Freedom of Information

State Litigation and Legislation Update

2024 COGEL Conference

Los Angeles, California

December 8-11, 2024

Prepared by

The Connecticut Freedom of Information Commission Staff

Table of Contents

Freedom of Information

Litigation and Legislation Update

I. Introduction

The following is an overview of action in state legislatures and courts around the country involving public access issues since the last COGEL conference in December 2023. 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 2024.

The cases and legislation referenced in this report were compiled using Westlaw.

Attorneys Danielle McGee, Mary-Kate Smith, Nicholas Smarra, Marybeth Sullivan, and Paul Arce, 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.***

  - ***Connecticut:***

    Town of Avon v. Sastre
    (224 Conn. App. 155) (appeal denied) (March 5, 2024)

    The Appellate Court affirmed the lower court's ruling that a log detailing allegations of misconduct by a town's chief of police ("the log"), prepared by a town employee and provided to the town manager, constituted a public record under the Freedom of Information ("FOI") Act.

    An employee met with the town manager to discuss certain incidents involving the police chief. Following that meeting, the town manager contacted the town attorney for legal advice about the employee's concerns. The attorney asked the town manager whether the employee had any documentation about the incidents. The town manager posed this question to the employee, who at that point informed the manager about the log's existence. The employee then voluntarily gave the log to the town manager, who then made a copy; provided the copy to the town attorney; and returned the original log to the employee. Thereafter, based on the employee's complaints as detailed in the log, the town placed the police chief on administrative leave, and the parties subsequently executed a severance agreement. A few months later, the town received an FOI request for "any and all records" relating to the accusations against the chief. The town declined to provide the log as part of its response to the request.

    The Appellate Court agreed with the lower court, holding that the log is a disclosable "public record." The FOI Act defines a public record as "any recorded date or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency." The court first considered whether the log related to "conduct of the public's business," as required by the FOI Act. Relying on dictionary definitions and case law, the Court found that the log did meet this standard because it pertained to police conduct, which is a matter of public concern and (2) the log came into the town's possession and was instrumental in placing the police chief on leave.

    Second, the Court considered whether the log was "prepared, owned, used, received, or retained" by the town as required by the FOI Act. Focusing on whether it was "received," the Court determined that the town manager's act of taking possession of the log to make a copy for the town attorney constituted receipt under the FOI Act. Therefore, the Court concluded that the log was a "public record" subject to disclosure under the FOI Act.

- ***Georgia:***

  Gonzalez v. Miller
  (2024 WL 4536191) (October 22, 2024)

  The Georgia Supreme Court held that the state's Open Records Act ("ORA") applies to records maintained by district attorneys' offices.

  In this matter, a requester sought records from a district attorney relating to various functions of the district attorney's office, including ones showing "staff shortages, staggering caseloads, violations of crime victim's rights, failure…to effectively prosecute criminal cases, and an open disregard for the State of Georgia." The district attorney declined to disclose the records, arguing, among other things, that neither she nor her office was subject to the ORA because she is a "judicial officer" pursuant to Georgia's constitution, and the ORA only applies to executive branch agencies.

  The court rejected the district attorney's argument, reasoning that the state constitution vests judicial power "exclusively" in the courts. District attorneys exercise executive power because their function is to enforce the law by prosecuting criminal cases; they have no judicial power because they do not decide cases.

  Milliron v. Antonakakis
  (2024 WL 3802782) (August 13, 2024)

  The Supreme Court of Georgia ruled that the state's Open Records Act ("ORA") applies to records held by an individual who performs services for a public agency as a private contractor where the records sought relate to that individual's services as a private contractor for the agency.

  The private contractor in this case is a professor employed by the Georgia Institute of Technology who also provided services to the institution as a private contractor, conducting federally funded research through two companies he founded and owned. A citizen made a public records request directly to this professor relating to these contracted services. The professor refused to respond to the request, claiming that (1) he was not an "agency" subject to the ORA and (2) the requester should have submitted it to the institution's designated open records officer, instead.

  The state's Supreme Court overturned both lower court decisions that favored the professor, basing its decision on the plain language of the ORA. The Court reasoned that the statutory language makes clear that records prepared or maintained by a private contractor "in performance of a service or function for or on behalf of a public agency" are public records under the ORA, even if the private contractor separately works as an agency employee.

- ***Kentucky:***

  Kentucky State Univ. Found., Inc. v. Frankfort Newsmedia, LLC
  (694 S.W.3d 394) (March 1, 2024)

  The Court of Appeals of Kentucky determined that a university foundation was a public agency under the state's Open Records Act ("ORA"), requiring the foundation to comply with records requests.

  A journalist made a request to the Kentucky State University Foundation, Inc. (the "Foundation") seeking records related to "payments made to a specific individual for a two-year period, as well as payments made for the purposes of parties celebrating [that same individual's] birthday."

  The Foundation denied the request, claiming it was not a public agency subject to the ORA. The Attorney General ruled the Foundation was indeed a public agency. The Foundation then filed a lawsuit, but the court ruled in favor of the journalist.

  The appellate court ruled that the Foundation is a public agency under ORA because its governing body is appointed by and controlled by a public agency, Kentucky State University ("KSU"). The court detailed examples of the ways KSU controls the Foundation "through practices surrounding the receipt and disbursement of Foundation funds" pointing specifically to a Memorandum of Understanding between the two organizations.

- ***Louisiana:***

  People for the Ethical Treatment of Animals v. Bd. of Supervisors of Louisiana State Univ.
  (387 So. 3d 527) (June 28, 2024)

  The Supreme Court of Louisiana held that veterinary care records were created and maintained pursuant to state law, and therefore were "public records" under the Public Records Law ("PRL").

  People for the Ethical Treatment of Animals ("PETA") filed a series of records requests with Louisiana State University ("LSU") related to an ongoing research project regarding wild songbirds. When LSU did not comply with such requests, PETA filed a writ of mandamus seeking production of the requested records. The court found in favor of PETA and ordered LSU to produce several categories of records, including veterinary care records. The appellate court affirmed.

  On appeal to the state Supreme Court, LSU argued that the veterinary care records are "records of the [Institutional Animal Care and Use Committee]" a body created by federal law, and thus, contended that such records are not "public records," within the meaning of the PRL. The Court disagreed with LSU, concluding that the veterinary care records were maintained not only for purposes of compliance with federal

standards, but also as part of LSU's state-mandated responsibilities, such as veterinary licensure requirements. Thus, the court ruled that LSU's animal care records, reflecting the care provided to animals in research, are subject to the PRL and should be disclosed.

- ***Michigan:***

  Litkouhi v. Rochester Cmty. Sch. Dist.
  (2024 WL 748476) (appeal denied) (February 22, 2024)

  The Court of Appeals of Michigan held that public school teachers do not qualify as "public bodies" under the state's Freedom of Information Act ("FOIA"), and therefore their individually created and retained records (e.g., teaching materials and lesson plans) are not subject to disclosure.

  A parent within the Rochester Community School District ("District") requested "all teacher training materials and references (written and video) for the 'History of Ethnic and Gender Studies' … access to and a copy of all teacher lesson plans, readings given to students (articles, publications, case studies), viewings (video clips), and assignments used to evaluate students (writing prompts) used for the 'History of Ethnic and Gender Studies' Course at Rochester High School, Adams High School, and Stoney Creek High School during the time period from August 30-September 10, 2021 … [and] If book(s) were given to be used, I request that the book(s) be made available for me to come and review."

  The District's FOIA Coordinator partially granted the request, providing some materials but claimed other documents did not exist. The parent followed up with a second FOIA request in December 2021, asking for similar materials. The FOIA Coordinator responded by stating the District did not possess the requested documents. The parent appealed to the District superintendent, who upheld the original decision. The parent then filed a lawsuit against the District, alleging that the District did not fully search for records at the individual school or teacher level. The District argued that teachers' documents are not considered public records under FOIA. The trial court ruled in favor of the District, stating teachers are not public bodies, and therefore, their materials are not subject to FOIA.

  The appellate court upheld the lower court's conclusion that public school teachers are not included in the definition of a "public body" under FOIA, and therefore, their individual work product is not subject to disclosure. The court noted that FOIA defines a public body as including state employees but excludes local government employees, such as teachers. The court reasoned that the absence of the term "employee" in the relevant statutory provisions for local government implies that local public employees are excluded. The court closed its analysis by expounding that the decision is consistent with earlier rulings, which found that private communications of government officials were not public records unless used in an official function.

- ***New Jersey:***

  American Civil Liberties Union v. County Prosecutors Association
  (257 N.J. 87) (April 17, 2024)

  The New Jersey Supreme Court affirmed that the County Prosecutors Association of New Jersey ("CPANJ"), a private, nonprofit organization, is not a public agency required to disclose records pursuant to the state's Open Public Records Act ("OPRA").

  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, which the ACLU considered "[a] partner in implementing statewide criminal justice policy." CPANJ denied the request, stating that it was not a public agency and, therefore, not subject to OPRA. The ACLU appealed the denial unsuccessfully in both Superior and Appellate Court.

  Under the OPRA, a public agency is defined to include an "instrumentality … created by a political subdivision or combination of political subdivisions." The ACLU argued to the state's Supreme Court that CPANJ is a public agency because it is an instrumentality of the county prosecutors, "state actors," who together comprise a "combination of political subdivisions" under OPRA.

  The Supreme Court first noted that nothing in the record suggested that the counties, which were indisputably political subdivisions, directly created CPANJ or authorized its creation. Rather, the core question, based upon the ACLU's argument, was whether a county prosecutor constituted a "political subdivision" for purposes of OPRA. The court held that a county prosecutor does not constitute a "political subdivision," because a county prosecutor is distinct from the county that the prosecutor serves. Like the Attorney General, a county prosecutor is an independent constitutional officer who serves by virtue of gubernatorial nomination and senate confirmation and occupies a hybrid role serving both the county and the state. Accordingly, the court held that CPANJ was not an instrumentality created by a combination of political subdivisions and, thus, not a public agency subject to OPRA.

- ***Ohio:***

  State ex rel Brown v. Columbiana County Jail
  (2024 WL 4508480) (October 17, 2024)

  The Ohio Supreme Court determined that there was a "quasi-agency relationship" between a county sheriff's office and private jail administrators and, therefore, ordered the sheriff's office to obtain and disclose requested records held by these administrators.

  An incarcerated individual requested records from the sheriff's office pertaining to the Columbiana County Jail. At the time of the request, private jail administrators, rather

than the sheriff's office, operated the Columbiana County Jail under a contract agreement. The sheriff's office provided responsive records in its possession to the requester and argued that any remaining responsive records must be provided by the private administrators.

Because the request was directed to the sheriff's office, the Court applied the "quasi-agency test," which provides that when a public office contracts with a private entity, the records held by the private entity are public records if "(1) [the] private entity prepares [the] records in order to carry out a public office's responsibilities, (2) the public office is able to monitor the private entity's performance, and (3) the public office has access to the records for this purpose." When a requester has proved the first prong of the "quasi-agency test," the requester has met his burden: "proof of a delegated public duty establishes that the documents relating to the delegated functions are public records."

