information Act; State Public Bodies; Meetings; Virtual Public Access.

    This Act permits state public bodies to provide access to and allow public comment during meetings via electronic communications such as telephone and video conferencing. If the state public body permits access to its meetings via electronic communications, then the notice of the meeting shall include the remote location. Under this Act, state public bodies shall not be liable for accidental or involuntary loss of audio or video signal or the inability of the public to comment through electronic means.

- ***Washington:***

  Engrossed House Bill 1210, Laws of 2023, Ch. 67, An Act Relating To The Recording Of School Board Meetings . . . .

  This Act amends the state's Open Public Meetings Act to require that all regular and special meetings of school district boards of directors at which a final action is taken or formal public testimony is accepted be audio recorded and that such recordings are maintained for at least one year. A public records request for these recordings is only valid if the requestor provides the date or range of dates of the recording in question. The school district may not consider any other search terms.

IV. Access to Public Records

A. 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 invade the privacy of individuals.

- ***Litigation.***

  - ***California:***

    Comm. to Support Recall of Gascón v. Logan
    (94 Cal.App.5th 352) (August 10, 2023)

    The California Court of Appeals, Second District, Division 4, held that: (i) the right of inspection and examination under the state's Public Records Act ("PRA") did not extend to removing electronic voter lists or information from the examination room under the supervision of Registrar-Recorder/County Clerk's (the "Registrar") supervision; and (ii) the PRA did not require disclosure of redacted copies of affidavits of voter registration.

    In December 2020, the Committee to Support the Recall of George Gascón (the "Committee") circulated a petition to recall George Gascón as the Los Angeles County District Attorney. The Committee collected 715,833 signatures for its petition, 148,976 more than the signatures required to trigger a recall election. The Committee submitted the recall petition to the Registrar to verify signatures, certify the sufficiency of the petition, and order a recall election. Following a full review of the petition, the Registrar indicated that it found 520,050 validated signatures, approximately 46,000 less than needed to qualify the recall for the ballot.

    Consequently, the Committee informed the Registrar that it intended to examine the petition to assess "whether signatures were disqualified and the reasons therefore" according to the California Government Code. The Registrar permitted the Committee to examine the petition signatures three days per week, from 9:00 a.m. to 4:00 p.m., with no more than 14 representatives working at seven computer workstations under the control of Registrar staff. The Registrar also prohibited the Committee from using personal electronic devices inside its examination room.

    Although the Committee commenced its examination of the petition signatures, it petitioned the Superior Court seeking, among other things, an order directing the Registrar to: (i) permit the Committee counsel and their retained computer analyst to use electronic voter data outside of the Registrar's examination room; and (ii) disclose current and former affidavits of registration for invalidated signatures. The Superior Court authorized the use of electronic data by the Committee outside of the Registrar's examination room under a protective order. Additionally, the court ordered the Registrar to disclose redacted hardcopy affidavits of registration.

The Court of Appeals vacated the decision of the Superior Court. Given the state's constitutional guarantee of voter privacy and the fact that the Committee already had access to the information inside the Registrar's examination room, the Court declined to construe the statute in a manner that allowed for access to electronic voter information outside of that secure environment. Additionally, the court held that disclosure of redacted copies of current and former affidavits of voter registrations was not required under the PRA with respect to recall petitions, even if such records might be available in other contexts (e.g., referendum measures).

- ***District of Columbia:***

  Fraternal Ord. of Police Metro. Police Dep't Lab. Comm. v. D.C.,
  (290 A.3d 29) (March 2, 2023)

  The District of Columbia Court of Appeals determined that the statutorily mandated release of body-worn camera ("BWC") footage did not implicate a fundamental right of privacy for police officers.

  In the summer of 2020, the Council of the District of Columbia (the "Council") approved the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (the "Emergency Act"), which in relevant part required the Mayor to "publicly release the names and [BWC] recordings of all officers who committed … officer-involved death or serious use of force" and "publicly release the names and [BWC] recordings of all officers who have committed [an] officer-involved death since the BWC Program was launched on October 1, 2014." The Mayor released a number of BWC recordings in accordance with the Emergency Act.

  Shortly after the passage of the Emergency Act, the Fraternal Order of Police Metropolitan Police Department Labor Committee, D.C. Police Union ("FOP") sued the District of Columbia (the "District") and the Mayor of the District of Columbia (the "Mayor") challenging the legislation, in part, on the ground that it violated the due process guarantees of the District of Columbia Home Rule Act because releasing the officer's names and the BWC footage could result in significant bodily harm to officers and their reputations, violating their fundamental right to privacy. In addition to granting the District's and the Mayor's motion to dismiss for lack of standing, the trial court also rejected the FOP's due process claim reasoning that there is no recognized due process right to safeguard personal information. The court noted that, under Metropolitan Police Department ("MPD") policies, members of the public have a First Amendment right to record police officers during official business, unless they interfere with police activity.

  On appeal, the FOP rested its due process and fundamental right argument on case law acknowledging that MPD officers have a "cognizable privacy interest in the nondisclosure of their names and other identifying information," *District of Columbia v. Fraternal Order of Police (Fraternal Order of Police I)*, 75 A.3d 259, 268 (D.C. 2013). The Court of Appeals disagreed, determining that no "court has ever held that police officers have a fundamental right to the privacy of information about their

involvement — while on duty and while in contact with the public they serve — in a shooting or other serious use of force." The Court of Appeals also noted that there is a "growing consensus" of circuit courts holding that "there is a First Amendment right to record police activity in public" subject to reasonable time, place, and manner restrictions that is incompatible with the FOP's argument.

- ***Michigan:***

  Blackwell v. Univ. of Mich. Regents
  (2023 WL 174554) (January 12, 2023)

  The Michigan Court of Appeals held that the University of Michigan ("University") properly withheld from disclosure the name of a subordinate employee identified in a complaint filed with the University as having an affair with the then-President of the University.

  The University terminated the employment of the University President after an investigation revealed that he was having an affair with a subordinate employee. The plaintiff filed a request under the state's Freedom of Information Act ("FOIA") seeking a copy of the anonymous complaint that was filed with the University. The University produced the anonymous complaint but redacted the name of the subordinate employee pursuant to the FOIA's privacy exemption, which permits a public agency to withhold information that is "of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." Information is "of a personal nature" if it "reveals embarrassing, intimate, private, or confidential details about an individual." To determine whether disclosure would result in a "clearly unwarranted invasion of privacy" the court "balances the public interest in disclosure against the interest the Legislature intended to protect by way of the exemption."

  The Court noted that although names, by themselves, are not considered personal information, they may become personal in nature when associated with other information. The Court pointed to the fact that the anonymous complaint identified that the employee was engaged in a sexual affair with the then-president of the University. The Court found that such details, when associated with a person's name, could be considered intimidating, embarrassing, private, or confidential and thus were "personal in nature."

  Additionally, the Court rejected the plaintiff's arguments that the public interest outweighed the employee's privacy rights. The plaintiff averred that because the individual with whom the then-president had an affair was a public employee, the public had a right to know the person's identity. In rejecting this argument, the Court found that the anonymous complaint did not relate to the conduct of the subordinate employee or her governmental role but rather the conduct of the then-president. The Court concluded the plaintiff had not alleged that the subordinate employee violated her employment agreement, broke university policy, or otherwise engaged in wrongdoing. Accordingly, the disclosure of the subordinate employee's name would

not advance the FOIA's core purpose and would not reveal any information related to the operations or activities of the government.

- ***New Jersey:***

  Rise Against Hate v. Cherry Hill Twp.
  (2023 WL 2670720) (March 29, 2023)

  The Appellate Division of the Superior Court of New Jersey concluded that members of the public who submit their email addresses to receive electronic newsletters and notices from a municipality have an objectively reasonable expectation that their email addresses will not be disclosed to a non-government organization that intends to send unsolicited emails to them to further the organization's political and social objectives.

  Rise Against Hate ("RAH"), a non-profit corporation, whose purpose is to raise public awareness about racism and civil rights, submitted records requests to two separate townships in New Jersey seeking copies of email subscriber lists. A separate non-profit also made a similar request. Both non-profits intended to use the subscriber lists to send unsolicited emails concerning their activities. The townships determined that the requested information was protected from public disclosure by the personal privacy provisions of New Jersey's Open Public Records Act (OPRA) and denied the requests.

  The trial court ordered disclosure of the lists, essentially finding in both cases that the disclosure of email addresses was minimally invasive. The Appellate Division disagreed and reversed the trial court's decision relying on the broad provision of the OPRA concerning the protection of personal information, which provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy...." After analyzing the supreme court precedent concerning this provision, the court applied the requisite balancing test that weighs the public's strong interest in disclosure with the need to safeguard from public access personal information that would infringe a reasonable expectation of privacy.

  The Appellate Division noted that it is reasonable that people who register for the passive electronic receipt of information from a municipality do not expect that their email addresses will be disclosed to non-government organizations that intend to send them unsolicited emails.

  The Supreme Court of New Jersey granted a petition for certification of the judgment on July 11, 2023.

