

Open Records Laws: A State by State Report



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NACO National Association of Counties

The Voice of America's Counties

Open Records Laws: A State by State Report

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About the National Association of Counties

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties. NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, assists counties in finding and sharing innovative solutions through education and research, and provides value-added services to save counties and taxpayers money. For more information about NACo, visit www.naco.org.

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Foreword

This publication represents a compilation of state laws governing public records. Designed to allow access to governmental documents while protecting privacy rights and maintaining public safety, open records statutes vary from state to state. The format of this publication is intended to outline the key aspects of public records laws and facilitate comparisons between each state.

The National Association of Counties published this report to serve as a reference tool for county officials charged with keeping public records. The information found in this guide reflects the statutes as of the date of this publication.

*Connecticut and Rhode Island are omitted from this report, as neither has counties with elected governing boards.

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Introduction

Governmental agencies and officials generate data, information, and documents related to public functions. Certain materials are required to be kept by law while others are simply created in the course of an organization's operations. Though Congress did not enact the Freedom of Information Act, which applies to federal government documents, until 1966, most states already had statutes regulating the release of public records. These vary in length from a few paragraphs to a few dozen pages. Some states' constitutions create a constitutional right to access open records. This publication summarizes several components of each state's open records law.

The information is presented in a parallel structure designed to enable comparisons among states' statutes. Specific judicial decisions or opinions of the states' attorneys general are cited when case law or opinions guide states' open records practices where the language of the law left room for interpretation.¹ The general format of each summary is as follows:

- Who may request records and for what purpose:
 - Some states place restrictions on who is allowed to request access to public records. These limitations generally apply to those who:
 - ▶ Are incarcerated,
 - ▶ Are not a citizen of the state,
 - ▶ Are not a citizen of the United States, or
 - ▶ Are not of majority age.
 - ◊ Certain statutes define the term "person" or "individual" to include corporations, firms, associations, and other forms of organizations.
 - Many states' open records laws do not allow individuals to request materials for certain purposes or limit the subsequent use of

public records. Some of these regulated purposes include:

- ▶ Commercial purposes,
 - ▶ Political purposes, and
 - ▶ Litigation purposes.
- Whose and which records are covered under the law:
 - Each statute defines the entities which are subject to its provisions slightly differently.
 - Every statute applies to the executive branch overall, though some exclude the office of the governor of the state or certain executive functions.
 - Likewise, no state exempts the legislative branch in its entirety, though the state legislature is sometimes subject to other rules or procedures.
 - The judiciary branch is occasionally exempt and is instead subject to common law practices or constitutional provisions that open its records to the public.
 - Non-governmental entities which receive public funding or have public officials as members are subject to some states' open records acts.
 - Multi-state or regional bodies and advisory boards or commissions are sometimes addressed within the statutes. Otherwise, the courts rule as to whether these entities must disclose records relating to public functions.
 - States' statutes also define the term "public records" in different manners.
 - ▶ The format or physical characteristics of the requested record is rarely relevant to the openness of that record.
 - Typically all records open for inspection are available for copying. A few provisions allow custodians to prevent the copying of any record deemed too fragile to be handled or too large to be copied feasibly.

¹ This publication used the Open Government Guide published by The Reporters Committee for Freedom of the Press in conjunction with states' official websites and other sources to provide an accurate and up-to-date compilation of common law practices and statutory guidelines relating to public records.

- Fees and costs:
 - Some public records laws create a schedule of fees or establish a maximum fee that custodians may charge for providing copies of public records.
 - Nearly every state's laws require public agencies to charge no more than the actual cost of providing copies of public records. These costs may be comprised of one or more of the following components, depending on the statutory provisions:
 - ▶ Actual costs of direct materials used,
 - ▶ The cost of mailing copies of records to the requester,
 - ▶ Overhead costs associated with providing copies, and
 - ▶ Personnel costs incurred in providing copies of records.
 - ◊ Often personnel costs may only be charged if the request is for a tailored format or requires a substantial amount of a public employee's time to compile the record or segregate confidential information from the public portions requested.
 - Several laws allow custodians to require advance payment if the fee is likely to exceed a specified amount.
 - Agencies are not generally allowed to charge individuals for the right to inspect records during normal business hours.
 - Fee waivers or reductions may be granted at the discretion of the custodian in many states. Some statutes require fees be waived under certain circumstances.
 - Most statutes stipulate that the fees established within the open records laws do not supersede any other statutory provisions dictating the charges for copies of public records.
- Enforcement and sanctions:
 - Most public records laws prescribe a procedure for appealing denials of requests for records. Appeals must be filed with courts of specific jurisdictions and within a certain time frame.
 - The attorney general or an ombudsman may play a role in enforcement, though in many states, requesters must pursue action on their own behalf. Some state agencies may have administrative processes to mediate disputes.
 - Court-imposed sanctions outlined within open records statutes may include:
 - ▶ Attorneys' fees to a substantially prevailing plaintiff,
 - ▶ Actual damages or punitive damages,
 - ▶ Civil fines against the public agency or custodian, and
 - ▶ Criminal sanctions including fines or imprisonment.
 - In accordance with the presumption of openness established by legislative intent and judicial interpretation of states' laws, public agencies bear the burden of proving that a requested record is exempt from disclosure.
- Exemptions:
 - All public records laws include specific exemptions which apply to certain types of records, while some also contain general exemptions to protect the public interest or prevent invasion of privacy.
 - Most laws enable custodians to utilize discretion to encourage a higher level of disclosure when appropriate or feasible.
 - Often the number of exemptions is too great to list all of them. This report offers a few examples of categories of records which are exempt in each state and provides the information necessary to find other exemptions listed within the open records law.
 - Each act expressly exempts other records deemed confidential by federal or state statute. Again, this report includes a few examples and directs the reader to where more information may be found.
 - Following the presumption of openness, courts have instructed agencies to construe exemptions narrowly to favor maximum disclosure.

- ▶ Often courts will look to the federal Freedom of Information Act to guide their interpretation of exemptions contained in the state's counterpart.
- Most open records laws require custodians to segregate the confidential portions of information from otherwise public documents. Public agencies are typically, though not always, required to bear the burden of the costs associated with this process.
- Electronic Records:
 - As the format of public information is generally immaterial, public records laws apply to electronic records, as well.
 - ▶ E-mail is often treated as any other document, depending on the nature of its content.
 - ▶ Software is often exempt due to proprietary or security-related reasons.
 - Certain provisions require custodians to produce electronic records in other formats upon request. However, custodians are not usually required to produce new records by compiling or analyzing information.
- Fees for access to electronic records are generally subject to the same limits as other forms of records, though the direct costs may include programming costs or other costs associated with maintaining records in electronic format.
- Money-Making:
 - Public agencies, unless otherwise provided by statute, may not generally charge more than the actual cost of providing copies of public records and do not profit from the sale of records.
 - Private use of public information may or may not be restricted by states' statutes or court orders. In some states, agencies may charge more for providing records of commercial value which are requested for commercial purposes.

Frequently Used Terms

The definitions of the following terms as they apply to open records practices may be helpful to the reader.

Common law (or case law):

Judicial decisions which are given precedential weight in interpreting legislative statutes or executive orders often affect access to public records or the subsequent use of information obtained

Segregable:

Refers to public information which must be provided to requesters after the confidential portions have been redacted

Et seq.:

From the Latin phrase “et sequentes,” which means “and the following;” used to refer to the sections containing a state’s open records statutes

Injunction:

A court order requiring an individual or organization to perform or refrain from performing some action; courts have the authority to mandate custodians or agencies to disclose documents should an petitioner appeal a denial of access to records

Writ of mandamus:

A type of injunctive order used to compel or prohibit some action

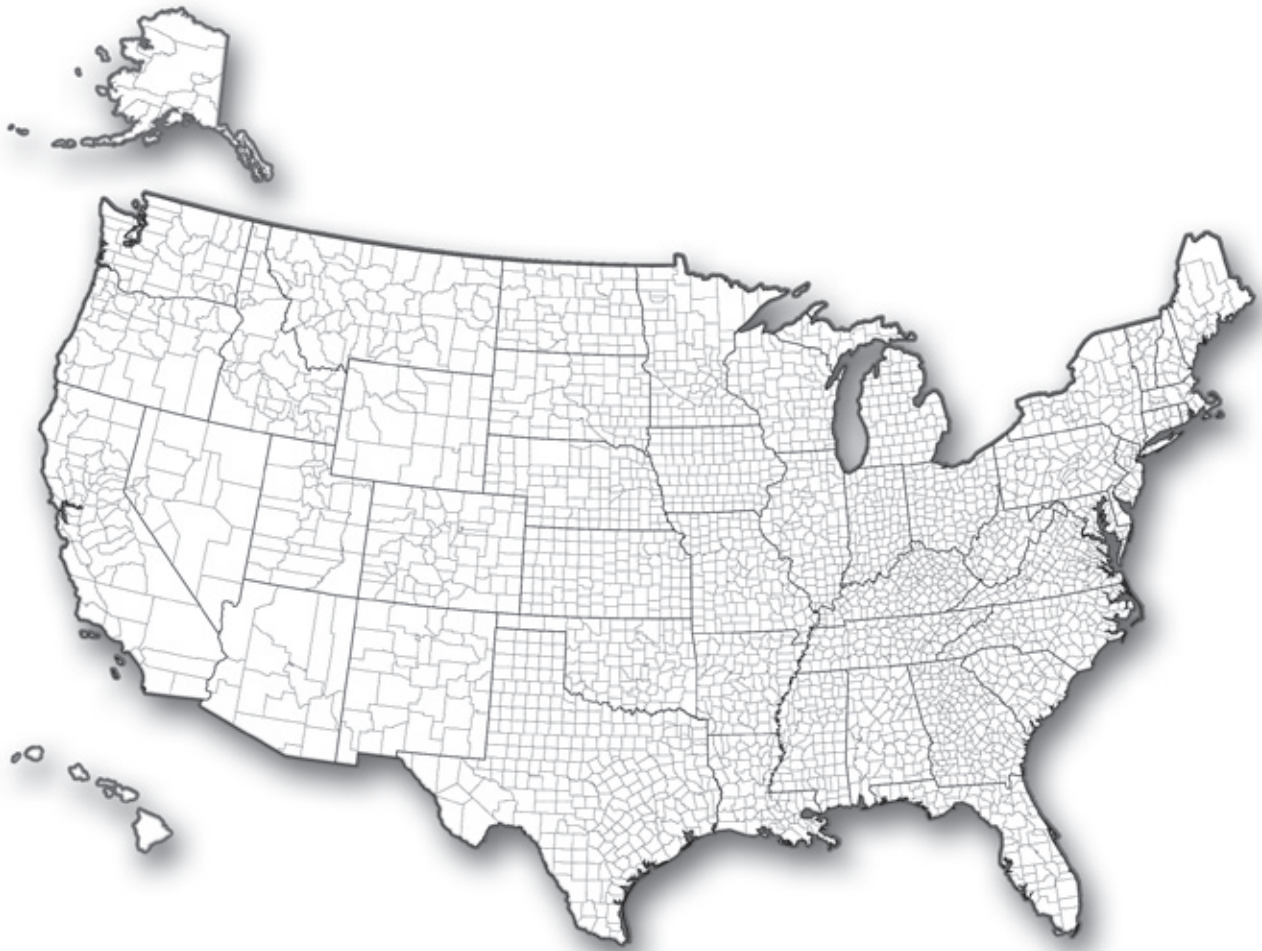
Custodian:

As used in this publication, this term refers to the legal keeper of public records

Person of interest:

The subject of the record, who may have greater access to that record than others under some states’ open records laws

Section I: State by State



Alabama

Public Records Law

Codes: Ala. Code § 36-12-40 (Supp. 2005)

Relevant Court Cases: *Excise Commissioner of Citronelle v. State ex rel. Skinner*, 179 Ala. 654, 60 So. 812 (Ala. 1912); *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (1981); *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989); *Birmingham Education Ass'n v. Birmingham City Bd. of Educ.*, CV 4-637 at 2-3 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995); *Walsh v. Barnes*, 541 So. 2d 33, 35 (Ala. Civ. App. 1989); *Blankenship v. City of Hoover*, 590 So. 2d 245 (Ala. 1991); *Scott v. Culpepper*, 220 Ala. 393, 393, 125 So. 643, 643 (1930)

Prior to 1923, only common law precedence offered the public access to certain records once the requester demonstrated a qualified interest. The first public records law codified the public's right to inspect and copy documents and has since been amended twice – once in 1983 and again in 2004 – to specify exemptions. Alabama's Public Records Law today is a relatively short, sweeping statement found in Section 36-12-40 of the Alabama Code. Due to its brevity and lack of detail, the Alabama Supreme Court has played a significant role in defining exemptions. Grounds for exclusion, however, are narrowly construed and favor disclosure.