In this case, the sheriff's office delegated the administration of the jail and the supervision and care of the inmates to the private jail administrators. The requester sought records pertaining to the names and positions of jail personnel, policies regarding inmate booking, and record policies and retention schedules. The court held that to the extent such records exist, all such records would have been created to carry out the delegated public responsibilities, and therefore, are public records. Accordingly, the court stated that the sheriff's office must obtain and disclose the requested records.

- ***Legislation.***

  - ***Ohio:***

    2023 Statewide Issue No. 2, An Act to Control and Regulate Adult Use Cannabis.

    Ohio voters approved a statewide ballot initiative to commercialize, regulate, legalize, and tax the adult use of cannabis, effective on December 7, 2023. Several provisions in the law require confidential, interagency information sharing about license applicants placing such information outside of the reach of the state's public records laws. The approved ballot initiative identifies the following information that is submitted, collected, or gathered, pursuant to the new law as "confidential" and, therefore, not public records under Ohio's open records law:

    (i) Social security numbers, passport numbers, or federal tax identification numbers,

    (ii) Home addresses and telephone numbers,

    (iii) Birth certificates,

    (iv) Driver's license numbers,

(v) Dates of birth,

(vi) Places of birth,

(vii) The personal financial information and records, including tax returns and information, and records of criminal proceedings,

(viii) Any information concerning a victim of domestic violence, sexual assault or stalking,

(ix) Electronic mail addresses,

(x) Internet Protocol (IP) addresses or similar addresses,

(xi) Any trade secret, patents, or exclusive licenses,

(xii) Client records and adult use consumer identifying information,

(xiii) Security information, including risk prevention plans, detection and countermeasures, location of vaults or other money and/or cannabis storage areas, emergency management plans, security and surveillance plans, equipment and usage protocols, and theft and fraud prevention plans and countermeasures.

Conversely, the approved ballot initiative requires the Division of Cannabis Control to provide upon request: (i) the amount of tax paid to the state by any license holder; and (ii) a copy of a letter providing the reasons for the denial of an applicant's license, but with confidential information redacted.

Last, some provisions in the approved ballot initiative exclude financial information and trade secrets submitted to the state's Department of Development by applicants for the cannabis social equity and jobs program as public records. However, the disclosure of such information may be required during a public hearing or proceeding regarding an applicant's eligibility to participate in the cannabis social equity and jobs program. Such disclosure is limited to only the information that is *required* to determine eligibility.

2024 Ohio Laws File 48 (Sub. S.B. No. 29), An Act to Amend . . . the Revised Code Regarding Educational Records and Student Data Privacy.

This Act governs the collection, use, and protection of educational records by technology providers that contract with school districts. Among its various provisions, the Act excludes "educational support services data" from the definition of "public records" in Ohio's Public Records laws, effective October 24, 2024.

Under the act, "educational support services data" means data on individuals that is collected, created, maintained, used, or disseminated relating to programs administered

by a school district, or an entity under contract with a school district, designed to eliminate disparities and advance equities in educational achievement for youth by coordinating services, regardless of the youth's involvement with other governmental services.

- ***Pennsylvania:***

  2023 Pa. Legis. Serv. Act 2023-38 (H.B. 1284), An Act Amending Title 75 (Vehicles) of the Pennsylvania Consolidated Statutes . . . for Automated Speed Enforcement Systems in Active Work Zones and for Pilot Program for Automated Speed Enforcement System on Designated Highway and Providing for Automated Speed Enforcement Study and for Pilot Program for Automated Speed Enforcement Systems in Designated School Zones.

  This Act amends the state law governing automated enforcement programs for motorists. Various provisions contain exemptions from public records disclosure requirements.

  Under this Act, any motor vehicle information that the state collects and maintains as part of its automated speed enforcement system in active work zones and on designated highways are not considered public records. However, the Act allows a court of competent jurisdiction to order that the information be provided to law enforcement officials, if the information is requested solely in connection with a criminal law enforcement action and is reasonably described. Already by law and unchanged by the Act, the following information collected from automated systems is also not deemed to be a public record: recorded images, written records, reports or facsimiles, and names and addresses.

  The Act also establishes a pilot program for automated speed zone enforcement systems in designated school zones. It likewise excludes the above categories of information collected by the systems as public records. The Act requires the system administrator to submit an annual report to the leadership of the state legislature's House Transportation Committee. The report is deemed a public record with respect to the following information from the prior year: the number of violations and fines issued, data regarding the speeds of motor vehicles in the enforcement area, penalties paid and outstanding, violations contested, and vehicular and pedestrian accidents and serious bodily injuries and deaths in the designated school zones, among other topics.

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 ensure 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.***

  - ***Colorado:***

    Anzalone Tr. of Town of Del Norte v. Bd. of Trustees of Town of Del Norte
    (549 P.3d 255) (appeal denied) (February 22, 2024)

    The Colorado Court of Appeals, Division II, concluded that an executive session of the Board of Trustees ("Board") for the Town of Del Norte's ("Town"), and subsequent censure, were subject to the Open Meetings Law ("OML"), as the censure was considered a formal action linked to the Board's policy-making powers, and thus, the public had the right to observe these proceedings.

    A trustee on the Board for the Town was censured by the Board following allegations of misconduct related to her public interactions and handling of town staff. The censure cited her interference with code enforcement, attempts to call an unauthorized board meeting, and conversations with town employees about replacing certain town staff. After being informed that her removal was under consideration, a special meeting was held, where the Board discussed her censure in a 90-minute executive session after which a public vote was held to approve and publicly announce the decision. In attendance were five (of seven total) trustees of the Board, as well as the Town attorney, Town clerk, code enforcement officer, treasurer, and police chief. The subject trustee sued, claiming the censure violated the OML. The district court dismissed the case, reasoning that the censure was an expression of opinion, not formal action (e.g., it did not involve the Town's policy-making authority/process).

    On appeal, the appellate court held that the Board's executive session and subsequent censure of the trustee were subject to the OML because the censure constituted formal action, directly connected to the Board's policy-making responsibilities. The court cited precedent which established that meetings with a policy-making connection must comply with the OML. The court concluded that the actions taken by the Board, involving matters affecting the public and the subject trustee's role, were improperly conducted in secret. As a result, the censure was deemed invalid.

- ***Illinois:***

  Int'l Ass'n of Fire Fighters Loc. 4646 v. Vill. of Oak Brook
  (232 N.E.3d 1125) (January 3, 2024)

  The Appellate Court of Illinois, Third District, held that a public body was not in "active or imminent negotiations" with a collective bargaining unit, nor was it discussing "probable or imminent litigation," for purposes of convening a closed meeting and therefore violated the Open Meetings Act ("OMA").

  On December 8, 2020, the Village of Oak Brook ("Village") held a public hearing on its year 2021 budget but unanimously voted to conduct a nearly three-hour closed session, citing exemptions for collective bargaining and probable litigation. The International Association of Fire Fighters Local 4646 ("Union"), a labor organization certified to represent the Village firefighters, filed a complaint, challenging the closed session's legality. The Public Access Bureau ("PAB") later reviewed the session and determined that the Village's closed session did not meet the requirements for either claimed exemption, as there was no imminent bargaining or litigation at the time.

  The appellate court upheld the lower court's determination that the limited exceptions for collective bargaining negotiations and imminent litigation under the OMA were not appropriate in this instance, as these exceptions are strictly construed, extending only to subjects clearly within their scope, and require clear justification. For the collective-negotiation exception, the court noted that closed meetings must involve active negotiations with employee representatives, not hypothetical or budget discussions that might affect future negotiations. Here, the Village discussed budget options that could impact wages and staffing but not active bargaining, making the exception inapplicable. As to the litigation exception, the OMA permits closed meetings only when litigation is probable or imminent, not merely possible. The Village argued that a budget decision might provoke a lawsuit, but because they had no basis to believe litigation was more likely than not at that time, the court found the exception did not apply. The court expounded that merely anticipating negotiations or hypothetical lawsuits did not justify closing the meeting.

- ***Ohio:***

  State ex rel Ames v. Portage County Solid Waste Management District Board of Commissioners, et al.
  (233 N.E.3d 138) (December 29, 2023)

  In this matter, a county resident alleged that a waste management district's board of directors violated multiple provisions of the state's Open Meetings Act ("OMA"). The Ohio Court of Appeals affirmed two determinations made by the lower court, specifically related to meeting minutes and notice.

First, the Court affirmed the lower court's decision that a public body's meeting minutes need not indicate the meeting's location. In his complaint, the resident alleged that the board's minutes were not "full and accurate" because they lacked this information. The Court found that neither the OMA nor precedent case law contained such a requirement. It reasoned that the OMA is concerned with public bodies providing *advance* notice of their meetings so that the public may attend, not post-meeting notice. Furthermore, it reasoned that case law has established that, to be full and accurate, "minutes must contain *sufficient facts and information* to permit the public to understand and appreciate the *rationale* behind the relevant public body's decision."

Second, the Court upheld the trial court's determination that the board had provided reasonable advance notice of its meetings under the OMA. The resident alleged that the board had failed to establish, by rule, a "reasonable method *that actually reaches the public*" to share the time, place, and purpose of special meetings. The Court found that the resident's allegations misstated the OMA's basic requirement, which the board had in fact met: it had established a rule that provided *reasonable advance notice* of its meetings, as evidenced by a copy provided to the Court by its clerk. The Court reasoned that the OMA itself required nothing beyond the creation of such a rule and, therefore, the trial court was correct to award summary judgment in favor of the board.

- ***Legislation.***

  - ***Virginia:***

    2024 Virginia Laws Ch. 610 (H.B. 1040), An Act to Amend . . .the Code of Virginia Relating to the Virginia Freedom of Information Act. . . .

    This Act allows an individual member of a public body who is a (i) person with a disability, or (ii) caregiver for such a person (needing to provide care at the time of a public meeting), and, in either instance, uses remote participation to attend a public meeting of said public body, to count toward the quorum as if the individual were physically present. Such person attending virtually or any other member attending an all-virtual meeting is not prohibited or otherwise restricted from voting in said meeting on account of their virtual attendance.

IV. Access to Public Records

A. Privacy Exemptions

Below are summaries of cases and legislation concerning exemptions, that aim to protect against the disclosure of information that could invade the privacy of individuals.

- ***Litigation.***

  - ***Illinois:***

    Teig v. Chavez
    (8 N.W.3d 484) (rehearing denied) (June 7, 2024)

    The Supreme Court of Iowa held that Iowa's Open Records Act ("ORA") protects the confidentiality of job applications received from external candidates, meaning anyone not employed by the government when the application was submitted. However, it does not exempt from disclosure applications submitted by current government employees.

    A requester sought several records related to the hiring process for the city clerk and city attorney positions for the City of Cedar Rapids ("City"). The City refused to disclose job applications, claiming they were confidential under the ORA.