- ***New York:***

Gruber v. Suffolk Cnty. Bd. of Elections
(218 A.D.3d 682) (July 19, 2023)

The New York Supreme Court, Appellate Division, Second Department, held that disclosing a complete and unredacted copy of an individual voter's ballot without his consent constituted an "unwarranted invasion of personal privacy" and was therefore permissibly excluded from disclosure under the New York State Freedom of Information Law ("FOIL").

The petitioner, David Gruber, was a candidate in the 2018 primary election for the nomination of the Democratic Party as a candidate for the office of town councilman. Running against the petitioner was David B. Lys, who ultimately defeated Gruber in the primary election. During the campaign, a press outlet reported that Lys, formerly a registered Republican, had not voted for Donald Trump for president in the November 2016 general election but wrote in his father's name on the ballot. After his defeat in the 2018 primary election, the petitioner made several requests for records relating to Lys under FOIL, seeking, among other things, a complete and unredacted copy of Lys's ballot for the November 2016 general election. The Suffolk County Board of Elections ("BOE") denied the petitioner's request.

The Second Department agreed with the BOE's denial, noting that releasing Lys's complete and unredacted ballot without his consent would constitute an unwarranted invasion of personal privacy. The Court noted that a voter's privacy interest as it relates to their votes stems from the New York State Constitution, which requires that "secrecy in voting be preserved." Such secrecy furthers the policy objective that votes are cast in an environment "free of coercion or undue influence." The Court held that a reasonable person would find that disclosing their ballot where it could be identified despite facial anonymity would be "offensive and objectionable." Accordingly, the Court determined that any purported public interest in disclosure did not outweigh Lys's privacy interest in keeping his ballot secret.

Getting the Word Out, Inc. v. New York State Olympic Reg'l Dev. Auth.
(214 A.D.3d 1158) (March 16, 2023)

The Appellate Division held that the trial court appropriately ordered disclosure of injury reports from sporting and athletic events in accordance with the requirements for deidentification of individually identifiable health information provided in the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d, *et seq*. ("HIPAA").

The respondent, a public authority created to manage the 1980 Winter Olympic facilities in Lake Placid, operates a sport training and recreation venue for various winter sports. The petitioner requested copies of injury reports for certain sporting and athletic events and competitions held at such venue. The respondent produced the reports with near-blanket redactions claiming that disclosing the withheld information

would constitute an unwarranted invasion of privacy under the New York Public Officers Law or was exempt from disclosure under HIPAA.

The court initially found that the health-related information contained in the reports at issue was subject to the protections of both HIPAA and the Public Officers Law. However, the court found that both relevant exemptions to disclosure provided a mechanism to disclose such information by way of deidentification and that the stringent deidentification procedure provided in the HIPAA Privacy Rule was sufficient to meet the analogous requirement in the Public Officers Law. The court further determined that a blanket redaction of the information contained in the records was improper and that the information contained in the reports could be properly deidentified in accordance with the requirements of the HIPAA Privacy Rule to permit disclosure.

- ***Pennsylvania:***

  City of Harrisburg v. Prince
  (288 A.3d 559) (January 3, 2023)

  The Commonwealth Court of Pennsylvania held that the privacy interest in withholding the names and addresses of donors who gave to the City of Harrisburg (the "City") legal defense fund outweighed the public's interest in disclosure.

  The requestor in this case sought an unredacted donor spreadsheet for a fund established for defending legal challenges to the City's firearms ordinances. The City denied the request asserting donor information was exempt under the state's Right to Know Law ("RTKL"). The requestor appealed the denial to the state's Office of Open Records ("OOR"), which held that the City failed to establish that the requested information did not fall within any of the exceptions to the RTKL's donor information exemption. The City appealed on the grounds that the donor's personal information was protected under the Pennsylvania Constitution because the donor's privacy interest outweighed the public's interest in disclosure. The Court of Common Pleas concluded that specific donor names and addresses could be withheld; however, the city and state of the donors' home addresses should be disclosed.

  On appeal to the Commonwealth Court, the requestor argued that a limited generalized disclosure was improper because the public's interest in identifying who contributed to the City's fund outweighed the donors' privacy interests. The court disagreed. In applying the required balancing test, the court determined that the release of the donors' identities would potentially impair their reputations or personal security. The donors provided sufficient evidence demonstrating individualized and generalized potential harms to their reputation and security, including harm to business reputation and belonging to a demographic more susceptible to criminal victimization. The donors also raised concerns relating to the current political climate involving gun rights.

Additionally, the court held that the requestor failed to establish how disclosing the donors' full names and addresses would better serve the public interest compared to the generalized order of the trial court.

- ***Washington:***

  Wash. Fed'n of State Emp. v. State
  (2023 WL 5438535) (August 24, 2023)

  The Supreme Court of Washington rejected an attempt by various labor unions to seek a permanent injunction blocking the disclosure of the identities and workplace contact information for abuse survivors under the state's Public Records Act ("PRA"), holding that the unions failed to demonstrate that disclosing such information would result in particularized harm to the affected employees. Nevertheless, the Court remanded the case to the Superior Court to apply a newly passed amendment to the PRA, which exempts from disclosure abuse survivors' employment-related information such as job title, work address, work e-mail address, work phone number, etc.

  The Freedom Foundation, a nonprofit organization whose mission, in part, is to alert public employees of their right to opt out of union membership, submitted PRA requests seeking employee contact information from various state and local agencies. Multiple labor unions sought declaratory and injunctive relief against the agencies contacted by the Freedom Foundation to block the disclosure of such information related to employees who were abuse survivors. The unions argued that releasing the requested information for abuse survivors would violate those employees' fundamental privacy and personal safety rights protected by the substantive due process provisions of the federal and state constitutions. The Superior Court granted the unions' preliminary and permanent injunctions.

  The Freedom Foundation appealed to the Court of Appeals, arguing that no constitutional right existed to protect the requested information and that the unions presented insufficient facts to justify relief. The Court of Appeals reversed the lower court's permanent injunction noting that the evidence presented by the unions was insufficient to satisfy the PRA injunction standard. The Court of Appeals upheld the lower courts' declaratory relief on the unions' constitutional claims, noting that abuse survivors "have a fundamental constitutional interest in preventing the release of information about their whereabouts when their perpetrators could use the information to locate them and inflict physical harm on them or their family members."

  On appeal, the Washington Supreme Court held that the unions did not meet the requirements for a permanent injunction under the PRA because they failed to show how individual public employees would be harmed by disclosure. The Court declined to consider the unions' constitutional substantive due process claims, and instead remanded the case to the trial court to consider a recently passed exemption under the PRA, which specifically exempted from disclosure abuse survivors' employment-related information.

Doe 1 v. Seattle Police Dep't
(531 P.3d 821) (June 26, 2023)

The Washington State Court of Appeals determined that the right to privacy and anonymity in political beliefs and associations as conferred by the First Amendment, prevented the disclosure of the identities of police officers who attended former President Trump's "Stop the Steal" rally on January 6, 2021, and who were found not to have engaged in unlawful or unprofessional conduct.

After several current or former police officers from the Seattle Police Department ("SPD") attended the "Stop the Steal" rally on January 6, 2021, they received complaints from SPD's Office of Police Accountability ("OPA"), alleging that they may have violated the law or department policy. SPA required the officers to submit to interviews, during which police investigators questioned them not only about their whereabouts and activities on January 6th, but also their political beliefs, associations, and their impressions of, and reactions to, the content of the rally. After members of the public submitted records requests seeking the disclosure of the investigatory records pertaining to the police officers who participated in the rally, the police officers sought a court injunction prohibiting SPD from disclosing their identities.

The Court of Appeals reversed the trial court's decision denying an injunction. The Court emphasized that the United States Supreme Court has recognized a First Amendment right to privacy that protects against state action requiring disclosure of political beliefs and associations. The Court found that because both the officers' attendance at the January 6 rally and their compelled statements to investigators implicated the First Amendment and their constitutional right to anonymity in their political beliefs and associations, the State must demonstrate that the disclosure of the officers' identities would further a compelling state interest and that such disclosure was narrowly tailored to achieve that state interest. The Court found no compelling state interest in disclosing to the public the identities of public employees against whom unsustained allegations of wrongdoing had been made. Therefore, the Court determined that the officers were entitled to an injunction prohibiting the government from disclosing their identities. The Court highlighted that the government lacked the authority to "expose for the sake of exposure," and that, while the public is entitled to be informed concerning the workings of its government, such right does not include a "general power to expose where the predominant result can only be an invasion of the private rights of individuals."

Additionally, the Court reasoned that, because the officers were found not to have engaged in any unlawful or unprofessional conduct during the rally, they had not forfeited their First Amendment Rights.

The Supreme Court of Washington granted a petition for review on November 8, 2023.

- ***Wisconsin:***

  Gierl v. Mequon-Thiensville Sch. Dist.
  (405 Wis.2d 757) (December 7, 2022)

  The Wisconsin Court of Appeals held that a list of parent email addresses maintained and used by a school district was subject to disclosure under the state's public records law, finding that the school district's interest in keeping parents' email addresses confidential did not outweigh the public policy presumption of open government.