- Who may request records and for what purpose:
 - Every citizen has a right to access public records. Because not otherwise stated in the law itself, the term “citizens” likely refers to all citizens of the United States. This includes news media, corporations, and professional organizations.
 - ▶ Court rulings have determined that the state is not explicitly required to mail public records to prisoners.¹
 - The custodian of public records may ask the purpose for a request or the requester's intended use of the records. The law, however, does not provide exemption to disclosure based on the purpose or intended use of any request.

¹ *Person v. State Dep't of Forensic Sciences*, 721 So. 2d 203 (Ala. Civ. App. 1998).

- ▶ The Alabama Supreme Court has ruled that records may not be requested when “the purpose is purely speculative or from idle curiosity.”² Media interest, however, is a legitimate purpose and not classified as “idle curiosity.”

- ▶ The language of the law does not prevent requests for commercial purposes, either. The legitimacy of seeking public records for profit has been upheld through court decisions.³

- Whose and which records are covered under the law:

- Alabama Code § 36-12-2 (2001) states that “[a]ll public officers and servants shall correctly make and accurately keep...all such books or sets of books, documents, files, papers, letters and copies of letters... in reference to the activities or business required to be done...”

- Under the Public Records Law, “[e]very public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor.”⁴

- ▶ The Public Records Law therefore covers the executive, legislative, and judicial branches of the state government.

- ▶ It has also been applied by the courts to various city, county, municipal, and state personnel, departments, boards, and commissions.

- ▶ Along with court decisions, the state attorney general's opinions have applied the law to the Circuit court clerk, County probate judge; State, county circuit, and municipal courts; County circuit court register's office; County

² *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941).

³ *Walsh v. Barnes*, 541 So. 2d 33, 35 (Ala. Civ. App. 1989).

⁴ Ala. Code § 36-12-41 (2001).

district court clerk's office; and probate judge's office.

- ▶ Whether non-governmental bodies which receive public funding or have public officials as members are subject to the Public Records Law has remained unaddressed by the courts and the law itself.
- The term "public writing" that appears in the Public Records Law has been interpreted to include the definition of "public records" according to Alabama Code § 41-13-1 (2000). In essence, all written and typed materials made by public officials in the course of conducting public business are subject to the law.
 - ▶ The Supreme Court has extended this definition to include audio-visual and computerized data, as well.
 - ▶ Interpretations have broadly defined the scope and type of materials subject to the law in favor of maximum disclosure.
- All records open to inspection are available for copying.
- Fees and costs:
 - The Public Records Law allows public agencies to charge for providing records to the public but does not establish a schedule of fees.
 - The attorney general has issued opinions suggesting nominal fees should be charged when budget constraints prevent agencies from offering free access and that personnel costs should only be recovered through fees if the search for documents and reproduction consumed a substantial amount of an employee's time.
 - Specific fees relating to duplication services provided by the courts have been established through orders and procedural rules. For example,
 - ▶ Fees levied by the Alabama Criminal Justice Information Center (ACJIC) may not exceed \$25.⁵
 - ▶ Fees levied by the Department of Public Safety records may not to exceed \$15

for each record or report, unless other statutes dictate otherwise.⁶

- Enforcement and sanctions:
 - The Public Records Law does not prescribe enforcement procedures. It is primarily enforced by private citizens or news media through civil action in court.
 - The attorney general may play a role in enforcement only in a case in which someone tampers with public records.
 - ▶ There is no ombudsman or specific agency charged with enforcement.
 - Sanctions for nondisclosure when the law demands it are not addressed by the law, though attorney's fees have been awarded in at least one case.⁷
- Exemptions:
 - The Public Records Law provides two specific and two general exemptions, all of which are mandatory.
 - Specific exemptions:
 1. Records regarding use of public libraries are exempt from disclosure.
 2. Information related to security and safety which, if released, may "reasonably be expected to be detrimental to the public safety or welfare."
 - General exemptions:
 1. "Records that are expressly made confidential or nonpublic by statute" should not be disclosed to the public.
 2. "Records the disclosure of which would . . . be detrimental to the best interests of the public"⁸ are mandatorily exempt from disclosure.
 - Many other mandatory and discretionary exemptions exist through specific statutes and common law but are typically narrowly construed so as to favor disclosure.
 - ▶ Statutory exemptions for certain professions or industries may be found

5 Ala. Code § 41-9-644 (2000).

6 Ala. Code § 32-2-8 (Supp. 2005).

7 *Tuscaloosa News v. Garrison*, CV-99-408 (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001).

8 Ala. Code § 36-12-40 (Supp. 2005).

in their respective titles of the Alabama Code.⁹

- ▶ Further rules regarding judicial records may be found in the Alabama Code for Criminal Procedure and the Alabama Code for Civil Procedure.
- Segregable portions of documents may be provided after material exempt from disclosure has been redacted.
- Electronic Records:
 - The definition of “public writings” has been interpreted to encompass electronic records.
 - ▶ E-mail may be treated as any other form of public record if releasing the content would not create “unreasonable and undue interference” with the agency’s public duties.¹⁰
 - ▶ Software, if proprietary and of a nonpublic source, is not subject to the Public Records Law.
 - The attorney general stated that the public should have reasonable access in a reasonable form, though public agencies are not required to compile information or tailor a dataset for the public.

▶ One trial court opinion, however, quoted an Ohio Supreme Court decision in favor of providing information in a format that would not require private individuals to spend extensive amounts of time compiling the data.¹¹

- The law does not dictate a schedule of fees for electronic records, and charges for access to public records through online sites or in other electronic formats vary.
- Money-Making:
 - Alabama Code § 41-9-644 (2000) caps fees for information from the Alabama Criminal Justice Information Center (ACJIC) at \$25. Resulting revenues enter the State’s General Fund. No other provisions relate to generating revenues from sales of electronic records.
 - The Public Records Law does not regulate the private use of public records. As previously noted, records may be obtained for commercial purposes, and individuals or corporations may create value-added services with public information for profit.

⁹ See Alabama State Legislature’s website for a complete copy of the state code: www.alabama.gov/sliverheader/Welcome.do?url=http://www.legislature.state.al.us/ALISNetHome.html

¹⁰ *George v. Glasscock*, No. CV-07-40 (Cir. Ct. of Morgan County, Ala., June 12, 2007).

¹¹ *Birmingham News Co. v. Peevey*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery Co., Ala., July 22, 1993).

Alaska

Public Records Act

Codes: *Alaska Stats.* 40.25.100-220; 2 AAC 96.100 - 2 AAC 96.900

Relevant Court Cases: *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1323 (Alaska 1982); *Doe v. Superior Court*, 721 P.2d 617 (Alaska 1986); *Capital Information Group v. Office of the Governor*, 923 P.2d 29 (Alaska 1996); *Gwich'in Steering Committee v. Office of the Governor*, 10 P.3d 572 (Alaska 2000); *Fuller v. City of Homer*, 75 P.3d 1059 (Alaska 2003)

Though the act has been revised, re-codified, and renumbered several times, statutory freedom of information dates back to 1900 in Alaska. Alaska's Public Records Act, found in Title 40 of Alaska Statutes, states, "public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government." Title 2, Chapter 96 of the Alaska Administrative Code further establishes procedures for providing access to public information. As courts apply this act to various circumstances, the balancing test used is predisposed to favor disclosure.

- Who may request records and for what purpose:
 - The Public Records Act makes little distinction among requesters of information or the purpose for which the records are sought.
 - ▶ The only exception occurs when a litigant requests records. Court rules regarding discovery procedures would then apply.
 - The subsequent use of public records remains unrestricted by the Public Records Act.
- Whose and which records are covered under the act:
 - The executive branch is covered under the language of the law that encompasses "every public officer."¹²

- ▶ Certain functions of the executive, however, are exempt. Courts have recognized a deliberative process privilege that protects materials relating to the decision-making process when the government interest in confidentiality outweighs the public interest in disclosure.
- The Public Records Act explicitly covers subordinate legislative entities, while state legislative rules and statutes pertain to the records made and kept by the Alaska state legislature.¹³
- Administrative Rule 37.5 from the Alaska Rules of Court enables access to documents within the judicial branch.
- The act expressly states that public contractors are subject to the law. Records relating to its public business must therefore be disclosed to the public.
 - ▶ However, the act may not necessarily cover all nongovernmental bodies that receive public funds or benefits.
- The term "public agency" has been defined and applied broadly by courts to include many boards and commissions, as well.
- The records subject to the act are defined in terms equally as broad as the definition of the entities to which they belong. Any record a public agency or private contractor for a public agency receives or develops is covered, regardless of its physical format.
- Any record open to inspection may be copied.
- Fees and costs:
 - Requesters may be required to pay a fee prior to receiving copies of public records. These fees may not exceed the cost of duplication.
 - Personnel fees may be added to duplication costs if the time used to search for documents exceeds five hours in one month. The time spent determining if

¹² AS 40.25.110.

¹³ *Aboud v. League of Women Voters*, 743 P.2d 333 (Alaska 1987).

records are indeed accessible to the public is not included.

- Fee waivers may be granted under the following circumstances:

- ▶ A waiver is in the best interest of the public and is applied to all others similarly situated.
- ▶ Charges amount to less than \$5 and the cost of seeking payment exceeds the payment owed.
- ▶ Documents to prove eligibility are available to veterans free of charge.

- Enforcement and sanctions:

- Individuals may seek help of the state ombudsman if denied access to records but generally rely on their own resources.¹⁴
- The law stipulates no role for the Department of Law or any other state agency or commission.
- Plaintiffs may recover costs of attorney fees if successful in the suit to obtain public records.
- Agencies may be found in contempt of a court order if injunctive relief is granted to the petitioner and the custodian fails to produce the requested record.

- Exemptions:

- Various mandatory and discretionary specific exemptions exist, while one general exemption serves to seal “records required to be kept confidential by federal law or regulation or by state law.”¹⁵
- Specific exemptions under the Public Records Act include records regarding adoption, juveniles, college tuition savings program, electronic signatures, and certain accidents; medical records; records made confidential by law; records for law enforcement purposes; and records related to security, the disclosure of which may detriment the public.
- As mentioned, common law exemptions protect the deliberative process. Once the minimum requirements for invoking

this exemption have been met, the party requesting the records holds the burden of overcoming the presumption of confidentiality.