    The State's Supreme Court held that job applications from external applicants were exempt from disclosure under the ORA as communications "made to a government body or to any of its employees by identified persons outside of government," where the government body receiving the communication "could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination." With respect to applications by existing government employees, the court held that job applications did not constitute "personal information in confidential personnel records" that is protected from disclosure under the ORA. Thus, the City was obligated to disclose those applications submitted by current employees of the City, although it properly withheld external applications.

  - ***Kentucky:***

    Shively Police Dep't v. Courier J., Inc.
    (No. 2023-SC-0033-DG) (September 26, 2024)

    The Supreme Court of Kentucky held that the personal privacy exemption in the Kentucky Open Records Act ("ORA") did not warrant the withholding of *all* police body-worn and dashboard camera footage of a high-speed police chase that resulted in the death of individuals who were passengers in another vehicle. The court noted that the police department failed to show how portions of footage that did not depict the deceased victims were exempt from disclosure based on personal privacy.

Two officers of the Shively Police Department ("SPD") pursued a truck that fled the scene of a potential domestic violence incident, resulting in a fatal crash. SPD justified the pursuit under their policy, stating that officers believed the reported domestic violence victim might be in the truck. However, questions arose regarding SPD's internal policy adherence, prompting The Courier-Journal, Inc. ("Courier Journal") to request related public records. SPD denied the request, citing ORA exemptions, including that releasing any of the footage would invade the privacy of the deceased victims and their families. The Courier Journal clarified that it only sought footage of the chase, not the crash itself. The Court of Appeals overturned the circuit court decision, instead finding insufficient grounds for SPD's exemption claims. SPD then sought and was granted discretionary review by the State's highest court.

The Court concluded that SPD could not withhold all dashcam and bodycam footage related to the fatal car crash under the ORA's personal privacy exemption. The ORA permits public agencies to withhold "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" To determine whether a public record was properly withheld pursuant to the personal privacy exemption, a reviewing court conducts a "comparative weighing" of the competing interests at stake in the record's release—those interests being an individual's interest in personal privacy and the public's interest in disclosure.

The Court recognized that the Courier Journal was not interested in footage depicting the crash, effectively conceding that those limited portions of the requested records were exempt from disclosure. Notwithstanding, SPD still was obligated to release the portions of the videos that were not exempt. SPD failed "to explain *how* the remaining portions of the requested dashcam and bodycam footage [were] exempt from disclosure pursuant to the personal privacy exemption." The Court therefore held that the personal privacy exemption was an improper basis to categorically withhold the *entirety* of the requested dashcam and bodycam video footage.

- ***Massachusetts:***

Mack v. Dist. Att'y for Bristol Dist.
(494 Mass. 1) (April 26, 2024)

The Supreme Judicial Court of Massachusetts, Suffolk, held that records related to an investigation into possible law enforcement misconduct are not exempt from disclosure pursuant to the privacy exemption set forth in the state's public records law.

Two Fall River police officers attempted to arrest a man for domestic violence. During the encounter, the man allegedly attacked one officer with a knife, leading the other officer to fatally shoot him. The district attorney's office conducted a five-month investigation into the incident, concluding that the officers acted lawfully and in accordance with the department's use of force policy. The decedent's brother requested records related to the fatal shooting. The district attorney's office withheld many records, citing invasion of privacy, among other exemptions. The brother sued for

access and a judge largely granted his request for records, which the district attorney's office then appealed.

The privacy exemption claimed applies to "personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." In 2020, the Legislature passed "An Act relative to justice, equity and accountability in law enforcement in the Commonwealth." The act amended the privacy exemption of the public records law to increase transparency in law enforcement investigations, and created a carve-out within the privacy exemption for "records related to a law enforcement misconduct investigation." Thus, the Court explained, "records that would otherwise fall within the privacy exemption but are 'related to a law **e**nforcement misconduct investigation'" may not be withheld from disclosure.

Although the district attorney's office argued that the records were exempt from disclosure pursuant to the privacy exemption, the Court ruled that all of the records fall under the "law enforcement misconduct investigation" carve-out to the privacy exemption. The Court also rejected the district attorney's office's secondary argument that "[w]here the shooting was deemed to be justified in this death investigation … and no criminal prosecution ensued, the records are not 'law enforcement misconduct' records at all." The Court explained that the carve-out "clearly and unambiguously states that the privacy exemption does not apply to an 'investigation' of law enforcement misconduct. To require the investigation to end with a finding of police misconduct places the cart before the horse and runs counter to the goals of police accountability and transparency. Thus, the investigation into the shooting of the decedent in this case was a 'law enforcement misconduct investigation.' Accordingly, the crime scene photographs, the home security videos, the still images, the names of officers and public officials, and the videotaped public employee interviews each 'relate[ ] to a law enforcement misconduct investigation' and may not be withheld under the privacy exemption."

- ***New York:***

Russell v. Town of Mount Pleasant
(227 A.D.3d 1083) (May 29, 2024)

The New York Appellate Court affirmed a trial court decision ordering a town clerk to disclose a list of names and email addresses of residents who subscribed to receive town email updates known as "E-news." The courts concluded that disclosure of the names and email addresses of town residents would not constitute an "unwarranted invasion of privacy."

A requester submitted a records request to the Town of Mount Pleasant ("town") for a "list of the names and email addresses of all residents who subscribe to receive email updates regarding items posted on the Town's website," which is referred to as "E-news." The Town's website allows residents to subscribe to E-news by submitting their email addresses. The Town denied the request.

The requester petitioned the trial court for an order to compel production and prevailed. The trial court placed a condition on the order, however, requiring that the requester "not reproduce, redistribute or circulate the information for solicitation, fund raising or any commercial purpose." The town appealed.

The appellate court rejected the town's arguments on appeal, finding that the town failed to show that the privacy interests at stake outweighed the public interest in the documents' disclosure. The court also found the town's argument that email address disclosure could expose E-news subscribers or the town to "unnecessary cybersecurity risks" to be speculative. The town failed to show that disclosure under the trial court's order would make subscribers or the town more susceptible to such risks than they ordinarily would be.

Spence v. New York State Dep't of Civ. Serv.
(223 A.D.3d 1019) (January 11, 2024)

The New York Supreme Court, Appellate Division, Third Department, held that disclosing the gender and ethnicity of candidates who failed civil service exams would constitute an unwarranted invasion of personal privacy, as this information, combined with other data, could lead to such individuals' identification.

The New York State Public Employees Federation ("PEF") filed a Freedom of Information Law ("FOIL") request seeking "the disposition of all applicants by ethnicity and gender, including but not limited to applicants who were approved, disapproved, failed, and passed" as it related to twelve civil service examinations. The Department of Civil Service ("DCS") denied the request, in part, concluding that disclosure would constitute an unwarranted invasion of personal privacy, and in addition, disclosure of "any information regarding failing candidates on a civil service examination" was barred by state law.

PEF disagreed, arguing that the request was for summary data regarding the applicant pool, not personal details. In denying the request, the FOIL officer reasoned that "by combining these sources of readily available information, it would be simple to compare a list of employees in the relevant promotion field job titles with the names on the eligible lists," which could lead to disclosure of the identities of failing candidates. PEF appealed and the lower and appellate courts affirmed.

FOIL exempts from disclosure materials that, "if disclosed would constitute an unwarranted invasion of personal privacy" and therefore allows an agency to withhold "records otherwise available . . . to prevent unwarranted invasions of personal privacy." An unwarranted invasion of personal privacy has been characterized as "that which would be offensive and objectionable to a reasonable person of ordinary sensibilities."

Here, state law specifically precluded disclosure of the "names of persons who failed examinations . . . or *any information* given about them." Therefore, "withholding or denying a request is proper 'where the requested records, when combined with other

readily available information, *could* identify or lead to the identification of information protected under a FOIL exemption.'"

DCS's rules prohibit disclosing "any information" relating to candidates who failed certain examinations. Therefore, in this case, disclosure would result in an unwarranted invasion of personal privacy, "as a reasonable person of ordinary sensibilities would find the disclosure of their name tied to a failed civil service examination to be offensive and objectionable." The court agreed with DCS that "the addition of each failing candidate's gender and ethnicity—when combined with other readily available information that PEF has access to through resources both publicly and privately available—could identify or lead to the identification of such candidates and is therefore an 'end-run around the statutory exemptions [that] cannot stand.'"

- ***Oregon:***

City of Portland v. Kessler
(334 Or.App. 189) (August 7, 2024)

The Oregon Court of Appeals held that employees' personal cell phone numbers were subject to public disclosure, affirming both a County District Attorney order and a Circuit Court decision ordering disclosure.

The request at issue in this matter was made to the City of Portland regarding city-issued cell phones. Specifically, the requester sought metadata of all numbers that exchanged text messages with city-issued cell phones, including dates, senders, and recipients (and, if possible, their names and other identities) for every message stored in or exportable from the city's archival service. The city claimed that a staff member would have to review the metadata to find and redact employee personal phone numbers, arguing that the state's public records law exempts them from disclosure.

The Court concluded that the categories of information listed in the exemption provision (i.e., public employee residential addresses and telephone numbers, personal email addresses, driver's license numbers, employer-issued ID card numbers, emergency contact information, Social Security numbers, birth dates, and *other telephone numbers*) are exempt only when they are contained in personnel records. The Court determined that the city-issued cell phone metadata were not personnel records and, therefore, any personal employee cell phone number contained therein could not be redacted from the disclosed records.

- ***Wisconsin:***

  Cronwell v. City of Glendale
  (2024 WL 938509) (March 5, 2024)

  The Wisconsin Court of Appeals upheld a lower court decision ordering a city to disclose an unredacted application for a license to sell alcoholic beverages, including portions containing an applicant's personally identifiable information.

  A requester sought copies of an entity's application to sell such beverages, along with its attachments. The city redacted from these records the personal phone number, email address, and date of birth of the entity's managing member, citing concerns that such information could be employed to commit identity theft and to procure an absentee ballot in someone else's name.

  Using the state's open records balancing test established by case law, the Court of Appeals found that the city failed to show that the public interests favoring secrecy outweighed those favoring disclosure. First, it reasoned that the city's concerns about identity theft, while legitimate, were insufficient to overcome the strong public interest in disclosure; the city had shown only the possibility, rather than the reasonable probability, of identity theft. Second, the city's argument that releasing such information would create a chilling effect on these license applications also failed to overcome the strong public interest in disclosure. Third, the court found the state's strong public policy favoring the inspection of public records "particularly significant" with respect to licenses to sell alcoholic beverages. Last, the court found that applicants inherently consent to public inspection of their license applications when choosing to submit them to the city and that such inspection allows the public to ensure the applicant meets the necessary statutory requirements (e.g., has attained the legal drinking age, does not have an arrest or conviction record, has demonstrated an overall fitness to sell such beverages).

- ***Legislation.***

  - ***Colorado:***

    2024 Colo. Legis. Serv. Ch. 445 (S.B. 24–160), An Act Concerning Records Related to Complaints of Discriminatory Workplace Practices.

    This Act tasks the office of legislative workplace relations with handling and preserving all complaints of discriminatory or unfair employment practices within the legislative department.