  The Mequon-Thiensville School District (the "District") denied a request for a list of email addresses of parents to whom it had sent an email invitation to participate in a webinar on privilege and race. The District relied on a letter by an assistant attorney general stating that it was "not unreasonable" under the state's public records law balancing test to deny a request for parent email addresses on the basis that disclosure would inhibit parent-school communication by discouraging parents from providing their email addresses. The trial court ordered the disclosure of the parent email addresses.

  On appeal, the District asserted that the list of parent email addresses maintained by the District did not relate to "the affairs of government and the official acts of those officers and employees who represent them." The Court of Appeals rejected this argument because the District was a government entity, used government resources to collect parent email addresses, and used those email addresses to promote selected matters of interest to District personnel. The District used the parent email addresses for reasons beyond the typical student-focused communications, such as school closures and enrollment reminders. Instead, the District sent emails including statements on current events, such as "[t]he death of George Floyd at the hands of police officers." The Court noted that, if the District was trying to influence the public, then the public had an interest in knowing who the government was attempting to influence.

  The Court of Appeals also held that no evidence or case law supported the District's contention that disclosing parent email addresses would have a chilling effect on parent-school communication. The District had previously provided the city's former mayor with a list of parent email addresses, and there was no chilling effect. The Court found that it has become a daily reality that people receive unwanted emails and that most modern email systems have a method to delete or block such emails. The Court also rejected the District's concern that the requester's purpose in requesting the email addresses was to spam parents with political ideology, since the district itself was utilizing the email addresses to promote and advance the District's positions, noting that the state's public records law "does not tolerate utilizing taxpayer resources for an ideological or political monopoly."

- ***Legislation.***

  - ***Colorado:***

    Senate Bill 23-286, Ch. 406, An Act Concerning Improving Public Access To Government Records.

    This Act modifies a provision of the state's Open Records Act to exempt from disclosure telephone numbers and home addresses provided by a person to an elected official of the state for the purposes of future electronic communications from the elected official. Previously, only email addresses provided to agencies, institutions, or political subdivisions for the purposes of future communications were exempt from disclosure under this provision.

    This Act also makes available for public inspection records relating to sexual harassment complaints against elected officials, provided that after an investigation, the elected official is found to be culpable for any act of sexual harassment. The identities of the accuser, the accused (who is not an elected official), victim, or witness must be redacted.

    [See Section V. (page 43) for additional provisions contained in this Act.]

  - ***Connecticut:***

    Senate Bill 1154, Public Act 23-197, An Act Implementing the Recommendations of the Auditors of Public Accounts.

    This Act exempts from disclosure under the Freedom of Information ("FOI") Act whistleblower complaints filed with the state auditors or under the False Claims Act. Existing law already exempts records of investigation. This Act also expands the exemption to include the name of any person, instead of only the name of an employee, who provides information on whistleblower investigations and complaints and False Claims Act violations.

  - ***Florida:***

    Senate Bill 50, Ch. 2023-131, An Act Relating to Public Records.

    This Act amends § 119.071 of the Florida Statutes to exempt from disclosure under the state's Public Records Law: (i) the home addresses, dates of birth, and telephone numbers of current judicial assistants; (ii) the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of current judicial assistants; and (iii) the names and locations of schools and daycare facilities attended by the children of current judicial assistants. The term "judicial assistant" refers to a court employee assigned to one of several specified class codes.

House Bill 1215, Ch. 2023-153, An Act Relating to Public Records.

This Act amends § 119.071 of the Florida Statutes and exempts from disclosure under the state's Public Records Law: (i) the home addresses, telephone numbers, dates of birth, and photographs of current or former inspectors or investigators of the Department of Agriculture and Consumer Services; (ii) the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of current or former inspectors or investigators; (iii) the names and locations of schools and daycare facilities attended by the children of current or former inspectors or investigators.

- ***Kentucky:***

Senate Bill 47, Ch. 146, An Act Relating to Medicinal Cannabis.

This Act amends several provisions of the state's Controlled Substances statute to provide for state regulation of the cultivation, processing, sale, distribution, and use of marijuana and related activities for medicinal purposes. As part of this Act, the following information was made exempt from the state's Open Records Act:

(1) Applications and renewals, their contents, and supporting information submitted by patients, visiting qualified patients, and designated caregivers.

(2) The individual names and other information identifying persons to whom the Cabinet for Health and Family Services has issued a registry identification card.

(3) Any dispensing information required to be kept under Section 21 of the Act (i.e., 2023 Kentucky Laws Ch. 146) or its regulations which shall only identify the cardholders by their registry identification numbers and shall not contain names or other personal identifying information.

(4) Any cabinet hard drives or other data-recording media that are no longer in use and contain cardholder information.

- ***Washington:***

Engrossed House Bill 1335, Laws of 2023, Ch. 381, An Act Relating To The Unauthorized Publication Of Personal Identifying Information. . . .

This Act allows individuals whose personal identifying information ("PII") was published in violation of the provisions of this Act to bring a civil action against the person who published the information and any person who knowingly benefited from participating in conduct that would constitute a violation of this Act.

This Act prohibits the publication of an individual's PII without consent when the publication is made with the intent or knowledge that the information will be used to harm the individual, or reckless disregard for the risk of such harm, and the publication causes physical injury, significant economic injury, mental anguish, fear of serious

bodily injury or death, or a substantial life disruption. The Act includes several exceptions such as the good faith reporting of a crime and providing PII to a requestor in response to a request under the Public Records Act.

Engrossed Substitute House Bill 1533, Laws of 2023, Ch. 458, An Act Relating to Exempting Disclosure of Certain Information of Agency Employees . . . Who Are Survivors of Domestic Violence, Sexual Assault, Harassment, or Stalking.

This Act amends Washington State's Public Records Act to exempt from disclosure any personally identifiable information for any employee who is a survivor of domestic violence, sexual assault, sexual abuse, stalking, or harassment as defined under state law. To qualify under this exemption, employees must submit to the employing agency a signed sworn statement that they or their dependent is a survivor covered by the exemption or proof that they or their dependent participates in the State's address confidentiality program.

This exemption does not apply to public records requests from the news media as defined under § 5.68.010 of the Revised Code of Washington. The "news media" includes any entity that is in the regular business of news gathering and disseminating news or information to the public by any means including, but not limited to, print broadcast, photographic, mechanical, internet, or electronic distribution.

Senate Bill 5153, Laws of 2023, Ch. 361, An Act Relating to Uniform Disclosure of Records Related to Future Voters and Making Conforming Amendments related to Participation of Future Voters in State Primaries.

This Act prohibits the disclosure of information relating to a "future voter" until that person reaches 18 years old or until the person is eligible to participate in the next election. A "future voter" means a U.S. citizen and Washington state resident, age sixteen or seventeen, who provides information related to voter registration to the appropriate state agencies.

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

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

- ***Litigation.***

  - ***Connecticut:***

    Comm'r of Mental Health and Addiction Serv. v. FOIC
    (347 Conn. 675) (August 29, 2023)

    The Connecticut Supreme Court held that a police report detailing the investigation into the death of a patient at the Whiting Forensic Division of Connecticut Valley Hospital ("Whiting") must be disclosed under the state's Freedom of Information Act ("FOIA"). The Court concluded that the police report was neither subject to the psychiatrist-patient communication privilege nor excluded from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA").

    In 2017, a reporter submitted a FOIA request to the Department of Mental Health and Addiction Services ("DMHAS") seeking incident reports regarding deaths of Whiting patients that were deemed "accidental" by the state medical examiner's office. DMHAS denied the request, asserting the report was exempt from disclosure under FOIA on three grounds: (1) the psychiatrist-patient communication privilege protected it; (2) it constituted personnel or medical files and similar files, the disclosure of which would constitute an invasion of personal privacy; and (3) HIPAA's Privacy Rule prohibits disclosure of personal health information without the consent of the patient or an authorized representative.

    The reporter appealed DMHAS's denial to the Freedom of Information Commission, which ordered full disclosure of the report after an evidentiary hearing and in-camera review.

    On appeal to the Connecticut Supreme Court, the Court reversed the trial court's decision and concluded that FOIA required disclosure of the entire police report. The Court found that the psychiatrist-patient privilege did not cover the police report, noting that although the police report contained information related to the patient's psychiatric diagnosis and treatment, at the time the police report was generated, the DMHAS police were not participating in the diagnosis and treatment of the patient. Instead, the police were participating in an investigation into the cause of the patient's untimely death and the adequacy of DMHAS' response to the patient's emergency medical event. Furthermore, the Court concluded that even assuming that the DMHAS Police Department was a covered entity under HIPAA, the police report was not protected from disclosure because HIPAA expressly allows for the release of information when required by law (in this case, the state FOIA).

Nevertheless, the Court allowed the redaction of patient names, dates of birth, and home phone numbers, as the original request stated that "all references to the identity of a patient can be redacted."