- Many other exemptions exist resulting from other statutory regulations.¹⁶
- Individuals may request documents that exclude portions which may be mandatorily confidential.
- Electronic Records:
 - Though not explicitly stated, the Public Records Act covers electronic records.
 - ▶ E-mail is not mentioned in the law.
 - ▶ Propriety software, however, is expressly exempt from disclosure.¹⁷
 - Individuals may request records in certain formats, though agencies are not required to provide data in a format in which it does not currently exist.
 - The act distinguishes between public records, which may exist in electronic format, and electronic products or services. Fees for reproduction of public records may not exceed the cost of producing these records. Agencies may charge an additional fee for providing services which may tailor records to fit requests.¹⁸
 - ▶ Fees for electronic services may be waived or reduced under the same circumstances regarding other fees previously mentioned.
- Money-Making:
 - Public agencies may not charge more than is reasonable to cover costs of providing public records.
 - Private individuals are permitted to use public records for profit, as the law does not address the use of public records. Businesses often utilize publicly accessible records and generate some value-added component to the data to earn profits.

¹⁴ AS 24.55.200.

¹⁵ AS 40.25.120(4).

¹⁶ See Alaska's State Legislature's website for a complete copy of the state code: www.legis.state.ak.us/basis/folio.asp

¹⁷ AS 40.25.220(3).

¹⁸ AS 40.25.120(b).

Arizona

Public Records Law

Codes: A.R.S. §§ 39-121 – 39-125

Relevant Court Cases: *Arizona Newspapers Inc. v. Superior Court*, 143 Ariz. 560-564, 694 P.2d 1174, 1178 (1985); *Carlson v. Pima County*, 141 Ariz. 487, 489, 687 P.2d 1242, 1244 (1984). *Cox Arizona Publications Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); *Bolm v. Custodian of Records of Tucson Police Dep't*, 193 Ariz. 35, 39, 969 P.2d 200, 204 (Ct. App. 1998)

Open records laws took root in Arizona in 1901. The Arizona Supreme Court has since noted that “this state has always favored open government and an informed citizenry.”¹⁹ Arizona’s Public Records Law, ranging from Sections 39-121 to 39-125 of the Arizona Revised Statutes, inherently favors disclosure and lacks specific statutory exemptions. The courts were therefore left to establish common law exemptions in response to challenges to denied requests.

- Who may request records and for what purpose:
 - Any person may request records for any purpose, including commercial purposes.²⁰ A requester must state the intended use of the records, however.
 - ▶ If an individual misrepresents the purpose of the request and fails to state the commercial purpose, the requester will be liable for damages and attorneys’ fees incurred by the public agency.²¹
 - If the custodian of records believes the proposed purpose represents a misuse of records, the custodian may request the governor issue an executive order to prevent disclosure. If the governor does not respond within 30 days, the custodian must issue copies of the requested records.²²
 - The subsequent use of any records received by private individuals remains unrestricted.

- Whose and which records are covered under the act:
 - The terms “officer” and “public body” have been defined broadly to subject appointed and elected officials within public agencies to the law.
 - No public entity is exempt in its entirety by statute or common law.
 - Records generated or used by public officials in performing their duties are public records. This does not necessarily include all records in possession of a public official.²³
 - Entities receiving or expending public funding are also subject to the act.²⁴
 - The phrase “[p]ublic records and other matters” has been interpreted to include videotapes, documents, maps, books, photographs, films, audio materials, and e-mails among materials available to the public.²⁵ The physical form of the record is irrelevant.
 - The law makes no distinction between records available for inspection and those available for copying but does dictate that copies must be made under the supervision of the custodian.
- Fees and costs:
 - Though the law does not establish a schedule of fees, it does stipulate that fees may be levied depending on the intended use of the information. The law distinguishes between records requested for non-commercial purposes and those requested for commercial purposes:
 - ▶ Custodians may charge a reasonable fee for duplication of documents requested for non-commercial purposes.

19 *Arizona Newspapers Inc. v. Superior Court*, 143 Ariz. 560-564, 694 P.2d 1174, 1178 (1985).

20 A.R.S. § 39-121.03(A).

21 A.R.S. § 39-121.03(C).

22 A.R.S. § 39-121.03(B).

23 *Salt River Pima-Maricopa Indian Community*, 168 Ariz. 531, 538, 815 P.2d 900, 907 (1991).

24 A.R.S. § 39-121.01(A)(2).

25 *Star Publishing v. Pima County Attorney’s Office*, 181 Ariz. 432, 891 P.2d 899, 901 (Ct. App. 1994).

- ▶ If the purpose of the records is commercial use, the requester must pay a fee comprised of three components:
 1. A portion of the cost for obtaining the documents;
 2. A reasonable amount for the cost of materials, equipment, and personnel in providing reproductions; and
 3. The value of the reproduction in the commercial market.²⁶
- ▶ The newsgathering activities of journalists are not considered as having a commercial purpose.
- Documents related to claims to be presented to a U.S. bureau for benefits, such as pensions or insurance, must be provided free of charge.²⁷
- Enforcement and sanctions:
 - The law specifies sanctions against those who misrepresent their intended use of public records. If the requester obtains the information for commercial purposes without disclosing those purposes, he/she may be liable for:
 - Three times the amount of fees that would have been paid in addition to attorneys' fees
 - Or three times the damages incurred if the records would not have been provided had the intended use been accurately represented.²⁸
 - Citizens denied access to public records may complain to the Office of the Ombudsman-Citizens Aide, which has investigative powers and the ability to make recommendations to agencies, excluding certain entities, such as the governor, attorney general, state treasurer and secretary of state.
 - If a superior court deems the denial wrongful and finds that the custodian acted arbitrarily or in bad faith, the petitioner may recover legal costs and will have a cause of action against the public officer or agency.

²⁶ A.R.S. § 39-121.03(A).

²⁷ A.R.S. § 39-122(A).

²⁸ A.R.S. § 39-121.03(C).

- Exemptions:
 - The Arizona Public Records Law does not codify mandatory exemptions, though other state statutes do provide mandatory and discretionary exemptions for records related to law enforcement, legal proceedings, and health facilities.²⁹
 - The law does state that “[n]othing in this chapter requires the disclosure of a risk assessment that is performed by or on behalf of a federal agency to evaluate critical energy, water or telecommunications infrastructure to determine its vulnerability to sabotage or attack.”³⁰
 - The Arizona Supreme Court has established three categories of circumstances under which disclosure may not be required:
 - ▶ Confidentiality,
 - ▶ Privacy, and
 - ▶ Disclosure is against the state’s best interest.
 - Segregable portions of documents which contain exempt information are available to the public.
- Electronic Records:
 - The format of a record does not affect its status under the law. The Public Records Law, however, does not specifically address many issues regarding electronic data, nor do many court cases provide common law guidelines.
 - The issues of whether a certain format can be requested, whether or not software is subject to disclosure, and how fees are assessed remain unaddressed.
- Money-Making:
 - Commercial use of public records is permitted if the requester states the intended use. Additional fees may be applied.

²⁹ See the Arizona State Legislature’s website for more a complete copy of the state code: www.azleg.state.az.us/arizonarevisedstatutes.asp

³⁰ Az. Stat. § 39-126.

Arkansas

Freedom of Information Act

Codes: Ark. Code Ann. §§ 25-19-101 – 25-19-109

Relevant Court Cases: *Collins v. State*, 200 Ark. 1027, 143 S.W.2d 1 (1940); *Republican Party of Arkansas v. State ex rel. Hall*, 240 Ark. 545, 400 S.W.2d 660 (1966); *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998); *Arkansas Newspaper Inc. v. Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984); *Arkansas Best Corp. v. General Electric Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994); *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board*, 72 Ark. App. 37, 32 S.W.3d 60 (2000)

No comprehensive piece of legislation articulated the public's right to access government records until 1967 when Governor Winthrop Rockefeller signed into law a bill first drafted by the Little Rock chapter of Sigma Delta Chi, the Society of Professional Journalists. Originally modeled in part after other states' statutes, this law has been amended 16 times to clarify its intent. Chapter 19 of Title 25 of the Arkansas Code formally and explicitly provides citizens the statutory right to inspect and copy public records.

- Who may request records and for what purpose:
 - The Arkansas Freedom of Information Act states that all citizens of Arkansas may request access to public records.
 - ▶ The term “citizens” has been expanded to include corporations and partnerships and unincorporated associations conducting business in the state.³¹
 - ▶ The act exempts convicted felons from obtaining those related to the Department of Corrections.
 - The purpose of the request is only taken under consideration when personnel records are the subject of the request. The state thus avoids unwarranted invasions of privacy.³²

³¹ *Arkansas Hwy. & Transp. Dep't v. Hope Brick Works Inc.*, 294 Ark. 490, 744 S.W.2d 711 (1988); *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998).

³² Ark. Code Ann. § 25-19-105(b)(12).

- The Freedom of Information Act does not restrict the use of records once obtained.
- Whose and which records are covered under the act:
 - The act covers records which are “maintained in public offices or by public employees within the scope of their employment.”³³
 - With regards to executive entities, this includes state university board of trustees, advisory councils, and licensing agencies, to name a few.
 - This term includes all legislative bodies, as well, including the General Assembly, legislators, legislative committees, city councils, and others.
 - The judicial branch, however, is not covered by this law, as courts have decided that it would violate the separation of powers doctrine. The court has the authority to seal its records under certain circumstances, though there is a common law right to access judicial records.³⁴
 - Non governmental agencies that receive public funding to perform public functions that otherwise could have been conducted by the government are also subject to the act.³⁵
 - The physical form or location of any public record is immaterial to its accessibility. However, agencies are not required to reproduce information in any format in which the data do not already exist in response to requests.
 - Prior to amendments in 2001, requesters were entitled to inspect and copy public records. Now, however, individuals have the

³³ Ark. Code Ann. § 25-19-103(5)(A).

³⁴ *Arkansas Newspaper Inc. v. Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984).

³⁵ *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board*, 72 Ark. App. 37, 32 S.W.3d 60 (2000).

right to “inspect, copy, or receive copies of public records.”³⁶

- Fees and costs:

- Unless otherwise dictated by statute, agencies may not impose fees greater than the actual cost of reproducing the documents.
 - ▶ Personnel costs are excluded and may not be part of the charge.
- Custodians may require advance payment if the fee will likely exceed \$25.³⁷
- A custodian may waive a fee if the intended use of the records is noncommercial and a waiver is in the public’s best interest.

- Enforcement and sanctions:

- The Attorney General’s role regarding the Freedom of Information Act is relatively more prevalent than in other states. While opinions are not binding, they may be influential to the courts’ interpretation of the act and are often sought by requesters and custodians.
- The Attorney General also has power to enforce the act and may bring a civil suit as if he/she was the original requester denied access to public records.³⁸
- If negligence in violation of the Freedom of Information Act occurs, the offender will be guilty of a Class C misdemeanor and liable for a fine up to \$100 and/or imprisonment not exceeding 30 days.³⁹
- In the case of a civil suit, prevailing plaintiffs may recoup attorney’s fees.
- Public agencies may also be awarded attorneys’ fees if the requester brought the lawsuit frivolously.⁴⁰

- Exemptions:

- The mandatory exemptions are narrowly construed to favor disclosure. A balance test applied by the courts utilizes common

sense to balance the interest of the public in disclosure and the need for the records to remain confidential.