    Records related to sexual harassment complaints involving members of the General Assembly are public records and must be made available if the investigation leads to a finding of culpability. If a workplace harassment committee finds a violation of policy, the executive summary of the investigation report, excluding identifying information of the complainant or witnesses, must be made public if it is determined that the

member violated the policy. The committee may vote not to release the summary, but it must still be provided if requested under the Colorado Open Records Act.

Last, the Act amends Colorado's Open Meetings Law and requires that any state public body enter into executive session to discuss matters which are required to be kept confidential pursuant to the requirements of the workplace harassment policy.

- ***Florida:***

  2024 Fla. Sess. Law Serv. Ch. 2024-111 (S.B. 548), An Act Relating to Public Records. . . .

  This Act exempts from public disclosure: (i) the home addresses, phone numbers, dates of birth for certain current and former military personnel, their spouses, and dependents; and (ii) names and locations of schools and daycares attended by their dependents. The Act, as amended, does not provide automatic protection of such information, instead requiring applicable military personnel to submit to the necessary agency a written request for such protection and a statement affirming that said requester made reasonable efforts to protect the identification and location information from being accessible through other means available to the public.

  2024 Fla. Sess. Law Serv. Ch. 2024-257 (C.S.C.S.H.B. 273), An Act Relating to Public Records. . . .

  This Act amends Florida's Public Nuisances Law and creates an exemption from public records laws for personal identifying information of individuals who foster, adopt, or otherwise take legal custody of an animal from an incorporated political subdivision or humane society operated shelter. This exemption is subject to the legislative review provision of Florida's Public Records laws and as such will expire on October 2, 2029, unless reenacted by the state legislature.

- ***Maine:***

  2024 Me. Legis. Serv. Ch. 637 (H.P. 1421) (L.D. 2215), An Act to Implement the Recommendations of the Right to Know Advisory Committee Regarding Public Records Exceptions.

  This Act, approved on April 16, 2024, implements various recommendations of the state's Right to Know Advisory Committee Regarding Public Records Exceptions.

  The first two sections of the Act relate to the state's medicinal use cannabis law, specifically registry identification cards for caregivers for qualifying patients and officers, directors, or assistants of a dispensary or caregiver; and registration certificates for dispensaries and long-term care facilities designated by a qualifying patient. The Act repeals confidentiality provisions in prior law and replaces them with new ones specifying information that is confidential (e.g., information identifying a qualifying, visiting qualifying, registered patient, or caregiver exempt from registration, with some

exceptions) and information that is not confidential (e.g., applications, supporting information, and other information about registered caregivers, dispensaries, manufacturing facilities, and cannabis testing facilities).

Section 3 of the Act amends the medical examiner statute removing the requirement that certain records (e.g., medical records relating to a medical examiner case; law enforcement agency reports relating to the case; photos/videos etc., of items relating to a medical examiner case, and communications with the department of the Attorney General or office of a district attorney relating to a medical examiner case) must be in the possession or custody of the medical examiner or Office of Chief Medical Examiner to qualify as "confidential."

Section 4 of the Act makes confidential all investigative records of professional and occupational licensing boards during the pendency of an investigation, with some exceptions. These records become public upon the conclusion of an investigation unless confidentiality is required by some other law. The exceptions permit an investigative record to be disclosed during the pendency of an investigation under specified circumstances, such as (1) to designated complaint officers of the appropriate board; (2) to other state or federal agencies when the files contain evidence of possible violations of laws enforced by those agencies; (3) when necessary to avoid imminent and serious harm; and (4) to the person investigated on request, unless disclosure would prejudice the investigation.

Section 5 of the Act amends the Made for Maine Health Coverage Act to make *all* personally identifiable information obtained by the Maine Health Insurance Marketplace confidential. Under prior law, only the following information obtained by the marketplace was confidential: personally identifiable financial information, supporting data, or tax returns of any person; and health information that is covered by the Health Insurance Portability and Accountability Act or state law governing the confidentiality of individuals' health care information obtained by health care practitioners or facilities. All information obtained by the marketplace is otherwise a public record.

- ***South Carolina:***

  2024 South Carolina Laws Act 106 (H.3872), An Act to Amend the South Carolina Code of Laws . . . to Exempt Certain Personally Identifiable Information Concerning Lottery Claims From Nonconsensual Disclosure or Release Under the Freedom of Information Act. . . .

  This Act amends the South Carolina Education Lottery Act to exempt lottery prize winners' personal information (i.e., names, addresses, birth dates, social security numbers, and copies of identification documents) from disclosure under the South Carolina Freedom of Information Act ("FOIA") unless the winner provides unsolicited written consent. Winners may also authorize the limited use of their likeness and hometown solely for lottery marketing purposes.

Except under certain limited circumstances, without written consent, the South Carolina Lottery Commission ("Commission"), or its contractors or other government entities with whom the Commission shares winner information, may disclose limited details, such as the claim date and draw, game played, prize amount, retailer location, and winner's town.

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:***

    Drumm v. Freedom of Information Commission
    (348 Conn. 565) (February 27, 2024)

    The Connecticut Supreme Court remanded to the Freedom of Information ("FOI") Commission a case appealing a police department's denial of a request for the investigative file for a nearly decade-old unsolved murder of a local woman. The Court instructed the Commission to issue a new final decision in the matter after applying a new legal standard.

    In 2010, a woman was found dead outside her home in Madison, CT. Her death was declared a homicide and remains unsolved. Almost ten years after the murder, a records request was filed with the Madison Police Department on behalf of the deceased woman's son. The police department denied the request, claiming that the disclosure of such records would be prejudicial to a prospective law enforcement action.

    After the Commission ordered the police department to disclose the records for failure to identify a "prospective law enforcement action," the department appealed to the Superior Court. The Superior Court affirmed the Commission's decision and also established a new legal standard. Under the new legal standard, the exemption requires a prospective law enforcement action to be at least a "reasonable possibility," not a mere theoretical possibility. The court then articulated several factors to consider when applying the new legal standard, and the police department appealed.

    The Connecticut Supreme Court affirmed the lower court's standard while stressing that the public agency's burden is to establish only that it is reasonably possible that the information in the records will be used in support of an arrest or prosecution, and not that such information is going to be used for such purpose. It adopted the Superior Court's multi-factor test for determining "reasonable possibility" of law enforcement action (non-exhaustive and no single factor being determinative): (1) the length of time that has elapsed since the crime was committed; (2) the length of time that has elapsed since the law enforcement agency last obtained significant new evidence or leads; (3) whether the agency classified the investigation as a cold case or the functional equivalent thereof; (4) the number of investigators currently assigned to the

investigation; (5) the amount of time investigators currently commit to the investigation; (6) whether the agency has a suspect and, if so, whether the agency's suspicion is supported by more than speculation; and (7) whether advances in science or technology may lead to new evidence or permit the fruitful reexamination of existing evidence. The Supreme Court then added an additional factor to the above test: the longer a case has been cold, the greater the burden is on police to demonstrate that there is a "reasonable possibility" of a prospective law enforcement action. The Supreme Court remanded the case to the FOI Commission to apply the new legal standard.

- ***Michigan:***

  Hjerstedt v. City of Sault Ste. Marie
  (2024 WL 3907176) (August 22, 2024)

  On remand from the Michigan Supreme Court, the Court of Appeals held that a police department could not withhold portions of its use of force policy from public disclosure by invoking the state's Freedom of Information ("FOI") Act exemption for law enforcement staff manuals (the "staff manual" exemption).

  When a citizen submitted a request to the city for the police department's "use of force policy/standard," the city disclosed the record with redactions. One of the FOI Act exemptions claimed by the city specifically examined by the Court of Appeals on remand, exempts from disclosure the contents of staff manuals provided to law enforcement officers or agents. The "staff manual" exemption makes confidential "the contents of staff manuals provided for law enforcement officers or agents" from disclosure "[u]nless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance[.]"

  The trial court concluded that the redacted material was exempt from disclosure, writing that "[i]t is clear in this case that the redacted portions of the Policy are in fact 'contents' of a 'staff manual' provided for the law enforcement officers. A Police 'staff manual' can certainly be described as a book or set of policies (i.e. 'contents') that tell the law enforcement officers how to do something and as such, the Policy in this case certainly falls within that exemption at least as to the common place use of terms used therein."

  The Court of Appeals disagreed, reasoning that, because the city's use-of-force policy was part of a standing general order, and there was no evidence in the record that the policy appeared in any staff manual or handbook disseminated to officers, the city could not claim this statutory exemption. Accordingly, the Court declined to consider the city's argument that release of the redacted information could impact officer and public safety, and therefore outweighs the public's interest in disclosure.

- ***Missouri:***

  Hynes v. Missouri Dep't of Corr.
  (689 S.W.3d 516) (April 23, 2024)

  The Missouri Court of Appeals, Western District, determined that records sought by a mother concerning the death of her son while he was in the custody of the Department of Correction ("DOC") were not exempt from disclosure as "reports or documents relating to institutional security" under Missouri's Sunshine Law ("Sunshine Law").

  Willa Hynes' ("Hynes") son died in DOC custody on April 4, 2021. Seeking information about his death, Hynes requested "all records pertaining to [her son's] detention including [the DOC's] investigation of his death on April 4, 2021." The DOC denied access, citing various exemptions to disclosure.

  Hynes filed a lawsuit alleging Sunshine Law violations. Among claims, DOC claimed that it did not violate the Sunshine Law by denying access to "offender records" and records pertaining to its investigation of the death. The DOC contended that such records were not "public records" under the Sunshine Law in that they "related to institutional security."

  Under the Sunshine Law, "[a]ll offender records compiled, obtained, prepared or maintained by [the DOC] or its divisions shall be designated public records … except ... [a]ny internal administrative report *or document relating to institutional security*." Here, the DOC failed to prove that the records sought fell within this exemption. The court criticized the DOC for its broad, general and conclusory arguments that the request "plainly appeared to seek records that related to institutional security. Moreover, the court determined that substantial evidence supported that the DOC's violation of the Sunshine Law was purposeful, so as to warrant a penalty, attorney's fees, and costs to Hynes.

- ***New Jersey:***

  21st Century Media LLC v. Ewing Township
  (2024 WL 561207) (February 13, 2024)

  The New Jersey Appellate Court partially reversed a trial court decision denying the production of internal affairs ("IA") reports on several police officers' conduct.

  A media corporation made a request to a municipality seeking IA reports related to three police officers. These officers had been indicted by a grand jury on civil rights charges for their roles in assaulting a sixteen-year-old suspect during a January 2018 arrest. The corporation requested the entire IA files for these officers, including any files that preceded the incident for which they were indicted, pursuant to both the state's Open Public Records Act and the common law right of access.

The town twice declined to release the records. Both times it cited a "pending criminal proceeding," claiming that the public interest in the officers' alleged misconduct did not outweigh the officers' right to a fair trial. A trial court then ordered the town to disclose *only* the IA reports related to the arrest incident for the pending civil rights charges, but declined to order disclosure of the IA reports that predated the incident. The media corporation appealed.