- ***Illinois:***

  Edgar Cnty. Watchdogs v. Will Cnty. Sheriff's Off.
  (2023 IL App [3d] 210058) (June 21, 2023)

  The Illinois Appellate Court, Third District, determined that 911 calls were subject to disclosure under the state's Freedom of Information Act ("FOIA"), provided the caller's identity could not be ascertained.

  The Edgar County Watchdogs ("ECW") filed state FOIA requests seeking, among other things, certain 911 calls. In each instance, the Sheriff's Office denied the requests because the caller's identity could be determined by either the substance of the call or the tone of the speaker's voice. The ECW filed a complaint against the Sheriff's Office, claiming it wrongfully denied ECW's request under FOIA. After an in-camera review of the 911 records, the trial court determined that while the substance of the calls was not protected under the state's FOIA, the speaker's voice could reveal their identities. Accordingly, the trial court held that the ECW was entitled to either an altered audio recording (obscuring the speaker's voice) or transcripts of the 911 calls. The Sheriff's Office appealed the trial court's decision.

  On appeal, the Appellate Court, Third Division, noted that 911 calls were not automatically exempt from disclosure under the state's FOIA. Such calls are only exempt to the extent that the recordings would "*unavoidably* disclose the caller's identity" in accordance with the statutory exemption from disclosure.

  As the Sheriff's Office did not include copies of the 911 calls in the record on appeal, the Appellate Court was required to defer to the findings of the trial court – i.e., the substance of the 911 calls was not protected, but that the tone of the speaker's voice could reveal their identity. Because the Sheriff's Office lacked the capabilities to disguise the speaker's voice in the 911 calls, the Appellate Court concluded that those calls were exempted under the state's FOIA. The Court noted, however, that not every statement in a 911 recording would "unavoidably disclose the caller's identity" and declined to adopt a blanket rule exempting 911 recordings from disclosure under the state FOIA.

  Additionally, the Appellate Court determined that the Sherrif's Office was not required to create a transcript of the 911 call because the state's FOIA does not require public agencies to create new records that do not already exist.

- ***Maine:***

  Fairfield v. Me. State Police
  (288 A.3d 1220) (April 6, 2023)

  The Maine Supreme Judicial Court held that DNA contamination logs and certain quality assurance records maintained by the Maine State Police (the "MSP") were exempt from disclosure under the state's Freedom of Access Act ("FOAA") because releasing such records would constitute an unwarranted invasion of personal privacy or result in the disclosure of personnel records.

  The MSP denied a request for DNA contamination logs, which tracked all instances of identified contamination of DNA samples, as well as certain quality assurance records, including corrective action forms, which addressed staff performance; testimony review forms, which evaluated and documented State Police Crime Lab employee testimony; and portions of drying locker logs.

  On appeal, the Supreme Judicial Court upheld the trial court's determination that the DNA contamination logs were exempt from disclosure because they contained highly sensitive information, such as the name of the suspect or victim and the nature of the offenses. The Court noted that the privacy interest in keeping contamination logs confidential outweighed the public interest in disclosure. The DNA contamination logs also included DNA identifying information, rendering the records entirely exempt under state law.

  The Court concluded that many of the quality assurance records were exempt because state employee records containing performance evaluations or information that may result in disciplinary action are confidential pursuant to state statute. The Court noted that the corrective action and testimony review forms could be withheld in their entirety as they related to employee performance evaluation. The Court further held that the MSP properly redacted names of suspects and victims associated with evidence stored in drying lockers (secure locations to keep and dry out wet evidence) because disclosing such information would constitute an unwarranted invasion of personal privacy, rendering the names confidential under state law. The Court found that the individuals whose names were redacted from the logs had a strong privacy interest, and it was unclear how releasing the names of the suspects or victims would advance any public interest.

- ***Michigan:***

  Hjerstedt v. City of Sault Ste. Marie
  (2023 WL 2144757) (February 21, 2023)

  The Michigan Court of Appeals held that the City of Sault Ste. Marie (the "City") Police Department's use of force policy was not exempt from disclosure under the state's Freedom of Information Act ("FOIA").

A requestor sought a copy of the City Police Department's use of force policy under the state's FOIA. The police department denied the request; however, the City commission (the City's governing body) voted to disclose a redacted version of the policy. The requestor appealed the denial seeking the disclosure of the full policy. The trial court held that the unredacted version of the policy was exempt from disclosure because it: (1) was a record of law enforcement communication codes or plans for deployment; (2) disclosed law enforcement operational instructions; and (3) would, if released, endanger the safety of law enforcement officers.

The Michigan Court of Appeals reversed the trial court, noting that none of the purported grounds for withholding the police department's use of force policy applied in this situation. The use of force policy did not contain communication codes, nor did it outline specific deployments of personnel to specific locations or particularized threats. The policy was also not "operational instructions," because it did not give instructions on use of force in specific situations, but rather outlined a broader policy that guides law enforcement when engaging in the use of force. Finally, the City failed to establish that the disclosure of the policy would endanger the life or safety of police officers. The only evidence in the record were affidavits from the current and former police chiefs that disclosure of the full policy "would or could" have an impact on the safety of the public or the officers. The court held that these affidavits were speculative and insufficient to establish the public's knowledge of the redacted portions of the policy would endanger the officers.

- ***Legislation.***

  - ***Florida:***

    House Bill 7025, Ch. 2023-19, An Act Relating to Public Records.

    This Act amends § 1002.42 of the Florida Statutes and exempts from disclosure any information held by a law enforcement agency that may identify whether a particular individual has been assigned a safe-school officer at a private school.

  - ***Idaho:***

    House Bill 149, Ch. 108, An Act Relating to Criminal History Records; Amending Section 67-3004, Idaho Code, To Provide That Criminal History Records Shall Be Shielded From Disclosure Under Certain Circumstances; Amending Section 74-105, Idaho Code, To Provide That Certain Records Shall Be Shielded From Disclosure . . . .

    This Act amends the state's Public Records Act to exempt from disclosure any records of any person arrested for, prosecuted for, or convicted of a crime who has successfully petitioned a court to have their records shielded from disclosure pursuant to the "Clean Slate Act," enacted in tandem with the revisions to the Public Records Act.

    Under the Clean Slate Act, individuals who have been arrested for, prosecuted for, or convicted of relatively minor non-violent, non-sexual offenses can petition to seal their

public records. To be eligible to have their records shielded, an individual may not make the petition within five years after completing their sentence. Only one offense, or offenses arising from a single incident, is eligible for sealing. If the individual is convicted of another crime, the exemption from disclosure may be revoked. The shielded records may still be used by law enforcement and prosecutors for any purpose and may be used to enhance future penalties.

- ***Kentucky:***

  House Bill 207, Ch. 168, An Act Relating to Internal Police Communications.

  The Act allows law enforcement agencies to create wellness programs to support their employees' mental health and well-being. All proceedings, records, opinions, conclusions, and recommendations arising from any aspect of a wellness program are confidential and privileged from disclosure, regardless of who possesses them. However, the privilege does not apply in the following circumstances: (i) when information is disclosed in response to a claim made by the holder of the privilege against a law enforcement agency related to programs or services by a wellness program; and (ii) when the communication contains a threat or intention to commit suicide, threat of imminent and serious physical injury, bodily harm or death to a clearly identified or reasonably identifiable victim, information related to the abuse or neglect of a child, an admission of a crime, or other information which is required by law to be disclosed.

  This Act also amends the state's Open Records Act to exempt from disclosure records confidentially maintained by a law enforcement agency in accordance with a wellness program.

- ***North Dakota:***

  House Bill 1262, Ch. 397, An Act To Amend And Reenact Subsection 9 Of Section 44-04-18.7 Of The North Dakota Century Code, Relating To Exempt Records And Body Camera Images.

  This Act broadens the scope of the state's exemption from disclosure for images of private property taken with a body camera or similar device. Previously, this exemption only applied to images taken by a law enforcement officer or a firefighter; however, now the exemption applies to any image of private property taken by a body camera or similar device, regardless of the source.

V. Other Noteworthy Litigation and Legislation

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

- ***Artificial Intelligence.***

  - ***Connecticut:***

    Substitute Senate Bill No. 1103, Public Act 23-16, An Act Concerning Artificial Intelligence, Automated Decision Making And Personal Data Privacy.

    This Act addresses artificial intelligence ("AI") and its use in state government. Executive and judicial branches are required to do annual inventories of their systems that employ AI and make policies and procedures on developing, procuring, using, and assessing systems that use AI. These inventories, policies and procedures are required to be made publicly available and posted online.

    This Act also creates a 21-member working group to make recommendations on certain AI issues including how to develop best practices for the ethical and equitable use of AI in state government and the development of an AI bill of rights. The Act designates the Executive Director of the Connecticut Freedom of Information Commission as a nonvoting member of this working group.

- ***Attorney-Client Privilege & Work Product.***

  - ***New York:***

    Empire Chapter of Associated Builders and Contractors. Inc. v. N.Y. State Dep't of Transp.
    (211 A.D.3d 1155) (December 1, 2022)

    The Appellate Division, Third Department, held that a labor and cost analysis study prepared for the New York State Department of Transportation ("DOT") was not exempt from disclosure under the state's Freedom of Information Law ("FOIL").