- A general catch-all exemption prevents the disclosure of any record that is made confidential by other statutes.
- Specific exemptions under the Freedom of Information Act relate to state income tax records; medical, adoption, and education records; historical or archeological files; grand jury minutes; judicial and quasi-judicial drafts; law enforcement records; records protected by court orders or rules; trade secrets; certain personnel records (including evaluation records and home addresses of state employees); licensing examinations; settlement agreements in tax cases; oil and gas records; military discharge records; and public water system security records.⁴¹
- Several other statutory exemptions found in other sections of the Arkansas Code may be found using the Arkansas State Legislature’s website.⁴²
- Unlike the practices of other states, the courts may not create common law exemptions that do not relate solely to judicial records.
- Agencies may classify documents if expressly granted that authority.
- Regarding individuals’ right to privacy, the Freedom of Information Act only addresses personnel records and lacks a general exemption for the release of information that may be found embarrassing.
 - ▶ The Arkansas Supreme Court, however, has recognized a right to privacy under the federal constitution which may prevent disclosure if the individual’s privacy interest outweighs the government’s interest in disclosure.
- The Freedom of Information Act addresses the availability of segregable portions of exempt documents in detail.⁴³ The amount

36 Ark. Code Ann. § 25-19-105(a)(2)(A).

37 Ark. Code Ann. § 25-19-105(d).

38 *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998).

39 Ark. Code Ann. §§ 5-4-104, -201, -401.

40 Ark. Code Ann. § 25-19-107(d).

41 Ark. Code Ann. § 25-19-105(b).

42 www.arkleg.state.ar.us/assembly/2009/2010F/Pages/Home.aspx

43 Ark. Code Ann. § 25-19-105(f)

of and place where information has been deleted should be indicated, and the costs of doing so will be incurred by the provider of the records.

- Electronic Records:

- Electronic records are explicitly covered under the act.
 - ▶ E-mail is considered a public record.⁴⁴
 - ▶ Software is explicitly exempt from disclosure.⁴⁵
- Individuals may request documents in any form readily available, though agencies are not required to tailor data upon request. Custodians are encouraged to compile or summarize data if the costs of doing so are minimal.
- Fees are generally assessed for electronic records in the same manner as those for any other medium. Fees may not exceed the reproduction costs which exclude personnel costs.

- If, however, custodians provide tailored material upon request, the cost of personnel time exceeding two hours, along with the cost of copying, may be recovered from the requester.⁴⁶

- Money-Making:

- Earning revenues through the sale of public databases has not been prevalent in Arkansas, and when attempted, revenues have generally been inconsequential.
- Records unavailable to the public, however, may be provided by state agencies to authorized users for a fee. This practice annually generates millions of dollars in revenue.
 - ▶ For example, the state police may provide background checks to employers or traffic violation records to insurance companies to generate revenues to fund its operations.

44 Ark. Op. Att’y Gen. Nos. 2000-096, 99-018.

45 Ark. Code Ann. § 25-19-103(5)(B).

46 Ark. Code Ann. § 25-19-109(a)(1), (b)(1).

California

California Public Records Act

Codes: California Constitutional Sunshine Amendment: Cal. Const. Art. I, § 3(b);

California Public Records Act: California Government Code §6250 – 6276.48; Legislative Open Records Act: Cal. Gov’t Code § 9070, et. seq.

Relevant Court Cases: *Register Div. of Freedom Newspapers Inc. v. County of Orange*, 158 Cal. App. 3d 893, 901, 205 Cal. Rptr. 92 (1984); *CBS Inc. v. Block*, 42 Cal. 3d 646, 652 n.5, 230 Cal. Rptr. 362, 725 P. 2d 370 (1986); *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 813 P.2d 240, 283 Cal. Rptr. 893 (1991); *Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1045, 13 Cal. Rptr. 3d 517 (2004); *Versaci v. Superior Court*, 127 Cal. App. 4th 805, 813, 26 Cal. Rptr. 3d 92 (2005)

California adopted a constitutional amendment to ensure the public’s access to government records. This elevation to a constitutional stature signifies that all existing statutory exemptions will be narrowly construed and that any new exemptions must conform to the standards set forth in the Sunshine Amendment, as it is called. The amendment does not, however, supersede any constitutional right to privacy. The California Public Records Act, modeled after the federal Freedom of Information Act, further promotes access through provisions designed to allow agencies to exceed the minimum standards in opening their records, including discretionary fee waivers and discretionary exemptions.

- Who may request records and for what purpose:
 - “Every person” has the right to access public records. This term includes corporations, associations, partnerships, limited liability companies, and other firms.⁴⁷
 - ▶ Citizens of other states or other countries also enjoy the right to request records,⁴⁸ as do those seeking access for litigation purposes.⁴⁹

⁴⁷ Cal. Gov’t Code § 6250.

⁴⁸ *Connell v. Superior Court*, 56 Cal. App. 4th 601, 611-12; 65 Cal. Rptr. 2d 738 (1997).

⁴⁹ *County of Los Angeles v. Superior Court*, 82 Cal. App. 4th 819, 826, 98 Cal. Rptr. 2d 564 (2000).

- The purpose of the request is immaterial and need not be stated, with the exception of requests for the addresses of individuals arrested for a crime or victims of a crime. In this circumstance, the requester must affirm that the request is for a scholarly, journalistic, political, or investigatory purpose.
- The subsequent use of obtained records is unrestricted, with one exception. Those requesting addresses of people arrested for or victims of a crime may not use the acquired information to earn revenues.⁵⁰
- Whose and which records are covered under the act:
 - The California Public Records Act applies to the executive branch, including all state and local offices, boards, commissions, departments, and other subdivisions.
 - The legislative branch does not fall under the California Public Records Act. It is, however, covered by the Sunshine Amendment and the Legislative Open Records Act. The public therefore has a constitutional right to access any records of legislative bodies not otherwise statutorily made confidential.
 - The judicial branch is likewise excluded from the Public Records Act but is covered under the Sunshine Amendment, which does not supersede any other pre-existing exemptions found in other statutes or judicial rules of procedure.
 - Any non-governmental body is subject to the law if it is established by a legislative body which delegates its authority to that entity or if it receives funding from an agency and a member of the legislative body is appointed to the governing entity of the private organization.
 - The courts, with approval from the Attorney General, have adopted a broad definition of “public records” that covers “every conceivable kind of record that is

⁵⁰ Cal. Gov’t Code § 6254(f)(3).

involved in the governmental process...”⁵¹
Records that are purely personal in content are not subject to the act.

- All physical forms of records are covered.
- Any record that is available for inspection is also available for copying unless the task of copying is unreasonable, or too burdensome and costly.⁵²
- Fees and costs:
 - Fees are limited to the direct cost of reproduction of the requested records.
 - Custodians may not charge for the time spent searching for documents or determining the eligibility of those documents for disclosure.
 - Statutorily established flat fees supersede the California Public Records Act and remain in place.
 - The act does not explicitly provide for fee waivers but grants agencies discretionary power to promote greater access to public records.⁵³ Under this authority, custodians may reduce or waive fees.
- Enforcement and sanctions:
 - Individuals may seek injunctive relief after being denied access to public records.
 - ▶ The Attorney General has no role unless he/she has been wrongfully denied access.
 - Local agencies may provide an information officer or a review board to hear complaints concerning local sunshine ordinances.
 - Successful plaintiffs are entitled to attorneys’ fees, and agencies may be liable for contempt sanctions if they fail to comply with a court order requiring disclosure.
 - Public agencies may recoup litigation costs if the lawsuit was brought frivolously.⁵⁴
- Exemptions:
 - Existing exemptions are narrowly construed, and the imposition of future exemptions

must show relevant findings that disclosure is against the best interest of the public, due to the Sunshine Amendment in the California Constitution. The party preventing disclosure bears the burden of proving the need for confidentiality.

- The general catch-all exemption allows records to be withheld if “the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.”⁵⁵
- Unless the statutory exemptions demand otherwise, they may be applied at the discretion of the custodian, as the Public Records Act grants agencies the authority to provide a higher level of access than is required by the minimum standards.
- Specific, discretionary exemptions may be found in Section 6254 of the Public Records Act. These are numerous, though narrowly construed. Many relate to personnel files; personal, financial, medical, and police records; records relating to pending investigations and litigation; and many other categories.
- Sections 6276.02 through 6276.45 of the Public Records Act list more than 600 statutory exemptions derived from other sections of the California Code, ranging from records relating to accident reports to those pertaining to the youth service bureau.
 - ▶ This list may not be comprehensive. Specific exemptions relating to certain industries may be found in their respective sections of the California Code, such as the Penal Code, the Vehicles Code, and the Insurance Code, to name a few. This information may be found from the state legislature’s website.⁵⁶
- Common law provides two general circumstances under which information may be exempted from disclosure:
 1. The agency is not required to provide voluminous or costly records if the

51 *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 774; 192 Cal. Rptr. 415, 422 (1983).

52 Cal. Gov’t Code § 6253(b).

53 Cal. Gov’t Code § 6253(e).

54 Cal. Gov’t Code § 6259(d).

55 Cal. Gov’t Code § 6255.

56 www.leginfo.ca.gov/calaw.html

reproduction imposes an undue burden that interferes with the agency's duties.⁵⁷

2. Records relating to the deliberative process are exempt to protect the decision-making process and prevent the confusion that could arise upon disclosing documents prematurely.⁵⁸

- Segregable portions of otherwise exempt material should be available.⁵⁹ Agencies must bear either the costs of separating the exempt material from public information or the burden of proving that the task is too onerous.⁶⁰

- Electronic Records:

- The openness of a record is not hindered by its existence in an electronic format.
 - ▶ E-mail is considered public.⁶¹
 - ▶ Software, however, is excluded from disclosure requirements.⁶²
- If a public entity maintains a public record in an electronic format, it must be made available in an electronic format. Providing only a written paper copy to the public does not suffice. If an agency keeps records in more than one electronic format, individuals may request whichever format they prefer.
 - ▶ There is no requirement, however, for an agency to comply with a request to tailor information to a specific format in which the records are not already maintained.
 - ▶ No agency may deny access to public records on the grounds that providing the information would require the agency to "compile data, write programming language or a computer program, or to

construct a computer report to extract data."⁶³ Under these circumstances, the agency may extend the time limitation to provide the records rather than denying access altogether.

- As with other physical forms of public records, agencies may charge only the direct cost of duplication (or transmission in the case of e-mail) with two exceptions:

1. If an agency provides information outside the regularly scheduled interval in which it normally produces the records, it may charge the cost of constructing the record.
2. If the request requires the agency to compile, extract, or program software to produce a record, the requester may bear those additional costs.

- Money-Making:

- The California Public Records Act allows public agencies to sell, lease, or license the computer software they develop for noncommercial or commercial use.
- Three specific provisions prohibit private individuals' commercial use of certain public records:
 - ▶ As mentioned, addresses of arrested individuals may not be obtained for commercial purposes.
 - ▶ Home addresses or telephone numbers of appointed or elected officials may not be sold or solicited with the intent to cause danger or harm.⁶⁴
 - ▶ Individuals may not solicit information from the Department of Pesticide Regulation for the purpose of selling it.⁶⁵

57 *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal. 3d 440, 452-53, 651 P.2d 822, 186 Cal. Rptr. 235 (1982).

58 *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 813 P.2d 240, 283 Cal. Rptr. 893 (1991).

59 Cal. Gov't Code § 6253(a).

60 *State Bd. of Equalization v. Superior Court*, 10 Cal. App. 4th 1177, 1186, 13 Cal. Rptr. 2d 342 (1992).

61 *San Diego Reader v. Superior Court*, 31 Med. L. Rptr. 1890 (Cal. Sup. Ct. 2002).