With respect to the IA files dating back to January 2010, the Court of Appeals held that, pursuant to settled case law, the press has standing to request public documents, and the public has an interest in the disclosure of IA reports to hold officers accountable, deter officer misconduct, and foster trust in law enforcement, among other reasons. The court also found that the trial court should have considered eleven specific factors when evaluating whether the town demonstrated that its need for confidentiality outweighed the media corporation's need for disclosure, such as the nature and seriousness of the misconduct, whether the alleged misconduct was substantiated, the nature of the discipline imposed, the extent to which disclosure will discourage citizens from providing information to the government, among other factors. Accordingly, the court ordered the lower court to conduct an in camera review of the subject IA records and perform the required balancing test.

- ***Ohio:***

State ex rel. Slager v. Trelka
(2024-Ohio-5125) (October 29, 2024)

The Supreme Court of Ohio held that the lists of work schedules and work posts for prison correctional officers for a two-month period were security records that were exempt from release under the Ohio Public Records Act ("Act").

The requester, while an inmate at Southern Ohio Correction Facility ("SOCF"), made multiple records requests, including a request for lists of work schedules and work posts of all correctional officers for a two-month period. The agency responded, contending that the requested records are "security records," and therefore are not "public records." A "security record" includes "[a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage." The agency contended that the requested records were exempt from release in that their disclosure "would inherently jeopardize the security of the institution and its internal measures to thwart and prevent attacks, maintain order, and protect the prison."

The court agreed with the agency. In reaching its decision, the court explained that it previously "determined that the relevance of prison shift-assignment duty rosters to the security of a prison was apparent from the face of [such] documents and held that the records qualified as security records for the purposes of the [Act]." Given that the requester sought the same type of information here, the court found that the records are exempt from disclosure as "security records."

- ***Pennsylvania:***

  Michalski v. Dep't of Corr.
  (315 A.3d 903) (May 7, 2024)

  The Commonwealth Court of Pennsylvania held that data available on Netflix's website identifying histories of movies that DOC ordered were "public records" within the meaning of the Right-to-Know Law ("RTKL").

  An incarcerated requester requested records from the Pennsylvania Department of Corrections ("DOC"), specifically a list of movies ordered from Netflix for eight correctional institutions between June 2019 and October 2021. The requester wanted the information printed from Netflix's history tab. The DOC denied the request, citing that these Netflix histories were not in "DOC's possession, custody, or control."

  The requester appealed to the Pennsylvania Office of Open Records ("OOR"). DOC contended that it does not maintain these Netflix records directly. On March 28, 2023, the OOR upheld DOC's denial, reasoning that the Netflix histories are external to DOC's records and that, even if DOC had accessed them, they are not public records as defined under RTKL.

  The court reversed the OOR's decision. The court explained that the first step in evaluating a request requires the agency to "discern whether [the] requested records are within its possession, custody[,] or control, such that it may be obligated to disclose them." Further, the RTKL defines "records" in pertinent part, as follows: "Information, regardless of physical form or characteristics, 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." (Emphasis in original.)

  The court explained: "[i]t is evident that data available on Netflix's website identifying the movies DOC ordered from Netflix for use in its [facilities] 'documents a transaction or activity of [DOC]' and "'is created, received[,] or retained ... in connection with a transaction, business[,] or activity of [DOC].'… The fact that they are in Netflix's possession or are difficult to print off directly from the Netflix [web]site[,]' … does not change the conclusion that they are public records that DOC must disclose."

- ***Legislation***

  - ***Connecticut:***

    P.A. 24-56, *An Act Exempting Certain Law Enforcement Records from Disclosure Under the Freedom of Information Act.*

    This Act modifies three existing exemptions under Connecticut's FOI Act. As amended, the FOI Act, now exempts from disclosure the identity of mandated reporters contained in law enforcement records, provided that: (i) the identity of that individual is not otherwise known to the public; and (ii) disclosing the identity would endanger that individual's safety or subject them to threat or intimidation.

Moreover, the exemption covering signed witness statements was expanded to include "signed or sworn" witness statements. This amendment was intended to address witness statements collected via police body-camera footage.

Finally, this Act expands the exemption for law enforcement records consisting of photos, videos, or other visual images depicting the victim of a homicide to also include a victim of domestic or sexual abuse, the victim of a suicide, or a deceased victim of an accident.

- ***Pennsylvania:***

  2024 Pa. Legis. Serv. Act 2024-18 (S.B. 37), An Act Amending . . . the Pennsylvania Consolidated Statutes. . .Providing for Data Collection and Reporting Related to Traffic Stops. . . .

  This Act, effective December 5, 2025, requires State and local police to collect the following data during self-initiated traffic stops:

  (i) the reason for the stop,

  (ii) the perceived race and ethnicity of the driver,

  (iii) the gender and age of the driver,

  (iv) whether a search was initiated, including a search of a vehicle or the vehicle operator or passengers, and, if a search was initiated, whether the search was conducted with the consent of the operator or passengers,

  (v) the result of such search,

  (vi) whether the traffic stop or subsequent search resulted in a warning, citation, arrest or other action, and

  (vii) any additional information the state police deem necessary.

  Local police departments must annually report the collected data to the Pennsylvania State Police who will prepare and publish an analysis and report. This report shall be made publicly available online and shared with key legislative committees and state commissions.

  The data collected, however, will not be accessible under the Pennsylvania Right-to-Know Law.

- ***Utah:***

  2024 Utah Laws Ch. 16 (S.B. 109).

  The bill protects from disclosure identifying information of individuals involved in administering or facilitating a death sentence, including medical staff, executioners,

and drug suppliers ("Protected Information"). Such Protected Information is exempt from discovery, judicial processes, and cannot be introduced as evidence in legal or administrative proceedings.

The bill also provides that no more than ninety days after an execution, the Department of Corrections must create a redacted version of relevant records, removing the Protected Information, and destroy the originals containing the Protected Information. Failure to comply with such redaction requirements may carry criminal penalties pursuant to Utah's Government Records Access and Management Act.

V. Other Noteworthy Litigation and Legislation

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

- ***Access to Government Records***

  - ***New Jersey:***

    NJ Sess. Law Serv. Ch. 16 (Senate 2930), An Act Concerning Access to Government Records, Amending and Supplementing Various Parts of the Statutory Law, and Making an Appropriation.

    This Act amends significant portions of New Jersey's Open Records Act ("ORA"), impacting several aspects of the law, including but not limited to, what types of records are considered "government records," provisions relating to the charging and explanation of fees, circumstances under which custodians need not complete certain records requests, and requirements for requests made "for a commercial purpose." The categories and summaries below highlight some of the many amendments to the ORA.

    Confidential Records (i.e. not "government records")

    This Act adds and/or modifies several provisions of the state's ORA defining what constitutes a confidential record. Some of those changes include, but are not limited to:

    - Permitting the release of photos or video of an autopsy made by a medical examiner "for use by next of kin, a legal representative, or an attending physician of the deceased person. . . ."

    - Exempting all metadata except for those portions of such metadata that "identif[y] authorship, identity of editor, and time of change."

    - Expanding the definition of trade secrets to cover "applications and code."

    - Expanding the exemptions for computer security or related technology to specifically cover technical information regarding tablets, phones, "electronic computing devices," or devices which operate on or as part of a computer network or related technologies.

    - Adding an exemption for security alarm system and access reports (including video footage) for public buildings facilities, or grounds unless the request identifies certain details and is deemed not to compromise security.

    - Exempting personally identifiable information disclosed on domestic animal permits, licenses, and registrations.

Fees

This Act also contains a number of provisions addressing when a custodian of government records may charge fees as well as the type of notice to be provided for such fees. For instance, the Act provides that:

- No fee shall be charged if the request is completed by directing the requester to the requested government record that is available on the public agency's website or the website of another public agency.

- There shall be a rebuttable presumption that the fees or charges imposed by the custodian of government records are reasonable. If the requester objects to the fees or charges, the burden of proof shall be on the requester to demonstrate that the fees or charges are unreasonable.

- A public agency is required to convert requested records to the medium or format requested if "the medium or format is available to the public agency and does not require a substantial amount of manipulation or programming of information technology or the services of a third-party vendor." If a public agency converts the records, it may charge a reasonable service fee in addition to the actual cost of duplicating the records.

Making Requests

This Act modifies how and when a requester may make a records request as well as the public agency's obligations to complete requests. For instance, the Act provides that:

- Government records shall be available to the public on a publicly available website to the extent feasible. When a record is available on the public agency's website, the custodian of records may require the requester to obtain the record from the website. The custodian of records must provide directions to assist the requester to find the record on the website. If the requester is still unable to locate records on the website and requests a physical copy of the record, the custodian must provide the requester with a physical copy within seven business days. The custodian may charge a fee not exceeding two times the cost of the production of the document.

- Public agencies must adopt the request form created by the Government Records Council. Requests must be submitted either (i) using such form; or (ii) via letter or email containing all the required information on the form. The custodian may deny a request that is incomplete. Requests made anonymously, however, are not grounds for denial.

- Custodians of records are not required to complete a request for mail, email, text messages, correspondence, or social media postings or messages, if the request does not identify a specific job title or accounts to be searched, a specific subject matter, and is not confined to a reasonable time period.

- Requests are not considered submitted until they are received by the custodian of records.

- Requesters cannot utilize the ORA to seek records that are the subject of a court order or pending discovery request (limited exception for labor unions).

- Custodians of records are not required to complete an identical records request from the same requester.

- Provides for different requirements depending on whether a request is made for a "commercial purpose." Response time for commercial requesters is 14 days instead of the 7-day response window for non-commercial requesters. Alternatively, commercial requesters may pay a fee of not more than two times the cost to produce the records for expedited processing. Requests made for "commercial purposes" must be certified as such. Intentionally failing to certify a request as having a "commercial purpose" is subject to escalating penalties from $1,000 to $5,000 based on the number of offenses. Such penalties are imposed by the courts.

➢ ***Adequacy of Search***

▪ ***Connecticut:***

Town of Greenwich v. Freedom of Info. Comm'n
(226 Conn. App. 40, cert. denied) (June 11, 2024)

The Connecticut Appellate Court held that public agencies must search for and review records requested pursuant to the Connecticut Freedom of Information ("FOI") Act in order to prove that they are exempt from disclosure under the Act.

A requester sought police department records showing all changes made to an investigation file and arrest warrant application. The requester offered to provide the police department with detailed database commands to help retrieve the records and to pay any costs if a technician was needed. Without conducting a search for responsive records, the police department contended that the requested records constituted "preliminary drafts" exempt from disclosure under the FOI Act. The Connecticut FOI Commission ("Commission") concluded that the police department failed to prove that the requested records were exempt from disclosure and that the agency must review the requested records before it could conclude that they were "preliminary drafts" within the meaning of the FOI Act.

The Connecticut Superior Court had sustained the police department's appeal, determining that the requested records were "preliminary drafts" under the FOI Act and that review of the records was not necessary.