    The petitioner submitted a FOIL request seeking a labor and cost analysis study prepared to assist the DOT in determining whether the use of a project labor agreement ("PLA") was appropriate in a project to rehabilitate a bridge in Ulster County, NY. The DOT denied the request stating that the record was exempt from disclosure as intra-agency materials and was covered by the attorney-client privilege.

    The petitioner challenged the DOT's denial, and on appeal, the Court rejected both of DOT's claimed exemptions. Specifically, the Court noted intra-agency materials were only exempt from the FOIL to the extent that they do not contain statistical or factual tabulations or data or are a final agency policy or determination. The Court concluded that the labor and cost study contained factual information as to the area labor market and statistical data. Additionally, the Court noted that the DOT Commissioner expressly

relied on and cited the study in the final determination. Therefore, the study could not be withheld under the FOIL's intra-agency exception.

The Court also rejected the DOT's argument that the study was exempt under attorney-client privilege. The Court found that the study was not a communication that included legal advice or reflected client confidences. The primary purpose of the study was not to secure legal advice but to assess whether using a PLA for the DOT project was feasible. Furthermore, the Commissioner's public determination was virtually identical to the study's analysis and findings. Therefore, any privilege that could have been attached would have been waived.

- ***North Carolina:***

  House Bill 259, Session Law 2023-134, An Act To Make Base Budget Appropriations For Current Operations Of State Agencies, Departments, And Institutions.

  In addition to the amendments noted in Section II. (page 7) above, the budget bill also modifies the attorney-client privilege exemption from disclosure under North Carolina's Public Records Law.

  The confidential communications provision of the public records law excludes certain attorney-client communications from the definition of a "public record." Prior to the passage of the Act, such communications became public records three years after the date the governmental body received the record. Under the Act, attorney-client privileged communications to governmental bodies are no longer subject to disclosure after three years. The communications may be disclosed only if the governmental body chooses to do so. Additionally, the Act extends the attorney-client privilege exemption to include any communication written to the governmental body, provided that the communication is made within the scope of the attorney-client relationship, regardless of if it was made by an attorney.

- ***North Dakota:***

  Hagen v. N.D. Ins. Reserve Fund
  (993 N.W.2d 519) (July 19, 2023)

  The North Dakota Supreme Court held that documents discussing settlement ranges for resolved litigation do not fall within the "potential liability exception" to disclosure under the state's open records law.

  Under state law, attorney-work-product must be made available for public disclosure by a public entity after the completion (including the exhaustion of appeals) of civil or criminal litigation or adversarial administrative proceedings. However, the "potential liability exception" permits a public agency to withhold attorney-work-product that reflects mental impressions, opinions, conclusions, or legal theories regarding the potential liability of a public entity.

The petitioner filed a public records request related to a condemnation case to which he was a party that involved the City of Lincoln and the North Dakota Insurance Reserve Fund (NDIRF). Specifically, the petitioner sought records concerning how the city and the NDIRF spent approximately $1.1 million on litigation costs defending the action. By the time of the petitioner's records request, the condemnation case was finalized, and all appeals were exhausted.

The district court determined that approximately 41 documents were exempt from disclosure pursuant to the "potential liability exception." The district court reasoned that because the NDIRF regularly defends condemnation cases, releasing documents discussing prior settlement, litigation, and negotiation strategies could adversely impact the NDIRF in future cases involving similarly situated parties.

The Supreme Court of North Dakota reversed the judgment of the district court. The Court noted that the district court misapplied the "potential liability exception" because the documents at issue did not relate to circumstances where there remain a genuine potential for liability toward NDIRF or its members. Instead, because the litigation and negotiation strategies contained in the disputed documents were case-specific to litigation that had already occurred, there was no genuine potential for liability.

- ***Attorney's Fees***

  - ***Maine:***

    Human Rights Def. Ctr. v. Me. Cnty. Comm'rs Ass'n Self-Funded Risk Mgmt. Pool
    (301 A.3d 782) (August 22, 2023)

    The Supreme Judicial Court of Maine held that the Maine County Commissioners Association Self-Funded Risk Management Pool (the "Risk Pool") acted in bad faith, within the meaning of the state's Freedom of Access Act ("FOAA"), when it deceptively withheld records that were clearly responsive to a records request by the Human Rights Defense Center ("HRDC"), warranting an award of attorney's fees.

    A local news organization reported that the County paid a $30,000 settlement in a lawsuit alleging maltreatment of a prisoner in a county jail. HRDC submitted a FOAA request for documents showing settlement payments related to the lawsuit. The only documentation HRDC received from the County included a settlement agreement that indicated that the settlement was in consideration of "One Dollar and Other Good and Valuable Consideration." Upon requesting documentation of the $30,000 payment from the Risk Pool, HRDC received a copy of the news article stating that the case was settled for $30,000. Additional follow-up from HRDC representatives yielded a response from the Risk Pool that the signed release previously provided to HRDC was the only settlement release document; however, the Risk Pool never indicated whether it possessed the payment documentation that HRDC requested. During the trial, the Risk Pool noted that it possessed payment documentation but had not provided it to HRDC because it claimed that HRDC never requested payment documentation. The

Superior Court concluded that the Risk Pool acted in bad faith and granted HRDC's request for attorney fees.

Even though the Risk Pool never denied nor explicitly refused to comply with HRDC's request, the Supreme Judicial Court determined that the Risk Pool's failure to comply with the records request rose to the level of a bad-faith refusal to comply because it failed to produce any records, despite HRDC's repeated efforts to clarify what should already have been clear. The Court rejected the Risk Pool's claims that: (i) it thought HRDC's FOAA request was for a settlement agreement that showed the dollar amount of the settlement; and (ii) HRDC's request was not specific enough to identify the records they sought. The Court found that the request clearly sought records reflecting payments of the settlement amount and that the Risk Pool repeatedly mischaracterized the request and deliberately withheld access to records clearly responsive to HRDC's request. The Court agreed with the lower court's characterization that "the Risk Pool's behavior was so deceptive and abusive of the FOAA process" that an award of attorney's fees based on bad faith was warranted.

- ***New York:***

Prisoners' Legal Services of N.Y. v. N.Y. State Dep't of Corr. and Cmty. Supervision
(211 A.D.3d 1382) (December 22, 2022)

The Appellate Division concluded that the lower court erred in denying the petitioner attorney's fees and costs resulting from the respondent's improper denial of access to records under the state's Freedom of Information Law ("FOIL").

The petitioners filed a FOIL request with the New York State Department of Corrections and Community Supervision (the "DOC") seeking body camera footage used during an inmate's disciplinary hearing. The DOC denied the request asserting that the disclosure of the footage would "interfere with law enforcement investigations and could endanger the life or safety of any person." The Supreme Court rejected the DOC's claims and ordered the disclosure of the footage. Nevertheless, the court denied the petitioner's request for attorney's fees, finding that the DOC had a reasonable basis for denying access given the novelty of the issue and the important interests at stake.

The Appellate Division, Third Department, reversed the lower court's denial of attorney's fees concluding that the respondents, in claiming exemptions, merely quoted the relevant language from the FOIL with no factual explanation or justification. The DOC failed to explain how the footage was compiled for any law enforcement purpose, and how the release of the footage would interfere with any investigation or adjudication. Additionally, the DOC gave no explanation regarding how the release of the footage would impact the safety of the corrections officers or their families, particularly when the officers were already identified during the prisoner's disciplinary hearing. The Court remanded the matter to the lower court to determine the proper award for attorney's fees.

- ***Autopsy & Coroner Reports.***

  - ***California:***

    Edais v. Superior Court
    (87 Cal.App.5th 530) (February 6, 2023)

    The California Court of Appeals, First District, Division 3, held that the investigation report created by the County's Coroner's Office in connection with a police officer's death that was ruled a suicide, was subject to disclosure under the California Public Records Act ("CPRA").

    The petitioners in this case were the parents of a police officer whose death was ruled a suicide by the County Coroner's Office. The petitioners questioned the suicide determination and hired a private forensic pathologist to undertake an independent forensic autopsy review. The petitioners filed a CPRA request with the Coroner's Office for all records "received or generated by, or currently in the possession of, the [Coroner's] Office in connection with the death of" the officer.

    The respondents refused to turn over, among other things, the full summary and investigation notes report prepared by the coroner's investigator on the grounds that the decedent's widow had not consented to such disclosure. The petitioners filed a complaint with the Superior Court seeking to compel disclosure of the records. The Superior Court rejected the petitioner's arguments, noting that the respondents were justified in withholding the records because the public interest in not disclosing the records outweighed the public interest in disclosure.

    The petitioners appealed to the California Court of Appeals. On appeal, the Court held that most of the records sought by the petitioners should be disclosed. The CPRA exempts from disclosure "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." In determining whether an invasion of personal privacy is "unwarranted," the court balances the public interest in disclosure against the individual's interest in privacy.