62 Cal. Gov't Code § 6253.9(f).

63 Cal. Gov't Code § 6253(c)(4).

64 Cal. Gov't Code § 6254.21.

65 Cal. Gov't Code § 6254.2.

Colorado

Colorado Public Records Act

Codes: Colo. Rev. Stat. §§ 24-72-201 – 24-72-309

Relevant Court Cases: *Denver Publishing Co. v. Dreyfus*, 184 Colo. 288, 520 P.2d 104 (1974); *Freedom Newspapers Inc. v. City of Colorado Springs*, 739 P.2d 881 (Colo. App. 1987); *CFI Steel Corp. v. Office of Air Pollution Control*, 77 P.3d 933 (Colo. App. 2003); *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996); *Dawson v. State Compensation Ins. Auth.*, 811 P.2d 408 (Colo. App. 1990); *See Office of State Court Administrator v. Background Info. Sys.*, 994 P.2d 420 (Colo. 1999); *Denver Post v. Stapleton Dev. Corp.*, 19 P.3d 36 (Colo. App. 2000); *Wick Communications v. Montrose County Board of County Commissioners*, 81 P.3d 360 (Colo. 2003)

Article 72 of Title 24 of the Colorado Revised Statutes contains the Colorado Public Records Act. Enacted in 1969, it was originally patterned after the federal Freedom of Information Act. Subsequent amendments, however, produced distinctions between the two. In 1977, the legislature adopted the Criminal Justice Records Act as an amendment to the article (Colo. Rev. Stat. § 24-72-301, *et seq.*). These provisions offer criminal justice agencies a bit of latitude in determining which records are subject to disclosure, though records of official action remain open to the public.

- Who may request records and for what purpose:
 - Under the statute, “any person” may obtain access to public records that are not copyright protected. The term person includes corporations, partnerships, limited liability companies, firms and other associations.⁶⁶
 - ▶ The person who is the subject of the record may have greater access to that record than others.⁶⁷
 - The purpose of the request is immaterial and the subsequent use of public records unrestricted with the exception of those related to criminal justice. A requester must indicate that the intended use of criminal

justice records is not for commercial purposes.

- Whose and which records are covered under the act:
 - The act makes public records “made, maintained, or kept by the state or any agency, institution, a nonprofit corporation incorporated pursuant to Colo. Rev. Stat. § 23-5-121(2), or political subdivision of the state, or that are described in Colo. Rev. Stat. § 29-1-902, and held by any local government-financed entity.”⁶⁸
 - This applies to executive and legislative offices and entities at all state and local levels.
 - This act does not cover all courts and all actions of the courts, however. The Colorado Public Records Act does include the court registry of actions, all judgment records, and the records of official actions regarding criminal cases.
 - ▶ The Criminal Justice Records Act determines the openness of criminal case files.
 - ▶ Otherwise, other information is disclosed or kept confidential at the discretion of the custodian.
 - The term “political subdivision” has been extended by the courts to include private entities. The courts analyze several factors in determining whether a corporation is subject to the Colorado Public Records Act, including whether it receives public funding, performs public duties, uses public property, and is controlled by a public entity.⁶⁹
 - The definition of public records includes those made “for use in the exercise of functions required or authorized by law

⁶⁶ Colo. Rev. Stat. § 24-72-202(3).

⁶⁷ Colo. Rev. Stat. §§ 24-72-204(2)(a)(II), (3).

⁶⁸ Colo. Rev. Stat. § 24-72-202(6).

⁶⁹ *Denver Post v. Stapleton Dev. Corp.*, 19 P.3d 36 (Colo. App. 2000).

or administrative rule or involving the expenditure of public funds.”⁷⁰

- ▶ Specific records that are to be disclosed upon request are enumerated in other statutes of the Colorado Revised Statutes, which can be found from the state legislature’s website.⁷¹
 - ▶ Categories include state auditor reports, real estate records, election and voter registration records, and the minutes of meetings of public entities.
- Fees and costs:
 - Custodians may not charge a fee exceeding either 25 cents per page for copying or the actual cost of reproducing the record, with two exceptions.⁷²
 - ▶ If the custodian is the secretary of state, fees will be levied pursuant to section 24-21-104.
 - ▶ If the custodian is the executive director of the Office of Personnel, fees will be levied pursuant to section 24-80-102.
 - If the request requires manipulation of data, an agency may charge a reasonable fee not to exceed the actual cost of producing the materials requested.
 - Agencies may charge a “nominal” fee for the search and retrieval of documents.⁷³
 - Though all records available for inspection are also available for copying, the originals must remain under the supervision of a custodian. If the agency in which the requested documents are located does not have copying facilities, the requester will incur the costs of providing facilities.
 - Enforcement and sanctions:
 - The Colorado Public Records Act offers little direction for individuals seeking remedy for wrongfully denied requests:
 - ▶ No ombudsman or agency is charged with the task of enforcing this law.

70 Colo. Rev. Stat. § 24-72-202(6)(a)(I).

71 www.state.co.us/gov_dir/leg_dir/olls/colorado_revised_statutes.htm

72 Colo. Rev. Stat. § 24-72-205.

73 *Black v. Southwestern Water Conservation Dist.*, 74 P.3d 462 (Colo. App. 2003).

- ▶ The Attorney General has written amicus curiae briefs but is not prescribed a leading role in the enforcement of the act.

- Explicit penalties exist for public entities for violating the Colorado Public Records Act:
 - ▶ Anyone who knowingly violates the act is guilty of a misdemeanor, which carries a fine not exceeding \$100 and/or imprisonment for 90 or fewer days.⁷⁴
 - ▶ If a criminal justice agency is found guilty of arbitrarily withholding a criminal justice record, the court has the authority to impose a penalty of \$25 per day for each day the records were withheld. This fine must be paid by the custodian personally.⁷⁵
 - ▶ Successful plaintiffs may be awarded attorneys’ fees.
 - If, however, a groundless or frivolous lawsuit was brought against the public agency, the custodian may be awarded litigation costs.⁷⁶
- Exemptions:
 - Without a specific statute that dictates otherwise, agencies do not have the authority to refuse to allow access to public records.
 - Nothing that is confidential by state or federal statutes or court orders may be disclosed.
 - Certain specific exemptions in the Colorado Public Records Act relate to medical, sociological, or scholastic-related achievement data; personnel files; trade secrets; records regarding users of public libraries, facilities, utilities, or other services; and records regarding sexual harassment claims and investigations.
 - Agencies have discretionary authority to prohibit access to examination materials, real estate appraisals for state purposes, market analysis performed by the Department of Transportation, and photographs from the Department of Revenue.

74 Colo. Rev. Stat. § 24-72-206.

75 Colo. Rev. Stat. § 24-72-305(7).

76 Colo. Rev. Stat. § 24-72-204(5).

- The Colorado Public Records Act lacks a general catch-all exemption that gives agencies discrepancy to deny access to records that custodians believe would harm the public good.
 - ▶ Custodians may request a district court issue an order to restrict disclosure of a record if the custodian believes that disclosing the information would do “substantial injury to the public interest.”⁷⁷
 - ▶ Custodians may also redact from documents any specific information that would articulate details of security arrangements or investigations.
- Other statutory exemptions concerning juvenile delinquency records, health records, children’s matters, and more can be found in their respective titles under the Colorado Revised Statutes.
- Common law exemptions may limit access to court files, including attorney discipline records and those relating to grand jury proceedings. Case law also establishes protection for attorney-client privilege.
- Because the law does not explicitly state otherwise, portions from documents that contain exempt material should be accessible.

- Electronic Records:
 - Electronic records are subject to the Colorado Public Records Act.
 - ▶ E-mail is public, and public agencies must have a written policy regarding monitoring electronic communications and informing employees of its subject to disclosure.⁷⁸
 - ▶ Software is considered public.⁷⁹
 - The act does not dictate in which format agencies must make records available.
 - If a person requests information in a certain format, agencies may assess additional fees to cover the cost of providing the electronic product or service along with a reasonable portion of costs related to constructing and maintaining the necessary information system.
 - ▶ Custodians may reduce or waive these fees if the product or service will be used for a public purpose, nonprofit functions, journalism, or academic research. Any waiver or reduction should be uniformly applied to all those similarly situated.⁸⁰
- Money-Making:
 - As mentioned, criminal justice records that divulge names, addresses, or telephone numbers may not be obtained with the intent to use the information for pecuniary gain.⁸¹

77 Colo. Rev. Stat. § 24-72-204(6).

78 Colo.Rev.Stat. § 24-72-204.5.

79 Colo.Rev.Stat. § 24-72-202 (7).

80 Colo.Rev.Stat. § 24-72-205(4).

81 Colo. Rev. Stat. § 24-72-205.5

Delaware

Freedom of Information Act

Codes: *Freedom of Information Act* : 29 Del. C. § 10001 et seq.;

Administrative Procedures Act: 29 Del. C. § 10101 et seq.

Relevant Court Cases: *News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980); *Lee v. Minner*, 369 F. Supp. 2d 527 (D. Del. 2005); *See Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. 1995); *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628 (Del. 1984); *News Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977);

Though it bears the same name, the Delaware Freedom of Information Act, adopted in 1977, is not modeled after its federal counterpart. Many exemptions found in the state act are, however, nearly identical to the wording found in the federal statute. These exemptions are narrowly construed by the courts. The Administrative Procedures Act further enumerates documents that are to be either disclosed or withheld, but the Freedom of Information Act is much broader in its reach.

- Who may request records and for what purpose:
 - Though the Delaware Freedom of Information Act allows only Delaware state citizens to access public records, case law has extended this right to citizens of other states, as well. Corporate citizens also enjoy this same right.
 - ▶ Agencies are only legally obligated to make records public after receiving a request under the act. The custodian of the records is charged with allowing or denying access and bears the burden of proof to justify nondisclosure.⁸²
 - The purpose of a request does not affect a person’s right to obtain access to public records.
 - The use of public records, even commercial use, is not restricted by law.

- Whose and which records are covered under the act:
 - The Delaware Freedom of Information Act encompasses all public bodies that are not otherwise expressly exempt. A “[p]ublic body” is defined as “any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ... association, group, panel, council or any other entity or body established by an act of the General Assembly of the State...”⁸³
 - The act therefore covers the executive branch and its members.
 - The General Assembly is subject to the act, though committees, subcommittees, and caucuses are not.
 - As public entities established by the General Assembly are subject to the act, those courts that the legislature created, such as the Family Court, the Justice of the Peace Court, and the Administrative Office of the Courts, are covered.
 - ▶ Those established by the Delaware Constitution are subject to the provisions of the constitution, rather than the Delaware Freedom of Information Act. Common law has provided access to court records, as the Delaware Constitution states “[a]ll Courts shall be open.”⁸⁴
 - Private bodies, including agencies, commissions, or multi-regional entities, are subject to the act if they meet any one of three criteria found in Section 10002(c):
 1. The entity is supported at least partially by public funds;

⁸² 29 Del. C. § 10005(c).

⁸³ 29 Del. C. § 10002(c).

⁸⁴ Del. Const. of 1897, art. I, § 9.

2. The entity expends or disburses public funds through grants, gifts or other methods; or
 3. The entity is implicitly or explicitly charged by a public body to advise or conduct investigations.
 - ▶ Having a public official serve as a member of a private organization does not bring that organization under the act.
- “Public record” is broadly defined as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest...”⁸⁵
 - The physical format of the record is inconsequential.
 - All those available for inspection are also available for copying.
 - Fees and costs:
 - Agencies are left to establish “reasonable” fees for providing copies of public records and may charge for the time spent searching for requested records.
 - Once set, however, agencies may not deviate from their fee policy without presenting adequate notice.⁸⁶
 - Agencies do have authority to waive fees, should it serve the public interest.
 - ▶ Conversely, agencies may not raise fees in efforts to construct an obstacle to prevent access to public records.
 - Enforcement and sanctions:
 - Citizens denied access to public records may bring suit against the public agency within 60 days of the denial of the request.
 - The requester may also petition the Attorney General to determine if a violation has taken place or may be about to occur. If the Attorney General decides the public agency should have produced the records, the citizen may either file suit or
- request that the Attorney General do so on his/her behalf.
- ▶ The Attorney General is not obligated to file suit upon request.
 - ▶ The public agency, which receives a notification from the Attorney General of the citizen’s petition and the resulting opinion, may choose to grant access to the records at that point.
 - If successful in court, a plaintiff may be awarded injunctive relief as well as attorneys’ fees and costs.
 - ▶ If the action was frivolous or brought only to harass the defendant, costs and attorneys’ fees may be awarded to the agency.
 - Exemptions:
 - Delaware lacks a general exemption that would grant agencies substantial latitude in prohibiting access to records. Exemptions must be specifically mandated by statute within the Delaware Freedom of Information Act or elsewhere in the Delaware Code or derived from common law.
 - The caucuses of the General Assembly, along with the University of Delaware and Delaware State University, excluding their respective Boards of Trustees, are exempt from this act.
 - Seventeen other statutory exemptions discuss medical and investigatory files, trade secrets, collective bargaining and pending litigation records, and other records that could jeopardize security or violate personal privacy if disclosed. Further details regarding each exemption may be found in section 10002(g).
 - ▶ Each of these exemptions is to be narrowly construed.⁸⁷
 - Many other statutory exemptions exist outside the Delaware Freedom of Information Act which does not supersede

85 29 Del. C. § 10002(g).