The Appellate Court, however, disagreed with the lower court. The court held that the Commission correctly concluded that the police department did not meet its burden of proving that the records were exempt from disclosure, since it failed to search for and examine the responsive records.

- ***Adequacy of Request***

  - ***Florida:***

    Doe v. DeSantis
    (390 So. 3d 1245) (June 12, 2024)

    The District Court of Appeal of Florida, First District, concluded that the appellant failed to demonstrate a legally sufficient claim because his request could not be fulfilled as submitted.

    In August 2022, Florida Governor Ron DeSantis ("Governor") indicated that a group of "six or seven pretty big legal conservative heavyweights" advised him on judicial appointments to the Florida Supreme Court. Subsequently, an anonymous individual ("Appellant") sent a public records request to the Governor's Office, seeking all materials—such as call logs, emails, and texts—related to communications between the Governor, his wife, his political team, and the mentioned legal advisors. Although the Governor's Office acknowledged the request was in the queue, it cited a high volume of requests creating a backlog. The Appellant, maintaining his anonymity, filed a petition seeking to compel production of the requested records. The court dismissed the petition, in part, because the Appellant's claim was insufficient. The Appellant appealed.

    The appellate court affirmed the dismissal. The court found that the Appellant failed to establish a clear legal right to compel the Governor's Office to fulfill the request. The court characterized the request as seeking records "between many people during an unspecified period of time" and that fulfilling the request would require the custodian of records to consult with the Governor. The court determined that doing so was akin to an interrogatory seeking information, not a request to produce public records.

    The court concluded that "a public records request must be specific enough for the records custodian to perform the requested action," and therefore, "Appellant's petition failed to demonstrate a legally sufficient claim for mandamus because his request could not be fulfilled as submitted."

- ***Body-Worn Cameras***

  - ***New Hampshire:***

    2024 New Hampshire Laws Ch. 153 (S.B. 362), An Act Relative to Body-Worn Cameras.

    The New Hampshire Law Enforcement Accreditation Commission ("LEAC") has been tasked with identifying issues raised by copying, distributing, or using body-worn camera images in conjunction with, among others, the New Hampshire Right-To-Know Law, including but not limited to issues surrounding, the disclosure of sources and methods of investigations as well as the privacy of suspects, officers, and

civilians. The LEAC was to submit their findings to leadership in the New Hampshire Legislature by November 1, 2024.

LEAC was established by Executive Order 2022-06, issued by the Governor on July 25, 2022. This Act seems to be an extension of LEAC's mandate to "improve[] the delivery of law enforcement services and build[] on established accountability and trust within [New Hampshire] communities."

- ***Bona Fide Research***

  - ***Arizona:***

    Silverman v. Arizona Dep't of Econ. Sec.
    (549 P.3d 183) (June 3, 2024)

    The Supreme Court of Arizona held that investigative journalists can engage in "bona fide research" and therefore the records of the Arizona Department of Economic Security ("ADES") pertaining to the abuse, exploitation or neglect of vulnerable adults may be released to them for inspection.

    An investigative journalist submitted several requests to ADES seeking access to "[Adult Protective Services ("APS")] reports, investigations and other materials that provided the data for APS quarterly reports from April 2019 to March 2020." The journalist asked only for materials concerning closed cases and acknowledged that ADES would likely redact names and addresses.

    ADES denied the requests, contending generally that state law shields APS records from public inspection, unless a statutory exception applies, which includes an exception for "bona fide research." The requester sued ADES, arguing that her journalistic activities qualified as "bona fide research." The journalist contended that the records would assist her in reporting how ADES either protects or fails to protect vulnerable adults.

    The Supreme Court concluded that "bona fide research" "occurs when the researcher engages in a good faith and genuine study to acquire more knowledge, discover new facts, or test new ideas concerning reporting or stopping the abuse, exploitation, or neglect of vulnerable adults." The Court further concluded that state law authorizes ADES to determine whether a person seeking records is engaged in "bona fide research." The case was remanded to allow the parties the opportunity to develop the record regarding whether the journalist met the "bona fide research" exception and whether ADES abused its discretion in denying the request.

- ***Computer Programs***

  - ***Oregon:***

    Washington Cnty. v. Sippel
    (335 Or. App. 1) (September 11, 2024)

    The Court of Appeals of Oregon held that a zip file, containing a backup of data and proprietary database information from the November 2020 election in Washington County ("county"), was a "computer program" that was exempt from disclosure by the Public Records Law ("PRL") and that the public interest in the file's disclosure did not outweigh the county's compelling interest in maintaining the file's confidentiality.

    A requester sought "an electronic copy of the ballot database from a public test of the voting system." The county denied the request. After the county was ordered to release the information by the district attorney, it filed a complaint to prevent disclosure.

    The trial court concluded that all three exemptions raised by the county (i.e., "trade secrets," "computer programs," and "security measures") applied to the zip file, and that the county's interest in maintaining the confidentiality of the zip file outweighed the public interest in disclosure.

    The lower court's decision was affirmed by the Oregon Court of Appeals with respect to the "computer programs" exemption. The court held that the "computer programs" exemption applied to the zip file, as it contained computer programing language instructions that constituted a computer program allowing the functioning of the election database. The court explained that this exemption excludes computer programs developed or purchased by a public body from public disclosure, defining a "computer program" as instructions enabling the operation of a computer system for data storage, retrieval, and manipulation. They further noted the exemption does not cover original data, analyses/compilations of that data, or mathematical and statistical formulas used in such analyses. Last, in making its determinations, the court weighed and concluded that the county's interest in maintaining confidentiality, including security concerns and commercial interests, outweighed the public interest in disclosure.

- ***Confidentiality Provisions in Agreements***

  - ***New Hampshire:***

    Stone v. City of Claremont
    (319 A.3d 1274) (March 20, 2024)

    The New Hampshire Supreme Court held that the confidentiality provision of a former police officer's stipulated award with the city related to disciplinary actions taken against the officer did not supersede the disclosure requirements of the state's Right-to-Know Law ("RKL").

The former officer, through his union, had negotiated an agreement with the city to resolve grievances related to several internal affairs investigation ("IA") reports. Among other things, the agreement required the city to purge the officer's personnel file of all references to his suspension, notice of termination, and events leading up to them. It also required the parties to agree to keep the agreement's existence, terms, and substance confidential, except to the extent required by a court or by law. A journalist later requested copies of the IA reports and related records.

The state's Supreme Court upheld the trial court's decision ordering disclosure of the former officer's disciplinary records and denying his motion for an injunction to prevent their disclosure. The court determined that the records were otherwise subject to disclosure under the RKL and, thus, the agreement's confidentiality provision did not apply. Further, it found that the agreement's purging provision did not require the records' "wholesale destruction," but rather their removal from his personnel file.

- ***Enforcement/Liability***

  - ***Hawaii:***

    2024 Hawaii Laws Act 160 (H.B. 1597), A Bill for an Act Relating to Open Meetings.

    This Act amends Hawaii's Open Meetings Law ("OML") to expand instances where a person may file a suit against a board (or alleged board). Prior to this Act, the OML permitted a person to file a suit against a board (or alleged board) to (i) require compliance with or prevent violations of the OML; or (ii) determine the applicability of the OML to discussions or decisions of the public body.

    In amending the OML, the Act provides a private right of action to persons challenging an opinion or ruling of the Office of Information Practices ("OIP") (the entity responsible for interpreting Hawaii's public records and OML) concerning a complaint by that person alleging violation of the OML. Suits challenging an OIP decision are reviewed "de novo" (i.e., without deference to the OIP's decision). Furthermore, a person bringing a suit pursuant to the OML must notify OIP of such suit and OIP may intervene in that action. This Act does not change the existing administrative appeal process for public agencies challenging final decisions of the OIP.

    Moreover, this Act clarifies that only members of the public may recover attorney's fees and costs if they prevail in an open meetings lawsuit. Prior to this amendment, the law technically allowed courts to award attorney's fees and costs "to the prevailing party."

    Finally, the Act requires courts to prioritize open meetings lawsuits that seek to void a board's final action.

- ***Illinois:***

  2024 Ill. Legis. Serv. P.A. 103-786 (H.B. 5239), An Act Concerning Civil Law.

  This Act provides a private right of action against a "unit of government" which violates the prohibitions on state action related to the disclosure of an individual's "lawful health care activity." If the individual bringing the action prevails, the court may grant reasonable attorney's fees, court costs, and other litigation expenses.

- ***Louisiana:***

  2024 La. Sess. Law Serv. Act 493, An Act to Amend . . . the Public Records Law . . . Relative to Enforcement Proceedings; to Limit Personal Liability for Failure to Comply. . . .

  Prior to this Act, custodians of public records were held personally liable for damages, civil penalties and attorney's fees if a court found that they arbitrarily and capriciously withheld requested records or unreasonably or arbitrarily failed to respond to a request as required by the Louisiana Public Records Law.

  Under this Act, individual custodians of public records are no longer personally liable for such penalties. Rather, liability for such penalties is shifted to the public entity.

- ***New Hampshire:***

  2024 New Hampshire Laws Ch. 49 (H.B. 1002), An Act Relative to Fees for Records Under the Right-to-Know Law.

  This Act limits the liability of a public agency when information that is exempt from disclosure under the Right-to-Know Law is released in response to a records request. The Act provides that public agencies are shielded from liability in civil actions regarding the disclosure of exempt information, provided that the public agency acted in good faith to redact any exempt information. The Act specifically designates the "use of automated software to produce redactions or other automated process to speed production in concert with spot checks" as acting in good faith.

- ***Fees***

  - ***New Hampshire:***

    2024 New Hampshire Laws Ch. 49 (H.B. 1002), An Act Relative to Fees for Records Under the Right-to-Know Law.

    This Act introduced a new fee structure for electronic communications. Under the Act, agencies may charge up to $1.00 per electronic communication exceeding 250 communications, with no charge for the first 250 communications. The Act does not clarify whether the 250 communications resets annually or is a lifetime calculation. Attachments and related message threads are counted as a single communication, and

public bodies must adopt transparent and uniform fee policies, including waivers for indigent individuals or cases where disclosure benefits public understanding of government activities. Requests within 30 days from the same person are treated as one, and any cost disputes can be reviewed within 10 business days to determine reasonableness, with the public body bearing the burden of proof.

- ***Virginia:***

  2024 Virginia Laws Ch. 669 (S.B. 324), An Act to amend . . . the Code of Virginia, relating to Virginia Freedom of Information Act; charges for production of public records. . . .

  This Act imposes on requesters certain administrative fees for every hour spent accessing, duplicating, or searching for requested records, with the hourly charge capped at the lower of $40 or the hourly rate of the lowest-paid qualified individual. A public body cannot charge a requester for the first hour spent accessing, duplicating, or searching for records on their first request of each calendar year (this appears to be regardless of topic or issue raised, the sole focus is on the individual). The Attorney General's Office and local public bodies (e.g., school boards) are exempt from this fee cap.