    Concerning the investigation report, the Court employed such balancing test weighing the public interest in disclosure of the investigation report against the privacy interests at stake. Specifically, the Court noted that the public had a substantial interest in correctly distinguishing suicide from homicide; this public interest justifies compromising the confidentiality of patient medical records. Additionally, the Court concluded that respondents' concerns regarding the privacy interest of the decedent's family were attenuated because it was members of the decedent's family that were requesting the records. Further, while the decedent's widow had declined to allow the release of the requested documents, she did not provide any affirmative request for privacy.

- ***Florida:***

  Senate Bill 404, Ch. 2023-44, An Act Relating to Public Records.

  This Act amends §§ 119.071 and 406.135 of the Florida Statutes and, outside of limited exceptions, exempts from disclosure under the state's Public Records Law: (i) any photograph, video, or audio recording that depicts or records the killing of a minor; and (ii) autopsy reports of a minor whose death was related to an act of domestic violence.

  Under this Act, a court may authorize any person to view or copy such records upon showing good cause. In determining good cause, a court shall consider whether such disclosure is necessary for the public evaluation of governmental performance, the seriousness of the intrusion on family's right to privacy and whether such disclosure is the least intrusive means available, and the availability of similar information in other public records, regardless of form. Any viewing, copying, or listening of the records must be done under the direct supervision of the custodian of the record or their designee. Additionally, parents must receive notice of any petition filed with a court to view the records and have an opportunity to be heard on the matter.

- ***Pennsylvania:***

  Allegheny Cnty. v. Hailer
  (298 A.3d 476) (July 11, 2023)

  The Commonwealth Court of Pennsylvania held that the autopsy/external examination and toxicology report for an inmate who died while in the custody of Allegheny County (the "County") Jail were accessible through the state's Right-to-Know Law ("RTKL"), provided that requestors pay the fees outlined in the state's Coroner's Act.

  The Pittsburgh Current (the "Current") filed an RTKL request with the County seeking the "autopsy/external examination and toxicology report" for an inmate who died while in the custody of the County Jail. In response to that request, the County provided the Current with the cause and manner of the inmate's death, but otherwise denied the request. The Current then appealed to the Pennsylvania Office of Open Records ("OOR"), which issued a final decision concluding that the records sought by the Current were accessible upon paying an appropriate fee.

  The County appealed the OOR's decision to the County's Court of Common Pleas, which reversed the OOR's decision. In its decision, the Court of Common Pleas concluded that pursuant to state statute, coroner records may only be disclosed to nongovernmental agencies investigating an insurance claim or determining the liability for the deceased's death. The Current averred that it sought the coroner's reports as part of its research into whether the conditions at the County Jail contributed to the inmate's death. Nevertheless, the court held that the Current's research did not encompass the necessary legal process.

  The Current appealed to the Commonwealth Court. The Commonwealth Court reversed the decision, concluding that the plain language of the statute does not limit

the receipt of coroner records to nongovernmental agencies seeking records to investigate insurance claims or determine liability for the death of the decedent. Rather, the statute merely sets forth a fee schedule that lists specific fees to be paid for certain types of records. In addition, the statute also authorizes coroners to charge or collect other fees established for certain nongovernmental agency requests.

- ***Collective Bargaining Agreements & Union Representation.***

  - ***California:***

    Freedom Foundation v. Superior Court
    (87 Cal.App.5th 47) (December 30, 2022)

    The California Court of Appeals, Third District, held that the California Department of Human Resources ("CalHR") was not required to disclose a record relating to collective bargaining units and state employees pursuant to the collective bargaining exemption of the state's Public Records Act ("PRA"). The Court also determined that CalHR was not required to search a database maintained by the State Controller's Office ("SCO") for other responsive records, affirming the trial court's finding that CalHR did not have the power or authority to manage, direct, or oversee SCO's database or the information within it.

    The Freedom Foundation submitted two records requests to CalHR: the first sought information and statistics related to the state's collective bargaining units and the number of state employees; and the second request sought employee-specific information relating to certain bargaining units, including employees' full name, month and year of birth, job classification, employee identification number, hire date, current rate of pay or salary, full-time status, work email address, worksite address, and bargaining unit number.

    CalHR denied the request, indicating that the record it possessed that was arguably responsive to such request was exempt from disclosure under the collective bargaining exemption of the PRA which, in part, exempts from disclosure records that would reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work product, theories, or strategy concerning the collective bargaining process. CalHR also indicated that it did not possess some information requested in the second request and referred the Freedom Foundation to the SCO.

    The Freedom Foundation petitioned the trial court to compel the disclosure of the requested records, arguing that the collective bargaining exemption did not apply and that, since CalHR had access to the SCO database, it was obligated to search it for responsive records. After the trial court denied its petition, the Freedom Foundation appealed.

    The Court of Appeals concluded that the collective bargaining exemption was not limited to records that reveal an agency's deliberative process. Rather, the statute listed several categories of records that are exempt from disclosure, including research and

evaluations. The Court also concluded that CalHR established that it used the information contained in the record to research and evaluate bargaining proposals and strategies. Furthermore, the court determined that CalHR was not required to redact the record as it was entirely exempt and could not be separated into exempt and nonexempt portions. The Court also held that CalHR was not required to search a database maintained by SCO for responsive records. The Court concluded that the fact that CalHR had some degree of access to the SCO database was insufficient to show that those records were in CalHR's possession.

- ***Washington:***

  Engrossed Substitute House Bill 1187, Laws of 2023, Ch. 202, An Act Relating To Privileged Communication Between Employees And The Unions that Represent Them . . . .

  This Act creates a union-employee privilege, which covers any communication between an employee and a union representative or between union representatives made in the course of union representation. The privilege does not apply in certain circumstances, including where disclosure appears necessary to prevent injury from a crime or when legal claims are brought in formal proceedings against unions. The privilege also does not apply to any record of communications that would otherwise be subject to disclosure under the state's Public Records Act.

- ***Confidential Informants.***

  - ***Nevada:***

    Las Vegas Review-Journal, Inc. v. Las Vegas Metro. Police Dep't,
    (139 Nev. Adv. Op. 8, 526 P.3d 724, 728) (March 30, 2023)

    The Nevada Supreme Court concluded that the Las Vegas Metropolitan Police Department ("Metro PD") failed to prove that disclosing certain records would expose an informant's identity and that selective and narrow redactions of the records would not adequately protect an informant's identity, in this case. The court also held that unsubstantiated assertions of harm, stigmatization, and privacy were insufficient to justify withholding such records.

    Pursuant to the Nevada Public Records Act ("NPRA"), a reporter for the Las Vegas Review-Journal, Inc. requested the entire case file concerning Metro PD's investigation of a Nevada Highway Patrol trooper and allegations that he had solicited a confidential informant ("CI") to murder or harm his wife. The Metro PD denied the reporter's request several times, and then finally released heavily redacted portions of the investigative file. The reporter's news agency sought relief in the district court, but the district court ultimately denied the petition, concluding that the files contained confidential and private information not subject to public release.

Under state law, the Metro PD maintained a "privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information purporting to reveal the commission of a crime," also known as the confidential informant privilege.

The Supreme Court held that the Metro PD failed to meet its burden to show that the records may be withheld in their entirety pursuant to the confidential informant privilege. Rather, the court determined that background details about the CI's employment, the CI's familiarity with the trooper, the CI's affiliation with a specific group, and the CI's attorney could be redacted. The Court rejected the claim that the investigation report, in full, identified the CI, finding that such claim was based, in part, on exaggerated assertions that the CI's assistance in the investigation by itself identified the CI. The Court also concluded that the claim that the release of such records would endanger the lives of those involved in the investigation was entirely unsubstantiated, emphasizing that "a governmental entity's supposition does not overcome the public's right to access."

- ***Encryption and Redaction of Public Records.***

  - ***Arizona:***

    Silverman v. Arizona Health Care Cost Containment Sys.
    (255 Ariz. 387) (June 22, 2023)

    The Court of Appeals of Arizona held that using encryption to redact non-disclosable information stored in an electronic database does not constitute the creation of a new record.

    The Arizona Health Care Cost Containment System ("AHCCCS") oversees the Arizona Long-Term Care System ("ALTCS"). Journalists researching issues related to services for individuals with developmental disabilities submitted a public records request for data in AHCCCS's databases for multiple categories of information provided in or related to ALTCS applications to learn what factors affect eligibility decisions.

    The journalists acknowledged that healthcare-related information would have to be de-identified, thus they requested that, for de-identified data, AHCCCS use a unique identifier, such as a hash key, to replace non-disclosable information. AHCCCS asserted that HIPAA required redaction of each applicant's unique "AHCCCS ID," and because the databases used that unique identifier as a relational key connecting various tables across the databases, its removal would leave other elements of the requested data unlinked. In response, the journalists asked that AHCCCS encrypt the non-disclosable information so that the confidential aspect is hidden but the functional link remains intact, but AHCCCS asserted that doing so would be creating a new record, which it was not required to do under Arizona law. The trial court agreed with AHCCCS and granted its motion to dismiss the journalists' complaint.