86 29 Del. C. § 10003.

87 *Delaware Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628 (Del. 1984); *News Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977).

other confidentiality requirements set forth in other sections of the Delaware Code.⁸⁸

- Court-derived exemptions fall under three general categories:

1. Executive privilege: Records may be exempt if they are deemed privileged.⁸⁹
2. Social Security numbers: Though contained in payroll documentation, social security numbers are not subject to disclosure.⁹⁰
3. Administrative burden: Courts may deny access to public records if the cost of procuring them constitutes an undue burden on the agency.⁹¹

- Citizens may obtain versions of redacted materials from certain agencies upon bearing the cost of those services.

- Electronic Records:

- As the Delaware Freedom of Information Act applies to all public records regardless of physical characteristics, electronic records are covered.
 - ▶ E-mail and software are not specifically addressed in the act, and the courts have not yet established case law regarding either.

- The format in which agencies provide electronic information may be determined by each agency. The act does not mandate custodians tailor the format or content of public electronic records upon request.

- ▶ The task of redacting exempt material from databases that contain information that would otherwise be made public, however, may prove to be a burden that prevents disclosure of those databases.

- Agencies may charge a reasonable expense, as with other forms of records.

- Money-Making:

- The Secretary of State, whose schedule of fees is not subject to the Delaware Freedom of Information Act, may earn revenues in excess of its costs, as it is permitted to charge up to \$500 for expediting the reproduction of electronic records.⁹²

- ▶ Other public agencies governed by the Delaware Freedom of Information Act may charge only reasonable fees.

- Citizens are not prohibited from using public records for commercial purposes.

88 See the state of Delaware's website for a complete copy of the Code: <http://delcode.delaware.gov/>

89 *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. 1995).

90 Del. Op. Att'y Gen., No. 95-ib03 (Jan. 25, 1995).

91 Del. Op. Att'y Gen., No. 95-ib13 (Mar. 20, 1995).

92 8 Del. C. § 391.

Florida

Public Records Law

Codes: Fla. Stat. § 119.01 – 119.15 (1995)

Relevant Court Cases: *Wait v. Florida Power & Light*, 372 So.2d 420 (Fla. 1979); *Florida Freedom Newspapers v. McCrary*, 497 So.2d 652 (Fla. 1st DCA 1986); *Florida Freedom Newspapers v. McCrary*, 497 So.2d 462 (Fla. 1st DCA 1987); *Lorei v. Smith*, 464 So.2d 1330 (Fla. 2d DCA), review denied, 475 So.2d 695 (Fla. 1985); *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988); *State v. Bundy*, 455 So.2d 330 (Fla. 1984); *Memorial Hospital-West Inc. v. News-Journal Corp.*, 729 So.2d 373 (Fla. 1999); *Shevin v. Byron, Harless, Schaffer, Reid and Associates Inc.*, supra, 379 So.2d at 640; *Miami Herald Pub. Co. v. City of North Miami*, 452 So.2d 572 (Fla. 3d DCA 1984), approved, 468 So.2d 218

Florida has several statutory provisions which grant the public a high degree of access to government records. The Public Records Law from Chapter 119 of Title X allows no general, catch-all exemption found in many other similar public records statutes. The act does not, however, supersede other statutes mandating confidentiality and enumerates many specific exemptions. Each exemption, however, is subject to the Open Government Sunset Review Act. Passed in 1995, this statute compels the state legislature to review each exemption five years after its passage and justify the necessity of maintaining confidentiality. The Constitution of Florida explicitly states that individuals' right to privacy does not limit the public's right to access public records, and the courts have no authority to create common law exemptions.

- Who may request records and for what purpose:
 - Any person may request access to records. This includes corporations, firms, estates, trusts, associations, syndicates, partnerships, joint ventures, and "all other groups or combinations."⁹³
 - The purpose for obtaining public records and their subsequent use is immaterial. Anyone may request records for any purpose, including commercial purposes or mere curiosity. A few narrow and specific

limitations of commercial use exist and will be discussed further.

- Whose and which records are covered under the act:
 - The Florida Public Records Law covers records "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."⁹⁴
 - ▶ The definition of "agency" includes "any state, county district, authority, or municipal officer, department division, board, bureau, commission, or other separate unit of government created or established by law . . . and any other public or private agency, partnership, corporation, or business entity acting on behalf of any public agency."⁹⁵
 - The executive and legislative branches at all levels of government are subject to the act. Unless statutory exemptions mandate otherwise, records of these offices are open to the public.
 - The judicial branch is not covered by the Public Records Law, but rather the Florida Constitution that ensures open proceedings. The judicial branch operates under a strong presumption of disclosure. The Supreme Court has found that court records may be sealed if the circumstances meet a three part test⁹⁶:
 1. Closure is required to prevent a serious threat to the administration of justice;
 2. Protecting the defendant's right to an impartial trial necessitates non-disclosure, and no alternative means exist; and
 3. The court can capably invoke closure to protect the rights of the accused without being any broader than is necessary.

94 Fla. Stat. § 119.011(1) (1995).

95 Fla. Stat. § 119.001(2) (1995).

96 *State v. Bundy*, 455 So.2d 330 (Fla. 1984).

93 Fla. Stat. § 119.01.

- ▶ Grand jury proceedings are kept strictly confidential, though the name of the foreman may be released.
- Non-governmental agencies may be subject to the Florida Public Records Law, but an agency merely receiving public funding may not fall under the act. The courts consider six factors when applying the law to non-governmental entities:
 - ▶ Whether a public agency created the private organization;
 - ▶ Whether the private entity receives substantial funding from the public;
 - ▶ Whether the public agency retains regulatory control;
 - ▶ Whether the agencies' decision-making process involves one another;
 - ▶ Whether the private body performs a government function; and
 - ▶ Whether the goal of the private entity is to assist the public.
- An agency is also subject to the act if it spends public funds to pay membership dues or if a public official's membership in the group is "in connection with the transaction of official business by an agency."⁹⁷
- The term "public records" is defined as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of physical form or characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."⁹⁸
 - ▶ In absence of a specific statutory exemption, records, regardless of type, are subject to public inspection under the Florida Public Records Law.
- Unless copyrighted by the public agency, all that is available for inspection is also available for copying.

- Fees and costs:
 - Fees are limited to the actual costs of duplication, which should not include any labor costs associated with searching or producing documents.⁹⁹
 - ▶ If extensive assistance from personnel is required, the agency may charge a special service fee derived from the cost to the agency.
 - ▶ Many statutory laws or department policies regulate the fees charged for the reproduction of specific records.
 - Provisions for fee waivers are not addressed in the act.
- Enforcement and sanctions:
 - Though the courts have not yet addressed who exactly has the right to sue, the Florida Public Records Law states that any action brought under the provisions it sets forth will receive priority over pending cases.¹⁰⁰
 - If the court orders disclosure, the agency has 48 hours to grant access to the records in question. The court may grant a stay if it believes substantial damage may be caused by the disclosure of the information.
 - If an agency is found to have wrongfully denied access to public records, it is liable for attorneys' fees and costs.¹⁰¹
- Exemptions:
 - This statute lacks a general, catch-all exemption common to many states' public records laws. Any record not expressly exempt is subject to disclosure. Moreover, the Florida Constitution provides no individual right to privacy with regards to public record.¹⁰²
 - Specific exemptions, however, are numerous, exceeding two hundred. Each expires after five years of enactment if not re-enacted by the legislature under the Open Government Sunset Review Act of 1995. In creating or re-enacting exemptions,

⁹⁷ Fla. Stat. § 119(1), (2) (1995).

⁹⁸ Fla. Stat. § 119.011(1).

⁹⁹ Fla. Stat. § 119.07.

¹⁰⁰ Fla. Stat. § 119.11.

¹⁰¹ Fla. Stat. § 119.12.

¹⁰² See Article I, Section 23 of the Florida Constitution. The issue of a federal constitutional right to privacy remains ambiguous in disjoint court rulings.

the legislature must demonstrate the public necessity for nondisclosure and construct the exemption as narrowly as possible.

- ▶ Though the act is unclear regarding whether certain exemptions are discretionary, when the language is such that it is clearly not mandatory, the presumption of openness would likely allow discretion.
 - ▶ If someone requests a record that contains exempt material, the custodian should redact that information from the record and provide the requester with the segregable portion.¹⁰³
 - Exemptions relating to each industry or profession can be found in the Florida Statutes from the state legislature's website.¹⁰⁴
 - The courts have no role in creating exemptions; therefore, no case law exemptions exist. The court may, however, determine the constitutionality of applying specific provisions of the act to certain records.
- Electronic Records:
 - Electronic records, including e-mail and software, are covered under the Florida Public Records Law.
 - ▶ Software may be exempt if it is copyrighted or constitutes a trade secret.
 - An agency must provide records in the format requested if it keeps records in that format.
 - If the requester prefers a format other than one the agency routinely uses, the agency may provide the material in the requested format at its discretion and charge the requester for any substantial use of the agency's information technology resources.

- Money-Making:

- Public agencies may sell software for which it holds a copyright based on market considerations and use the proceeds for authorized purposes.¹⁰⁵
- Private use of public records for commercial purposes is largely unrestricted with few exceptions:
 - ▶ Information from motor vehicle records received pursuant to the Florida Public Records Law may not be used for "mass commercial solicitation of clients for litigation against motor vehicle dealers."¹⁰⁶
 - ▶ Confidential material contained in police records that is exempt from disclosure may not be used for commercial purposes.¹⁰⁷
 - ▶ The legislature also monitors the commercial use of social security numbers in efforts to ensure that no commercial entity receives or uses that information for illegitimate purposes.

103 Fla. Stat. § 119.07.

104 See www.leg.state.fl.us/statutes/ for a complete list of Florida Statutes.

105 Fla. Stat. § 119.084.

106 Fla. Stat. 119.072(2)(b).

107 Fla. Stat. § 119.105.

Georgia

Open Records Act

Codes: O.C.G.A. § 50-18-70 – 50-18-77

Relevant Court Cases: *Atchison v. Hosp. Auth.*, 245 Ga. 494, 265 S.E.2d 801 (1980); *Parker v. Lee*, 259 Ga. 195, 199, 378 S.E.2d 677 (1989); *Hackworth v. Board of Ed.*, 214 Ga. App. 17, 447 S.E.2d 78 (1994); *Fathers Are Parents Too v. Hunstein*, 202 Ga. App. 716, 717, 415 S.E.2d 322 (1992); *Northwest Ga. Health Sys. v. Times-Journal*, 218 Ga. App. 336, 340, 461 S.E.2d 297 (1995); *Red & Black Publishing Co. v. Board of Regents*, 262 Ga. 848, 427 S.E.2d 257 (1993); *Dortch v. Atlanta Journal and Constitution*, 261 Ga. 350, 405 S.E.2d 43 (1991); *McFrugal Rental v. Garr*, 262 Ga. 369, 418 S.E.2d 60 (1992); *Powell v. VonCanon*, 219 Ga. App. 840, 467 S.E.2d 193 (1996)

Article 4, Chapter 18, Title 50 of the Official Code of Georgia Annotated contains the Georgia Open Records Act. Agencies must operate under the presumption of openness, and exemptions are specific and narrowly construed. Personal privacy and public safety are protected, however. Though the act does not cover the General Assembly or the courts of the state, each has adopted its own rules of procedure that favor disclosure unless there exists a clear reason for confidentiality.