  Additionally, the amendment provides that a public body can petition the court to lift the $40 per hour fee cap for fulfilling public records requests if it demonstrates that no qualified individual can fulfill the request for that rate. The court must hear the petition within seven days of its filing and the public body's response time shall be paused during the court process (such public body cannot pass-on or otherwise charge the requester for such court costs). Additionally, public bodies must document requests for electronic records that take more than 30 minutes to complete.

- ***Health Care Records***

  - ***Illinois:***

    2024 Ill. Legis. Serv. P.A. 103-786 (H.B. 5239), An Act Concerning Civil Law.

    This Act prevents state action that would provide any information or expend or use any time, money, facilities, property, equipment, personnel or other resources to assist any individual or out-of-state officer, official, agency, entity, or department seeking to impose civil or criminal liability upon a person or entity for "lawful healthcare activity."

    Illinois law defines "lawful healthcare" as: (i) reproductive health care that is not unlawful under Illinois Law; or (ii) treatment of gender dysphoria or the affirmation of an individual's gender identity or gender expression, including, but not limited to, all supplies, care, and services of a medical, behavioral health, mental health, surgical, psychiatric, therapeutic, diagnostic, preventative, rehabilitative, or supportive nature that is not unlawful under Illinois law. "Lawful health care activity" means seeking,

providing, receiving, assisting in seeking, providing, or receiving, providing material support for, or traveling to obtain lawful health care.

Exemptions to such prohibition on state action include: (i) where such action is necessary to comply with Illinois or federal law; or (ii) the individual or out-of-state officer, official, agency, entity or department is investigating conduct that would be subject to civil or criminal liability under Illinois law.

Additionally, this Act exempts "location information related to lawful health care" from disclosure under the Illinois Freedom of Information Act. "Location information related to lawful health care" means precise location information that could be reasonably used to identify a person's attempt to acquire or receive lawful health care, including, but not limited to, records of the location of a person's license plate, records of the location of a cell phone or other device that tracks location, or records of observations of a person's location when the location is near a provider of lawful health care.

- ***Interagency Data Sharing***

  - ***Connecticut:***

    P.A. 24-81, ***An Act Concerning Allocations of Federal American Rescue Plan Act Funds and Provisions Related to General Government, Human Services, Education and the Biennium Ending June 30, 2025.***

    This Act contains new limitations on access to records that are shared between state agencies. Under this Act, any person requesting records that have been shared by one state agency with another state agency pursuant to any statute, regulation, data sharing agreement, memorandum of agreement or understanding or court order must direct such request to the state agency from which such data, records or files originated.

    If a state agency from which records do not originate receives a request for such records that agency must: (i) promptly refer such request to the state agency from which such data, records or files originated; and (ii) notify, in writing, the person who submitted the request for such data, records or files that such request has been referred to the originating state agency. Such written notification must include the name, address and telephone number of the originating state agency and the date on which the referral was made to the originating state agency.

- ***Incarcerated Individuals***

  - ***New York:***

    New York State Corr. Officers & Police Benevolent Ass'n, Inc. v. New York State Dep't of Corr. & Cmty. Supervision
    (224 A.D.3d 974) (February 1, 2024)

    The Appellate Division of the New York Supreme Court found, as a matter of first impression, that records expunged from an incarcerated individual's institutional file, such as misbehavior reports and records of disciplinary hearings, are subject to disclosure under the New York State Freedom of Information Law ("FOIL"), provided such records are redacted to protect the personal privacy of the incarcerated individuals.

    The New York State Correctional Officers and Police Benevolent Association, Inc. filed several FOIL requests with the New York State Department of Corrections and Community Supervision ("DOC") seeking records associated with disciplinary hearings involving certain incarcerated individuals, wherein the charges were ultimately not substantiated and corresponding records were expunged from their institutional files. The DOC withheld the records claiming that disclosure would constitute an unwarranted invasion of personal privacy under FOIL.

    On appeal, the court acknowledged that incarcerated individuals have a reasonable expectation that misbehavior reports and disciplinary hearing records – which were determined to be unsubstantiated and expunged from such individuals' institutional files – would be kept private; however, the DOC failed to make a sufficient showing that the records could not be redacted to protect the personal privacy of each such incarcerated individual. Accordingly, the court affirmed the trial court's decision directing the DOC to redact and disclose the responsive documents.

- ***Juvenile Records***

  - ***New Hampshire:***

    Union Leader Corporation v. New Hampshire Department of Safety
    (2024 N.H. 35) (July 3, 2024)

    The New Hampshire Supreme Court concluded that juvenile "court records," the disclosure of which is expressly prohibited under the state's Right-to-Know Law, may be released when generated and possessed by governmental entities other than the courts; however, information contained therein must be redacted if disclosure would run counter to the purpose of rehabilitating delinquent minors.

    In this case, a newspaper publisher requested from the state's Department of Safety, any records, including incident reports, related to the state police's response to an incident at a youth services center (excluding confidential information). The

department denied the request, contending that "law enforcement investigative records pertaining to juvenile delinquency" are exempt from disclosure. The publisher appealed this denial. The trial court dismissed the appeal, noting that "juvenile delinquency proceedings were brought against multiple juveniles involved" in the underlying incident, and further that the records "contain the facts that underlie the basis for ... juvenile delinquency proceedings" and therefore such records were not subject to disclosure.

The Supreme Court clarified its interpretation of juvenile "court records" subject to the exemption invoked in this case. The Court explained that when the records at issue are generated and possessed by governmental entities other than the courts, the disclosure exemption extends only to information that, if released, would run counter to the purpose of rehabilitating delinquent minors. The Court contemplated that such information should be redacted prior to release. Accordingly, it remanded the matter to the lower court to review the withheld records and make such determinations.

- ***Processing Records Requests***

  - ***New Hampshire:***

    2024 New Hampshire Laws Ch. 49 (H.B. 1002), An Act Relative to Fees for Records Under the Right-to-Know Law.

    This Act permits public agencies, upon receiving a records request, to suggest to the requester a reasonable modification of the scope of the request, if doing so would enable them to produce the requested records more efficiently and affordably.

    Additionally, existing New Hampshire law required public agencies that are unable to provide records for immediate inspection and copying within five business days to provide a written statement indicating the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay. This Act requires that such written statement also include an itemized estimate of the cost of making the records available if a charge would be incurred.

- ***Records of State Ethics Commission***

  - ***Vermont:***

    2024 Vermont Laws No. 171 (H.875), An Act relating to the State Ethics Commission and the State Code of Ethics.

    This Act addresses public records that are maintained by the Vermont Ethics Commission ("Commission"). Generally, records relating to the Commission's handling of complaints, alleged unethical conduct, investigations, proceedings, and executed resolution agreements are exempt from public inspection and copying under Vermont's Public Records Act. However, this Act specifically designates the following records as subject to public inspection and copying: (i) investigation reports relating to

alleged unethical conduct determined to warrant a hearing, but not any undisclosed records gathered or created in the course of an investigation; (ii) at the request of the public servant or the public servant's designated representative, investigation reports relating to alleged unethical conduct determined to not warrant a hearing, but not any undisclosed records gathered or created in the course of an investigation; (iii) evidence produced in the open and public portions of Commission hearings; (iv) any warnings, reprimands, and recommendations issued by the Commission; (v) any summaries of executed resolution agreements; and (vi) any records, as determined by the Commission, that support a warning, reprimand, recommendation, or summary of an executed resolution agreement.

Notwithstanding the above, the Act does not prohibit the disclosure of any information regarding alleged unethical conduct pursuant to a court order, or to a State or federal law enforcement agency in the course of its investigations, provided the agency agrees to maintain the confidentiality of such information.

- ***Responding to Requests During States of Emergency***

  - ***California:***

    2024 Cal. Legis. Serv. Ch. 161 (S.B. 1034), An Act . . . Relating to Public Records.

    The California Public Records Act typically requires that a public agency respond to records requests within 10 days from their receipt of the request indicating: (i) whether the records sought are disclosable, in whole or in part; and (ii) if such records are disclosable, an estimated date and time when the records will be made available. This 10-day period may be extended during "unusual circumstances."

    This Act amends the definition of "unusual circumstances" to include the need to search for, collect, and appropriately examine records during a state of emergency proclaimed by the Governor in the jurisdiction where the agency is located when the state of emergency "currently affects" the agency's ability to timely respond to requests due to staffing shortages or closure of facilities where the requested records are located.

    This extension is not applicable to requests for records that are created during and related to the state of emergency proclaimed by the Governor.

- ***Safety***

  - ***California:***

    2024 Cal. Legis. Serv. Ch. 551 (A.B. 1785), An Act to Amend Section 7928.205 of the Government Code, Relating to Public Records.

    This Act amends the California Public Records Act to prohibit a state or local agency from publicly posting the home address, telephone number, or both the name and assessor parcel number associated with the home address of any elected or appointed

official on the internet without first obtaining the written permission of the individual. In this context, "publicly posting" means to intentionally communicate or otherwise make available such information on the internet in an unrestricted publicly available manner.

The public's right to inspect and obtain copies of public records that are in the possession of a county recorder or assessor during business hours is unaffected by the implementation of this Act.

- ***Louisiana:***

  2024 La. Sess. Law Serv. Act 638, An Act Amend . . . Relative to the Public Records Law . . . .

  This Act creates a new exemption for records relating to certain statewide elected officials. Records that include security details and are related to the schedule of the lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, or commissioner of insurance or any of their office employees may be kept confidential for seven days after a scheduled event if disclosure could compromise safety. The Act, however, does not create a blanket exemption for *all* records concerning the schedules of such officials.

  Additionally, the Act creates a residency requirement to request, inspect, or copy the records of the office of the governor. Specifically, the custodian of such records may require a requester to provide "sufficient information" verifying residency within the state. "Sufficient information" may include any government-issued documentation showing the requester's identity, age, and residential address. A custodian of the records of the office of the governor may deny any request if the requester fails to provide "sufficient information" verifying residency. Documents submitted for the purpose of verifying residency are not public records and must be destroyed within one year after the request is finalized.

- ***Social Media***

  - ***Nevada:***

    Conrad v. City of Reno
    (No. 86340, 2024 WL 3664212) (August 5, 2024)

    The Supreme Court of Nevada held that the City of Reno ("City") did not have custody or control over a City councilmember's private devices and social media accounts, and therefore was not required to provide records from those devices and platforms under the Nevada Public Records Act ("NPRA").

    Robert Conrad ("Conrad"), representing thisisreno.com, filed several public records requests with the City, including a request for Reno City Council Member Devon Reese's ("Reese") social media communications with constituents.

In response, the City provided emails and text messages from City-issued devices and accounts Reese used but denied having additional responsive records within its custody or control. Conrad sought an order to release the records.

The district court denied Conrad's petition to order the City to produce Councilmember Reese's social media communications with constituents because the City did not have custody or control over Reese's private devices and social media accounts. Although Reese used social media to communicate with constituents, the City did not have control over her private devices and accounts, and the court could not order the City to provide records from those devices. On appeal, the court affirmed. Notwithstanding, the court made clear that Reese, as an elected official, is also subject to the NPRA.