    The Court of Appeals reversed, reasoning that using a one-way cryptographic hash function to substitute a unique hashed value for protected information does not add to

or change any of the underlying information (much less aggregate or analyze the data). Rather such redaction-by-encryption hides a limited aspect of the data contained in the record and therefore does not create anything new, which was a key fact distinguishing this case from others which required the agency to analyze, compile, or otherwise manipulate its existing data to create a new record.

- ***Family Educational Rights and Privacy Act.***

  - ***Pennsylvania:***

    Central Dauphin School District v. Hawkins
    (286 A.3d 726) (December 21, 2022)

    The Pennsylvania Supreme Court held that a local school district (the "District") failed to prove that video footage from a school-bus camera of an incident between a student and a parent of another student was exempt from disclosure under the state's Right to Know Law ("RTKL") or the Family Educational Rights and Privacy Act ("FERPA") and that it was unable to redact students' personally identifiable information ("PII").

    A reporter, on behalf of a TV news channel, requested from the District a copy of the school bus surveillance video that captured the parent grabbing a student's wrist. The adult involved received a summary citation from a court for harassment related to the incident, a copy of which the reporter attached to her records request as it identified the adult and student by name. The District denied the request claiming that the video was an education record that contained a student's PII and, therefore, was entirely exempt from disclosure under FERPA.

    The Office of Open Records ordered the video's disclosure, which the trial court upheld. The Commonwealth Court affirmed but remanded with instructions to redact all student PII before disclosure. The District appealed to the Pennsylvania Supreme Court, arguing that the record is exempt from disclosure under FERPA, a federal law, and therefore it is by definition not a public record, and the redaction provision does not apply. The District also argued that it could not de-identify the video because it lacked the technical capability to redact video, and the student's identity was already known due to media coverage of the incident and subsequent public legal filings.

    The Supreme Court rejected both arguments emphasizing that FERPA does not categorically exempt education records. Rather, it prohibits the disclosure of student PII contained within education records. Accordingly, the District had an obligation to redact the student PII contained within the video consistent with the RTKL. The court also rejected the District's contention that it lacked the technical capability to redact video footage, discrediting the testimony of the District's witness and finding that it failed to offer evidence that it could not utilize several redaction methods, such as face blurring.

    The Court also disagreed that the video could not be redacted because the student's identity was already known. The Court noted that the standard under FERPA is whether the information requested is "information that, alone or in combination, is linked or

linkable to a specific student that would allow a reasonable person in the school community, *who does not have personal knowledge of the relevant circumstances*, to identify the student with reasonable certainty." The fact that the public knew the student's identity because of media coverage obviated the District's argument. Additionally, although the District may have a colorable basis to withhold the information if it reasonably believed that the requestor knew the student's identity, the District did not raise this argument until its appeal and therefore the Court lacked a sufficient record to review this claim.

- ***Texas:***

  Univ. of Tex. at Austin v. Gatehouse Media Tex. Holding, II, Inc.
  (656 S.W. 3d 791) (November 29, 2022)

  The Texas Court of Appeals held that the state's Public Information Act ("PIA") required the disclosure of the University's disciplinary determinations finding that a student had perpetrated a sex offense.

  The Austin American-Statesman (the "Statesman") made a PIA request to the University seeking the "final results" of all disciplinary hearings conducted by the University since 2014 wherein it determined that a student committed a crime of violence, including forcible and nonforcible sex offenses. For each such determination, the Statesman sought the name of the student who was found to have committed the offense, the violation committed, the essential findings supporting that a violation had been committed, and the sanction imposed. The Statesman specifically tailored its request to information that is permitted to be disclosed under the Family Educational Rights and Privacy Act of 1974 ("FERPA"). The University denied the request stating that it would not produce the information because FERPA does not require the disclosure of such records.

  The Statesman filed a petition with the district court seeking the disclosure of the requested information. The University argued that the requested information was exempt from disclosure under the PIA's confidentiality-of-student-records exception as well as the confidential-information exception. The lower court rejected these arguments and the University appealed.

  The Court of Appeals rejected the University's contention that the confidentiality-of-student-records exception gave the University the discretion to voluntarily decide whether to disclose information within a student record even when disclosure is authorized by FERPA. The Court emphasized that the information sought, which is directly related to the safety of students on campus and the University's response to incidents where students commit violent acts, is of significant public interest.

  The Court also held that the confidential-information exception, which exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision[,]" did not apply, reasoning that privacy protections do not shield information concerning individuals who have been accused of breaking

laws. Moreover, the Court stated that the public has a constitutional right to access information concerning crime in the community.

- ***Library Records.***

  - ***Colorado:***

Brookhart v. Reaman
(2023 WL 6471120) (October 5, 2023)

The Colorado Court of Appeals, Division VI, held that the identities of individuals who submitted requests for books to be removed from a public library were exempt from disclosure under the Colorado Open Records Act ("CORA") exception to disclosure for "library user records." Under this exception, a library may not disclose any record or other information that identifies a person as having requested or obtained specific materials or services or as otherwise having used the library.

After several individuals requested that the Gunnison County Library (the "Library") remove or restrict access to the book *Gender Queer: A Memoir*, a reporter submitted a request under CORA seeking unredacted copies of the requesters' "Request for Reconsideration of Materials" forms (the "reconsideration forms"). The Library developed reconsideration forms, which were available to the public through its website, so that any person could request an item be removed from the Library's collection or that access to the item be restricted.

The Library brought an action seeking guidance on how it should respond to the CORA request. The district court determined that the requestor was entitled to the reconsideration forms but that the identities of the individuals who submitted those forms must be redacted. The requestor appealed.

The Court of Appeals affirmed the district court and held that the CORA exception for library user records applied to requesters' reconsideration forms. The Court noted that based on the language of the statute, an individual was a "user" of the Library if they requested or obtained a specific service from the Library. The Court determined that the definition of "service" encompassed the Library's promulgation and the submission of the reconsideration form. Crucial to the Court's analysis was that the Library created and disseminated the reconsideration form, establishing a procedure by which any person could request certain books be removed or restricted.

- ***Miscellaneous Public Records Administration (Processing, Fees, Training, Etc.)***

  - ***Colorado:***

    Senate Bill 23-286, Ch. 406, An Act Concerning Improving Public Access To Government Records.

    This Act amends several provisions of the Colorado Open Records Act ("CORA"), addressing several aspects of how records requests may be processed and fulfilled. Such provisions include the following:

    (1) Government entities are prohibited from requiring CORA requesters to show any form of identification as a condition of making a request unless otherwise permitted by law or if such records are only available to the "person in interest."

    (2) If public records are stored in a searchable digital format, the custodian of the records must provide a digital copy of the records in a searchable format unless otherwise requested by the requester. The custodian of the records cannot convert digital records into a non-searchable format before transmission to the requestor.

    (3) Digital records must be transmitted via email or other mutually agreed upon method if the file size is too large.

    (4) The custodian of the records may not charge a per-page fee for records provided in a digital or electronic format.

    [This Act amends other provisions of the CORA, which are discussed Section IV.A. (page 23) of this report.]

  - ***Connecticut:***

    Substitute Senate Bill No. 1221, Public Act No. 23-200, An Act Concerning The Enforcement of Violations Of the Freedom Of Information Act.

    This Act increases the civil penalty that may be imposed against a custodian or other official directly responsible for the denial of any right conferred under the state's Freedom of Information ("FOI") Act from $1,000 to $5,000.

    Additionally, this Act allows the FOI Commission to impose a separate civil penalty of up to $5,000 against a custodian of records or other public official where, after a hearing, it is found that the public agency is engaging in: (i) a practice or pattern of conduct that constitutes an obstruction of any right conferred by the FOI Act; or (ii) reckless, willful or wanton misconduct with regard to the delay or denial of responses to request for public records.

- ***Montana:***

  Senate Bill 232, Ch. 439, An Act Generally Revising Public Records Laws; Establishing A Deadline For Public Agencies To Acknowledge Receipt Of A Public Information Request; Establishing A Deadline For Certain Executive Branch Agencies To Respond To A Request For Public Information . . . .

  This Act modifies the deadlines by which certain executive branch agencies must respond to or acknowledge public records requests. Previously, such public agencies were only required to "respond in a timely manner to the requesting person." Now, public agencies must acknowledge the request within five days of receipt. Additionally, executive branch agencies (except for the Department of Corrections) must provide the requested information in a timely manner but no later than 20 working days after the date of the acknowledgment. The agency and the requestor may mutually agree to extend the deadline for response by an additional 20 working days. If the executive branch agency does not respond within the deadline set forth above, the requestor may file a complaint in the district court.

- ***Virginia:***

  House Bill 2007, Ch. 599, An Act to Amend and Reenact § 2.2-3704.1 of the Code of Virginia, Relating to the Virginia Freedom of Information Act; Posting of Fee Policy.

  This Act requires all state public bodies, any county or city, any town with a population of more than 250, and any school board to make available on its website and upon request a written policy: (i) explaining how the public body assesses charges for accessing or searching for requested records; and (ii) noting the current fee charged, if any, for accessing and searching for such requested records.