- Who may request records and for what purpose:
 - Though the Georgia Open Records Act states that citizens of Georgia may access public records, case law and opinions from the Attorney General have extended this right to nonresidents as well.¹⁰⁸
 - The purpose of requesting records is normally irrelevant with two exceptions:
 1. Commercial solicitation is limited in that selling records to unauthorized users is a misdemeanor. Generally if a record is available to one citizen, it will be equally accessible to all. However, in 1999 the General Assembly restricted access to Uniform Motor Vehicle Accident reports to only those parties specifically named in the report or

¹⁰⁸ *Atchison v. Hosp. Auth.*, 245 Ga. 494, 265 S.E.2d 801 (1980); 1993 Op. Att’y Gen. No. 93-27

those who demonstrate a “need” for the report.¹⁰⁹

2. Any party to a proceeding governed by the Georgia Administrative Procedure Act may not use the Open Records Act to obtain records related to the proceeding without prior approval from the presiding judge.¹¹⁰
 - Once lawfully attained under the act, the use of public records is unrestricted.
- Whose and which records are covered under the act:
 - Records “prepared and maintained or received in the course of the operation of a public office or agency” are subject to the Georgia Open Records Act.¹¹¹
 - The term “public office or agency” has been interpreted broadly so as to favor disclosure. This includes executive offices at the state and local levels. These agencies may not adopt administrative rules or agreements to limit the applicability of the act.
 - Legislative bodies fall under the act because they perform public functions. The General Assembly itself is exempt from the act. It may employ its own procedural rules.¹¹²
 - Judicial records are likewise not subject to the act but are generally made available to the public through the internal procedures adopted by the courts.
 - ▶ Records relating to settlement agreements which involve government entities, however, are subject to the act.
 - Non-governmental bodies which perform public functions or receive more than one-third of their funds from a public source are subject to the act, as well.
 -

¹⁰⁹ O.C.G.A. § 50-18-72(4.1).

¹¹⁰ O.C.G.A. § 50-18-70(e).

¹¹¹ O.C.G.A. § 50-18-70(a).

¹¹² *Fathers Are Parents Too v. Hunstein*, 202 Ga. App. 716, 717, 415 S.E.2d 322 (1992).

- All public records, regardless of physical characteristics or location, are subject to inspection and copying under the act.
- Fees and costs:
 - Agencies may charge reasonable costs, not to exceed 25 cents per page, unless otherwise statutorily authorized.¹¹³
 - Agencies may also levy fees for excessive administrative costs, excluding legal fees for determining the openness of the documents, incurred while searching or retrieving records.
 - ▶ Custodians must provide an estimate for the costs and bear the burden of proving the necessity of the fees if a dispute arises.
 - ▶ Agencies must provide the copies in the most economical manner available.
 - The law does not explicitly prohibit or require fee waivers.
- Enforcement and sanctions:
 - Any person or entity, including the Attorney General at his/her discretion, may bring an action against those denying access to records.
 - ▶ There is no commission or agency or ombudsman charged with enforcement. However, the Office of the Attorney General has created an informal mediation program through which citizens may submit complaints.
 - Georgia's superior courts have jurisdiction over actions to enforce the Act and to assess civil or criminal penalties for instances of noncompliance.¹¹⁴
 - The act states that "[a]ny person knowingly and willfully violating the provisions of this article by failing or refusing to provide access to records not subject to exemption from this article or by failing or refusing to provide access to such records within the time limits set forth in this article shall be guilty of a misdemeanor and upon

conviction shall be punished by a fine not to exceed \$100.00."¹¹⁵

- ▶ Attorneys' fees may also be rewarded if either party lacked sufficient justification for either denying access to records or in bringing the suit.
- Exemptions:
 - Exemptions are to be narrowly construed, and the custodian bears the burden of proving the necessity of nondisclosure. Moreover, the custodian must specifically cite the legal authority under which the documents are exempt within three days of denying access.¹¹⁶
 - Exemptions are specific in nature. Many are discretionary, though records that are made confidential by federal law or the disclosure of which would cause an undue invasion of privacy are mandatorily exempt.
 - The act specifically exempts documents required to be kept confidential under federal law, privileged communications with the Office of Legislative Counsel, certain records relating to law enforcement, accident reports, medical files, evaluations of public employees, and records which would create an invasion of personal privacy or compromise public safety if disclosed, among others.
 - ▶ Other specific exemptions under the Georgia Open Records Act and other statutes can be found through the state legislature's website.¹¹⁷
 - The courts do not create broad common law exemptions, but rather use a balance test on a case-by-case basis to determine if disclosure would constitute an extreme invasion of privacy.
 - Agencies are required to grant access to portions of records that are not otherwise exempt.
 - ▶ Custodians may not charge requesters for attorneys' fees incurred by the agency to segregate the exempt portions from the non-exempt.

113 O.C.G.A. § 50-18-71.

114 O.C.G.A. § 50-17-73(a), (b).

115 O.C.G.A. § 50-18-74(a).

116 O.C.G.A. § 50-18-72(h).

117 www.legis.state.ga.us/

- ▶ If segregation is not possible, the custodian is required to disclose the entire record.¹¹⁸
- Electronic Records:
 - Electronic records are subject to the same guidelines as other types of records under the act.
 - ▶ E-mails are treated as other forms of records.
 - ▶ Software and computer programs, however, are exempt from disclosure.¹¹⁹
 - When feasible, agencies must make records that are kept electronically available in electronic format. Custodians are not required to compile separate data sets or create new software to comply with citizens' requests.
 - Agencies may charge for the actual cost of providing records in electronic format, along with administrative fees in the same manner as they may for other types of records. The act explicitly states that new fees not directly related to providing access to records may not be levied simply because the records are available in electronic format.¹²⁰

- Money-Making:
 - Clerks of the state's superior courts are permitted to enter into contracts to "distribute, sell, or otherwise market records or computer generated data of the office of the clerk" to generate a profit.¹²¹
 - ▶ This allows clerks to receive compensation for providing information in accessible formats to private entities who earn profits reselling the data.
 - Private commercial purposes are permitted except when firms or individuals sell public records to those unauthorized to receive them, as some specific exemptions allow access to certain individuals while restricting others.

118 *Dortch v. Atlanta Journal and Constitution*, 261 Ga. 350, 405 S.E.2d 43 (1991).

119 O.C.G.A. § 50-18-72(f).

120 O.C.G.A. § 50-18-71.2.

121 O.C.G.A. § 15-6-96.

Hawaii

Uniform Information Practices Act

Codes: *Haw. Rev. Stat. § 92F, et seq.*

Hawaii's original Sunshine Law, which encompassed both public records and meetings, was enacted in 1975, prior to the constitutional amendment that established a right to privacy. In response to the amendment and in efforts to correct ambiguities, Hawaii passed the Uniform Information Practices Act in 1988. While it recognizes privacy rights, the statute also demands disclosure under many circumstances and allows discretion on the part of custodians to increase openness. The act also established the Office of Information Practices to issue opinions clarifying the law's intent, oversee appeals, and issue reports regarding open records. Of particular note, the Uniform Information Practices Act not only addresses private bodies' right to access records, but also other governmental agencies' right to access records. To maintain individuals' privacy rights, governmental agencies are somewhat restricted in their information sharing practices.

- Who may request records and for what purpose:
 - Any person, including individuals, corporations, governmental entities, trusts, partnerships, associations, and all other legal entities may request access to public records.
 - ▶ In many cases, individuals may request records anonymously and may refuse to give an agency their names.
 - ▶ Foreign governments engaged in legally authorized law enforcement activities may access public records.¹²²
 - ▶ Governmental agencies may not, however, share records except under ten distinct circumstances enumerated in Section 92F-19.
 - The purpose of a request made by a private individual or business is generally immaterial, and the party denying access to records bears the burden of proving that the purpose falls under an exception provided by law.

- ▶ The purpose of a governmental agency's request, however, may be grounds for denying access.
 - The act does not restrict individuals' subsequent use of public records and absolves them from any liability if they acted in good faith in disclosing or not disclosing government records.¹²³
 - ▶ Governmental use is restricted. Of particular note, any agency which receives records from another agency is subject to the same rules of disclosure as the agency which provided the records.
- Whose and which records are covered under the act:
 - The definition of "agency" within the Uniform Information Practices Act encompasses "any unit of government in this State," which includes more than 6,800 entities.
 - The act does not explicitly state whether executive offices or officials are subject to the rules of disclosure, though the broad definition likely covers at least the offices.
 - The legislative branch is subject to the law, and its committee reports are made public through internal procedures of the state legislature.
 - The act exempts the "non-administrative functions of the courts," to protect the disclosure of courts' deliberative processes. Final opinions and court orders are public records, however.¹²⁴
 - ▶ Other statutes, internal rules of procedure, and established practices will also dictate the disclosure of judicial records.
 - Nongovernmental bodies which are managed, owned, or operated by or the behalf of public entities may be subject to the law. Whether an organization does indeed perform a public function is decided on a case-by-case basis.

122 Haw. Rev. Stat. § 92F-19(a)(3).

123 Haw. Rev. Stat. § 92F-16

124 Haw. Rev. Stat. § 92F-12(a)(2).

- All existing government records, unless statutorily mandated otherwise, are subject to the act, regardless of physical form. Agencies are not required to generate new records upon request, though they must provide records in the requested format if the records already exist in that format.
 - ▶ Section 92F-12(a)(1)-(16) outlines sixteen categories of records which agencies must disclose. With the exception of any record subject to other laws that mandate confidentiality, these will be disclosed regardless of whether they contain personal information. These categories include rules of procedure and court orders, pardons, environmental tests, minutes of public meetings, public personnel information, information regarding loans from the state, and several others.
- Any record open for inspection is also available for copying.
- Fees and costs:
 - Unlike other open records laws, the Uniform Information Practices Act imposes a minimum fee of five cents per page. Other costs may include personnel cost for searching and reproducing, material and certification costs, and other related costs.¹²⁵
 - The act also gives the Office of Information Practices (OIP) the authority to adopt rules related to fees and provisions for waivers to establish uniformity among governmental agencies.
 - The first \$30 of fees resulting from searching, reviewing, and segregating documents must be waived, according to the OIP. Further fee waivers must be granted when they will serve in the public's best interest. The OIP defines certain circumstances which may be deemed as serving the public's interest.
 - Agencies may require fees be paid in advance, but they may not charge excessive fees to obstruct access to records.
- Enforcement and sanctions:
 - The act requires agencies to adopt and disseminate rules and regulations in accordance with the law.
 - The Uniform Information Practices Act also established and funds the Office of Information Practice, a division of the Lieutenant Governor's Office.¹²⁶
 - ▶ The legislature appoints an ombudsman, who has jurisdiction to investigate into agencies' actions. The OIP facilitates between requesters and public officials through an appeals process. The office also issues formal and informal opinions interpreting the law and provides information and statistics regarding public records and agencies in Hawaii.
 - Individuals also retain a right to pursue action in court. Prevailing plaintiffs may recover attorneys' fees and costs.
 - Criminal sanctions may be levied against public officials who willfully and knowingly grant public access to confidential records or against individuals who willfully and knowingly obtain access to confidential records.
- Exemptions:
 - Exemptions are narrowly construed. All but two are specific, and many are discretionary to allow more disclosure.
 - Section 92F-13 lists five circumstances that may bar disclosure:
 1. "Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;"¹²⁷
 - ◆ Section 92F-14 provides several examples of information which would constitute an undue invasion of privacy, including individuals' social security numbers, financial records, and medical files.
 2. "Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to

125 Haw. Rev. Stat. § 92-21 (Supp. 1999).

126 Haw. Rev. Stat. § 92F-41 (Supp. 1999).

127 Haw. Rev. Stat. § 92F-13(1).

the extent that such records would not be discoverable;"¹²⁸

3. "Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;"¹²⁹
 4. "Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure;"¹³⁰
 5. "Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature."¹³¹
- Other statutory exemptions may be found throughout the Revised Statutes as they relate specifically to each agency or licensing board.¹³²
 - Under the five categories listed above, courts may order the disclosure or confidentiality of certain records but typically construe such exceptions narrowly.
 - Segregable portions of documents that contain otherwise confidential information are to be made available to the public.