- ***Statute of Limitations***

  - ***Washington***

    Cousins v. State of Washington
    (546 P.3d 415) (April 11, 2024)

    The Supreme Court of Washington determined that in order to trigger the Washington Public Records Act's ("PRA") one-year statute of limitations, a sufficient closing letter sent by an agency to a records requester must be written in plain language and should include at least the following information: (1) how the PRA request was fulfilled and why the agency is now closing the request; (2) that the one-year statute of limitations to seek judicial review has started to run because the agency does not intend to further address the request; and (3) that the requester may ask follow-up questions within a reasonable time frame, which may be explicitly specified by the agency.

    Renee Field ("Field") died in the Washington State Department of Correction's ("DOC") custody in 2016 from what was determined to be preventable medical issues, sparking her sister Terry Cousins' ("Cousins") pursuit of public records pertaining to her sister's death. Following a state led investigation which found the care Field received did not meet healthcare standards and resulted in sanctions imposed on a DOC physician assistant, Cousins filed a PRA records request for all records related to Field. Years of correspondence and delays, during which Cousins repeatedly identified missing emails and reports that the DOC failed to produce in a timely manner, ended with a January 2019 letter from the DOC stating that the request was closed. Despite the DOC conducting additional searches, releasing additional records and issuing a second closing letter in June 2021, Cousins filed a lawsuit alleging undue delay and denial of access. The DOC argued the case was barred by the one-year statute of limitations, citing the 2019 letter purportedly closing Cousins' request. The superior court ruled in the DOC's favor, and the Court of Appeals, Division 2, affirmed.

    The State's highest Court reversed the Court of Appeals and trial court. The Court clarified that not every "closing letter" automatically triggers the one-year statute of limitations under the PRA. Instead, the Court emphasized, that the statute of limitations period will begin to run upon a "final, definitive response," which requires agencies to

sufficiently notify a requester that the agency will not provide further records or take additional action. The Court emphasized a balanced approach, rejecting overly rigid interpretations that favor agency finality over the PRA's mandate for broad public disclosure; ultimately recognizing that "a sufficient closing letter will ordinarily satisfy [the] final, definitive response [requirement], thereby triggering [the] PRA's one-year limitations period".

The Court determined that the DOC's January 2019 letter failed to meet this standard because it provided an objectively insufficient and "ambiguous partial response" which did not clearly indicate that no additional records would be produced ("use of the word 'closed,' without more, is not determinative"). The Court strongly encouraged agencies to follow the State's Attorney General's Advisory Model Rules when issuing closing letters to ensure clarity and compliance.

- ***Student Athletes***

  - ***Illinois:***

    2024 Ill. Legis. Serv. P.A. 103-724 (H.B. 307), An Act Concerning Education.

    This Act, effective January 1, 2025, provides that information written, produced, collected, assembled, or otherwise maintained by a public university, community college or any private university or college which information includes, reveals, or otherwise relates to the terms of an existing or proposed student-athlete's publicity rights agreement is exempt from disclosure under the Illinois' Freedom of Information Act.

  - ***Mississippi:***

    2024 Miss. Laws S.B. 2417, An Act to Amend . . . [the] Mississippi Code to Authorize Certain Actions Taken By a Post Secondary Educational Institution or an Officer or an Employee Thereof Related to Student-Athletes and their Publicity Rights. . . .

    Under this Act, third parties and post-secondary institutions may compensate student-athletes for the use of their publicity rights, promoting athletic events, institutions, or its athletic programs.

    Moreover, this Act permits postsecondary institutions to require student-athletes (including those who have only announced an intention to attend that institution) to disclose any compensation agreement or its terms to a designated official of the postsecondary institution. Such compensation agreements and related documents (e.g., documents that compile, summarize or disclose terms of such agreements) are exempt from disclosure from the public records law, and neither institutions nor student-athletes are required to disclose them to athletic governing bodies.

- ***Vexatious Litigant***

  - ***Ohio:***

    State ex rel Ware v. Department of Rehabilitation and Correction, et al.
    (2024 WL 1200217) (March 21, 2024)

    The Ohio Supreme Court declined to declare an incarcerated requester a vexatious litigator, and instead granted several of his petitions to order the state's Department of Rehabilitation and Correction to produce responsive public records and awarded him statutory damages.

    The Court considered each of the requests for which the requester sought a court to compel disclosure. The Court compelled disclosure for two of the requests. First, it ordered the department to produce records responsive to the request for a copy of the requester's master file, along with charges and decisions from disciplinary infraction cases. The Court admonished the department for failing to provide the requester with an explanation and supporting legal authority for why it was withholding these records from him. Additionally, it found no evidence that the requester did not submit this request to the records custodian as required. Accordingly, the Court ordered production of responsive records and awarded the requester $1,000 in statutory damages.

    The Court ordered the same remedy for another request in which the requester sought from a commissary manager a copy of a list of items for which prices had increased during a five-month period. The Court once again rejected the department's argument that the requester did not submit his request to the records custodian. It found that after the commissary manager forwarded the request to the institution's public-information officer, that officer should not then have referred the requester to yet another employee.

    The Court was not persuaded that the requester's conduct in this case warranted a vexatious litigator declaration Furthermore, the respondents failed to cite any prior decision in which public records actions or appeals by the requester since 2018 (28 in total) were found to have been frivolous. Last, affidavits provided by the respondents from county offices, which indicated that the requester had a history of placing unrelated documents into certified mail that he claimed contained unfulfilled records requests, were not found by the Court to touch directly on his actions in this case.

- ***Voting/Election Records***

  - ***Kentucky***

    2024 Kentucky Laws Ch. 224 (HB 580), An Act relating to elections and declaring an emergency.

    Prior to this Act, voting equipment and ballot boxes containing paper ballots must, for 30 days after an election, remain locked and under video surveillance, which surveillance system must store continuous recordings for 60 consecutive days. This Act

makes clear that this video surveillance footage is subject to disclosure under the Kentucky Open Records Act.

This Act further provides that requests for such video surveillance footage must be made within 60 days after the election. After this 60-day period, such footage may be disposed of, unless required for compliance with the Open Records Act, or upon the completion of an investigation, or pending litigation, whichever is later.

- ***Pennsylvania:***

Previte v. Erie Cnty. Bd. of Elections
(320 A.3d 908) (July 31, 2024)

The Commonwealth Court of Pennsylvania held that digital images of completed absentee and mail-in ballots were public records under the Election Code, and thus could be obtained through a Right-to-Know Law ("RTKL") request, to the extent such request did not include any information that identified the individuals who cast the ballots.

The requester, Michelle Previte ("Previte"), submitted three RTKL requests to the Erie County Board of Elections ("Board") for records from the November 2020 General Election. Specifically, she sought an electronic copy of (1) the images of all mail-in ballots (including absentee ballots), (2) the images of all outer envelopes (containing each voter's declaration) for the mail-in ballots (including absentee ballots), and (3) the images of all polling place ballots. The Board denied Previte's request, contending that the requested records were not public records, per the Election Code.

Previte appealed the Board's denial to the Pennsylvania Office of Open Records ("OOR"), which partially reversed the Board's decision, concluding that the mail-in and absentee ballot records, along with the outer envelopes, should be disclosed, but upheld the denial for polling place ballots.

The Board appealed the OOR ruling and the court ruled against Previte as to items one and two. The court explained, in relevant part, that "Previte had sought 'images of ballots that, pursuant to the new voting system implemented in Pennsylvania for the November 2020 election, are electronically kept within the voting machines and stored as inseparable three-page documents.' ... [S]uch images were the contents of voting machines and, thus, were shielded from RTKL requests by ... the Election Code ...."

On appeal, the court reversed. The court explained that the Election Code provides certain exceptions to ballot protections, and that "these exceptions establish that completed absentee and mail-in ballots are to be treated as public records once those ballots have been removed from the ballot box or voting machine, and that those ballots can be obtained through a RTKL request as long as they follow the Election Code's rules of disclosure and do not include any information that identifies (or is reasonably likely to facilitate the identification of) the individuals who cast those ballots." The

court therefore concluded that "images of completed absentee and mail-in ballots are public records that can be obtained through a RTKL request."

Honey v. Lycoming Cnty. Offs. of Voter Servs.
(312 A.3d 942) (appeal granted) (March 4, 2024)

The Commonwealth Court of Pennsylvania held that digital copies of voting records from electronic voting systems are "contents" of voting machines that are exempt from public inspection under the Pennsylvania Right-to-Know Law ("RTKL").

Heather Honey ("Honey") requested digital copies of Cast Vote Records ("CVR") from the 2020 General Election in Lycoming County, but Lycoming County Offices of Voter Services ("Voter Services") denied her request, citing an exemption under the Pennsylvania Election Code ("Code"), and responding that "[t]he contents of ballot boxes and voting machines are not public." The relevant provision provides that most records and documents in the possession of each county's board of elections are open to public inspection, except for "the contents of ballot boxes and voting machines and records of assisted voters…."

Honey appealed the decision, but the Office of Open Records ("OOR") upheld the denial, agreeing with Voter Services that the CVR is the "digital equivalent" of the contents of ballot boxes and, therefore, is not a public record.

Honey then appealed to the Court of Common Pleas, which ruled in her favor. The court determined that the CVRs were public records not shielded by the Code, concluding that the term "contents" in Section 308 referred only to physical ballots and voting machine mechanics, not the information contained in the physical ballots. The court held that the CVR was a public record that could be obtained via a RTKL request.

On appeal, the court reversed. Lycoming County's voting machines record votes digitally, meaning CVRs are the only "contents" they hold. Because CVRs are the digital equivalent of physical ballots, it would be illogical to protect physical ballots from disclosure while allowing public access to digital versions, as both contain the same essential voting information. The court explained, "what is special about the ballots is not so much the form which they take, but the voting information which they contain."

The Supreme Court of Pennsylvania granted a Petition for Allowance of Appeal in this case on October 7, 2024.

- ***North Carolina:***

  2024 North Carolina Laws S.L. 2024-51 (H.B. 149), An Act to Enact the Disaster Recovery Act of 2024.

  In response to Hurricane Helene and its aftermath the North Carolina General Assembly enacted the Disaster Recovery Act of 2024 (the "Act"), which, in part, addressed how individuals in certain impacted counties may submit absentee ballots for the November 2024 Election. Under this Act, completed absentee ballots could be delivered in person by a voter registered in an impacted county or that voter's near relative or verifiable legal guardian, by physically handing the completed absentee ballot to an elections official at: (i) any county board of election; (ii) and early voting site at any time that site is open for voting; or (iii) the State Board of Elections.

  County boards of elections or the State Board of Election receiving out-of-county absentee ballots must log the following information: (i) the date and time the absentee ballot was received; (i) the identities of the individuals delivering and receiving the absentee ballot; and (iii) the impacted county to which the absentee ballot was sent. This log is confidential and not a public record until the opening of the voting place, at which time the official register shall constitute a public record. Moreover, this Act requires each receiving county to report to the State Board of Elections the number of absentee ballots received for each impacted county. Such reports were to be completed on a daily basis and on Election Night and were designated as public records.