  House Bill 2006, Ch. 534, An Act to Amend and Reenact § 2.2-3704 of the Code of Virginia, Relating to the Virigina Freedom of Information Act; Public Records Charges; Electronic Payment Method.

  This Act provides that any local public body that charges for the production of public records pursuant to the Virginia Freedom of Information Act may provide an electronic method of payment through which all payments for the production of such records to such locality may be made.

  House Bill 2498, Ch. 461, An Act . . . Relating to the Virginia Freedom of Information Act; Training for Local Officials; Members of Park Authorities' Boards.

  This Act expands the list of individuals required to receive training related to the state's Freedom of Information Act to include members of any boards governing any authority established under the Park Authorities Act.

- ***Non-Criminal Investigations.***

  - ***Pennsylvania:***

    Cassel v. Dep't of Health (Off. of Open Records)
    (292 A.3d 623) (January 10, 2023)

    The Commonwealth Court of Pennsylvania held that affidavits submitted by the Department of Health (the "Department") consisting of mere conclusory statements were insufficient to justify the withholding of records under the "non-criminal investigation" exemption of the state's Right to Know Law ("RTKL").

    As part of a non-criminal investigation by the Department into vaporized medical marijuana products ("Products") that contain additives, the Department notified permitted medical marijuana growers that they must submit Products containing additives for reapproval and required growers to provide information regarding the safety of any additives in their Products. In response, the requestors submitted a records request seeking, among other things, records related to such decision. The Department denied the request, in part, asserting that such records were exempt as they related to the Department's non-criminal investigation concerning the safety of the Products.

    The Requestors appealed the Department's denial to the state's Office of Open Records ("OOR"). The Department submitted affidavits attesting that the subject records were related to the Department's non-criminal investigation. OOR determined that an in-camera review of the documents was unnecessary and relied solely on the Department's affidavits to determine that the non-criminal investigation exemption applied. Although some records may have predated the Department's investigation, OOR determined that those records were created exclusively for use in the investigation and were therefore covered by the exemption.

    The requesters appealed to the Commonwealth Court of Pennsylvania claiming that records predating an investigation may only be exempt from disclosure under the RTKL when they directly relate to a subsequent investigation, but the Department's affidavits failed to demonstrate such a relationship in this case.

    The court agreed with the requestors and found that the affidavits submitted by the Department were insufficient to establish the applicability of the non-criminal investigation exemption to any of the records because they contained only conclusory statements and provided "no detail whatsoever." Accordingly, the court remanded the matter to OOR for it to conduct an in-camera review of the responsive records to determine the exemption status of each record.

- ***Trade Secrets.***

  - ***Pennsylvania:***

    Garrett Hancock Optum Inc. v. Magellan Behavioral Health of Pa.
    (2023 WL 5214936) (August 15, 2023)

    The Commonwealth Court of Pennsylvania held that an unredacted copy of a contract between Montgomery County (the "County") and Magellan Behavioral Health of Pennsylvania Inc. ("Magellan") (collectively the "Respondents") must be made available under the state's Right-to-Know Law ("RTKL"). The Court rejected the Respondents' contention that the redacted portions of the contract constituted a trade secret or that disclosure would result in competitive harm.

    The Respondents entered into a contract in 2016 wherein Magellan would provide and deliver services under the HealthChoices Behavioral Health Program implemented by the state's Department of Human Services ("DHS"). In 2021, after a competitive bidding process, the Respondents amended and restated that agreement. After the County and Magellan executed the contract, an employee of Optum Inc., a potential competitor of Magellan, filed a request for copies of the current and original contract along with all amendments and/or revisions. The County partially denied the request, indicating that the requested information would require disclosing Magellan's trade secrets or confidential proprietary information protected under the RTKL. The requestors appealed to the state's Office of Open Records ("OOR"). The OOR, relying on an affidavit by Magellan's CEO, determined that certain redactions were proper because the withheld information constituted "confidential proprietary information and/or trade secrets" that may be redacted. Redactions included provisions stating the terms of payments to be made by the County to Magellan and fines for non-compliance by Magellan; provisions stating the metrics or standards for services to be provided by Magellan; provisions for protection of County from insolvency or nonperformance by Magellan; provisions in the event of an acquisition of Magellan or its parent; and provisions stating the terms of a covenant not to compete.

    The requestors appealed, and the court found that the redacted information consisted of various payment provisions, which, as financial records, were explicitly excluded from the RTKL's trade secret exemption and therefore subject to disclosure. The court concluded that none of the information that the OOR determined may be redacted was exempt. Magellan appealed.

    The Commonwealth Court affirmed the trial court's decision. The Court agreed that the contract was properly classified as a financial record because its general terms and payment provisions had a direct bearing on the disbursement of funds by the county. The Court noted that the state legislature sought to ensure the disclosure of financial records including information that may otherwise be considered a trade secret or confidential proprietary information. Therefore, the Court concluded that the information must be disclosed.

- ***Parole Records.***

  - ***Nebraska:***

    Jacob v. Neb. Bd. of Parole
    (313 Neb. 109) (December 23, 2022)

    The Nebraska Supreme Court determined that a record of an interview during a first-stage parole review proceeding was an investigatory record exempt from disclosure under the state's public records statute. Additionally, the Court held that an inmate's confidential individual file was not subject to disclosure.

    The Board of Parole (the "Board") conducted a "first-stage" review of the petitioner, an inmate eligible for parole, to determine if he was reasonably likely to be granted parole, which included an interview of the petitioner. The Board decided that the petitioner was not reasonably likely to be granted parole and deferred his case for later consideration. The petitioner submitted a records request to the Board seeking a complete record of the first-stage review, which the Board denied because the records were "investigatory records" or part of the petitioner's individual file. The petitioner filed a petition with the district court seeking to compel the disclosure of the first-stage review records, which the court denied.

    The Nebraska Supreme Court agreed with the lower court. The Court noted that certain records sought by the petitioner related to the interview conducted at the first-stage review, which were "investigatory records" under state law because they were an examination of a person created as part of the Board's statutory duty. The Court also concluded that the records the petitioner sought concerning his individual file were statutorily designated as confidential and thus were not public records. Although the Court recognized the petitioner's concern that the Board could place records into his individual file to prevent them from being disclosed, the petitioner failed to articulate what information he was seeking from his individual file. Therefore, the Court could not determine whether the Board abused its discretion by placing such information in the petitioner's individual file for the purposes of sheltering it from disclosure.

- ***Personnel Files.***

  - ***Maine:***

    L.D. 1397, Ch. 1569, An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees.

    This Act amends the personnel records provisions of the Maine Civil Service and Counties statutes. Under those statutes, final decisions imposing or upholding discipline against public employees are subject to disclosure. This Act clarifies specific information that must be included in such final written decisions. Under the Act, if disciplinary action is taken against a public employee, the decision now must state the

conduct or other facts based upon which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action.

- ***New Mexico:***

  Henry v. Gauman
  (2023 WL 4397787) (June 30, 2023)

  The Court of Appeals of New Mexico held that under the state's Inspection of Public Records Act ("IPRA"), the New Mexico Livestock Board (the "Board") was not required to disclose those portions of an investigative report concerning allegations of improper conduct by the livestock inspector that were factual in nature. The Court concluded that because New Mexico law exempts from disclosure "letters and memoranda that are matters of opinion in personnel files or students' cumulative files," the entire investigative report could be withheld.

  The requestor, Nancy Henry ("Henry"), filed a complaint with the Office of the State Auditor (the "OSA"), alleging that the Board's livestock inspector was fraudulently billing the Board while working a second job. The OSA investigated Henry's complaint and concluded that the state paid the livestock inspector while working at an unapproved second job. Separately, the Board retained an outside firm to conduct its own investigation to determine if the livestock inspector violated the State's or the Board's rules for employee conduct.

  After the Board's investigation, Henry filed an IPRA request for the Board's investigation report. The Board denied Henry's request, citing to an exemption to disclosure under the IPRA for "records and documentation containing matters of opinion and documents concerning infractions and disciplinary actions placed in an officer's personnel file."

  Henry filed a complaint in district court seeking an order to compel the Board to produce the Board's investigation report. The district court granted the Board's motion for summary judgment, noting that it was undisputed that the investigation report concerned potential disciplinary action against the livestock investigator, and that was sufficient to shield the report from disclosure under the IPRA.

  On appeal, Henry conceded that those portions of the investigation report containing matters of opinion concerning discipline were exempt under the IPRA; however, she argued that any factual portions of the report were required to be disclosed. The Court of Appeals disagreed. The Court concluded that the subject of the exemption was not the opinions but rather the "letters or memoranda" in which those opinions were contained. Therefore, the Court opined that the legislature intended for the entire record be exempt from disclosure, not just those portions containing opinions.

  In addition, the Court found that the fact that the IPRA requires custodians of records to separate exempt and nonexempt records does not require the Board to disclose the factual portions of the investigation report. The exemption in this case applied to the record as a whole, and therefore, it could be withheld in its entirety.