- Electronic Records:

- The Uniform Information Practices Act explicitly covers electronic records. The existence of any record in electronic format cannot affect its openness.
 - ▶ Software is not public.
 - ▶ E-mails may be, depending on the nature of their content.
- Requesters may not choose the format in which records are provided, as the OIP decides the proper format on a case-by-case basis. The office may, however, provide a customized search upon request.
- The statute only mentions geographic information systems with regards to the fees that may be charged for reproducing these records. Charges may include direct material and labor costs associated with providing the records though practices may vary from agency to agency.
 - ▶ Other fees are likely assessed in a similar fashion to fees for other types of public records.

- Money-Making:

- The Uniform Information Practices Act does not address money-making practices by private or public entities. Commercial use of public records is not explicitly prohibited, though the use of certain records may be dictated by other statutes.

128 Haw. Rev. Stat. § 92F-13(2).

129 Haw. Rev. Stat. § 92F-13(3).

130 Haw. Rev. Stat. § 92F-13(4).

131 Haw. Rev. Stat. § 92F-13(5).

132 See Hawaii's state legislature website: www.capitol.hawaii.gov/hrscurrent/

Idaho

Public Records Act

Codes: Idaho Code § 9-337 – 9-349

Relevant Court Cases: *Federated Publications Inc. v. Boise City*, 128 Idaho 459, 915 P.2d 21 (1996); *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (2002); *Cowles Publishing Corp. v. Kootenai Co. Board of County Comm’rs*, 159 P.3d 896 (Idaho 2007).

Chapter 3 of Title 9 of the Idaho Code contains the Public Records Act. Enacted in 1990, this legislation represents one of the most recently adopted acts of its kind. The Supreme Court of Idaho has thus had few opportunities to address its provisions. The office of the Attorney General provides a manual to inform the public about their right to access records and their right to privacy.

- Who may request records and for what purpose:
 - Any person, including corporations, partnerships, associations, government bodies, or any other legal entity may request access to public records. The act does not distinguish between citizens of any other state or country.¹³³
 - Agencies may not inquire as to the purpose of the request except to ensure that the intended use of public records is not to generate a telephone or mailing list, which is prohibited in the Idaho Public Records Act.¹³⁴
 - With the exception of selling mailing or telephone lists, the subsequent use of public records is largely unrestricted.
- Whose and which records are covered under the act:
 - The act encompasses both state and local agencies within the executive, judicial, and legislative branches of government.
 - ▶ State agencies include “every state officer, department, division, bureau, commission and board or any committee of a state agency including those in the

legislative or judicial branch, except the state militia.”¹³⁵

- ▶ Local agencies include “a county, city, school district, municipal corporation, district, public health district, political subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.”¹³⁶
- Courts have the authority to adopt rules to govern the disclosure of records of judicial proceedings.
- Agencies, on the other hand, do not have this rule-making power and cannot limit the openness of records without specific statutory authority.
- The courts have not yet addressed the applicability of the Public Records Act to non-public entities which receive public funding or have members who are public officials.
- The definition of records is as broad as the definition of the public entities defined under the act. The term “public records” includes “any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.”¹³⁷
 - ▶ The physical format of the material is irrelevant, and any document available for inspection are also open for copying, either through handwriting, photocopying, or other means.¹³⁸
- Fees and costs:
 - Fees may include the actual cost of reproducing the records.
 - Fees may also include personnel costs under three circumstances:

¹³³ Idaho Code § 9-337 (8).

¹³⁴ Idaho Code § 9-338(4), 9-348.

¹³⁵ Idaho Code § 9-337(13).

¹³⁶ Idaho Code § 9-337(7).

¹³⁷ Idaho Code § 9-337(12).

¹³⁸ Idaho Code § 9-337.

1. The request for paper records exceeds 100 pages;
 2. The request requires the custodian to segregate nonpublic information from the public portion of the records;
 3. The labor associated with searching for and copying records exceeds two hours.¹³⁹
- Public agencies may not charge fees if the individual requesting records is unable to pay or if a collection of fees would harm the public's interest.¹⁴⁰
 - Unless otherwise prescribed by law, agencies may not charge more than the direct costs of reproducing the record or more than the cost of selling the data in a publication form.
- Enforcement and sanctions:
 - The task of enforcement falls on the private individuals who were denied access to records. They may file an action in the district court in which the records are located.
 - The Attorney General has only a limited role relating to public information.
 - ▶ The office of the Attorney General publishes an "Idaho Public Records Law Manual" to educate the public regarding the act.¹⁴¹
 - ▶ The Attorney General encourages compliance from agencies and officials and offers training on the act for public entities.
 - Monetary sanctions may include attorneys' fees and reasonable costs to whichever party prevails if the court finds that either party acted frivolously or in bad faith.
 - Moreover, any public official found guilty of deliberately refusing a legitimate request for access to public records may be liable for a fine not to exceed \$1,000.¹⁴²
- Exemptions:
 - Exemptions are specific and typically mandatory. The exemptions that are discretionary are often construed by public agencies to favor nondisclosure for fear of disclosing sensitive information. If a custodian releases a record in good faith, however, he/she is immune from liability.
 - More than 75 exemptions exist within the Public Records Act. Many of these relate to law enforcement, investigatory, and juvenile records; personnel and employment files; financial, medical and geographic information; trade secrets; and several other categories.
 - ▶ Idaho's statute relating to police investigatory records (Idaho Code § 9-335) is patterned after Exemption 7 of the federal Freedom of Information Act.
 - Other records may be exempt from disclosure through other sections of the Idaho Code, which can be found from the state legislature's website.¹⁴³
 - Individuals may access records about themselves that would otherwise be exempt to others. However, they may not request records related to an ongoing investigation.¹⁴⁴
 - Public information found in documents containing confidential information should be available upon the removal of nonpublic information.¹⁴⁵
- Electronic Records:
 - Electronic records are expressly covered in the act, though it does not specify the format in which agencies must provide information or whether they are required to perform customized searches.
 - ▶ E-mails are only treated as public records if their content is of a public nature.¹⁴⁶

139 Idaho Code § 9-338(8)(a).

140 Idaho Code § 9-338(8)(c).

141 The manual is available online at www2.state.id.us/ag/manuals/index.htm.

142 Idaho Code § 9-344, 9-345.

143 See <http://legislature.idaho.gov/idstat/TOC/IDStatutesTOC.htm> for all Idaho Statutes.

144 Idaho Code § 9-342(1).

145 Idaho Code § 9-341.

146 *Cowles Publishing Corp. v. Kootenai Co. Board of County Comm'rs*, 159 P.3d 896 (Idaho 2007).

- ▶ Software purchased or developed by public entities is not public.¹⁴⁷
- Public agencies may charge for providing a reproduction of records in electronic format under the conditions previously stated. Fees may not exceed the direct cost of copying the data and the cost of selling the information in a publication format.
- ▶ Requesters may be asked to pay a fee in advance.

- Money-Making:
 - Unless otherwise specified by law, agencies generally may not charge more than the direct costs of reproducing records and cannot profit from selling public information.
 - Only one provision in the Public Records Act addresses the commercial use of public information by private bodies. No one may sell or distribute telephone or mailing lists without the permission of those on the list.¹⁴⁸
 - ▶ Violators may face a fine up to \$1,000.

147 Idaho Code § 9-340D(15).

148 Idaho Code § 9-348.

Illinois

Freedom of Information Act

Codes: 5 ILCS 140 et seq.

Relevant Court Cases: *People ex. rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374-75, 181 N.E. 2d 376, 378 (1st Dist. 1962); *Roulette v. Department of Central Mgmt. Servs.*, 141 Ill. App. 3d 394, 400, 490 N.E. 2d 60, 64, 95 Ill. Dec. 587, 591 (1st Dist. 1986); *Lieber v. Board of Trs.*, 176 Ill. 2d 401, 680 N.E.2d 374, 223 Ill. Dec. 641 (Ill. 1997); *Family Life League v. Dep of Public Aid*, 112 Ill.2d 449, 456, 493 N.E.2d 1054, 1057-58, 98 Ill. Dec. 33, 36-37 (1986); *Copley Press Inc. v. Administrative Office of the Courts*, 271 Ill. App. 3d 548, 648 N.E.2d 324, 207 Ill. Dec. 868 (2d Dist. 1995); *Oberman v. Byrne*, 112 Ill. App. 3d 155, 445 N.E.2d 374, 67 Ill. Dec. 894 (1st. Dist. 1983); *Lieber v. Board of Trs.*, 176 Ill. 2d 401, 407, 680 N.E.2d 374, 377, 223 Ill. Dec. 641, 644 (1997); *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977, 686 N.E.2d 1222, 1228, 227 Ill. Dec. 66, 72 (4th Dist. 1997)

Title 140 of Chapter 5 of the Illinois Compiled Statutes contains the state's Freedom of Information Act. While Illinois has had some form of public records act since the late 1800s, the current statute represents a more comprehensive guarantee of the public's right to access records in efforts to foster a more well-informed citizenry. Certain provisions of the statute resemble its federal counterpart that bears the same name. A strong body of case law serves to interpret the statute. Courts often use the federal Freedom of Information Act as an example in their rulings. Upon adoption of the state act, the legislature formed a statement of intent found in Section 1. The act is intended not to further commercial purposes¹⁴⁹ or warrant an undue invasion of privacy, but to "enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest."¹⁵⁰

- Who may request records and for what purpose:
 - The Illinois Freedom of Information Act allows any person, including corporations,

149 See the "Money-making" section of this report for further discussion on commercial use.

150 5 ILCS 140/1.

firms, associations, partnerships, and other organizations, to request public records.

- The legislative intent of the act is not to further commercial interests or engender invasions of privacy, but the Illinois Supreme Court ruled that this preamble has no authoritative force¹⁵¹ and that the act does not require persons to state their intended use of the records.¹⁵²
- The intent behind the act is to allow a well-informed public monitor the acts of government. It does not restrict the use of records obtained.
- Whose and which records are covered under the act:
 - The act covers "any legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue."¹⁵³
 - ▶ The act also encompasses subsidiaries of public bodies.
 - ▶ No executive or legislative agency is exempt in its entirety, though certain records associated with each entity may be exempt.
 - The act does not cover the judiciary branch, as determined by case law and an opinion of the Attorney General.¹⁵⁴

151 *Lieber v. Board of Trs.*, 176 Ill. 2d 401, 680 N.E.2d 374, 223 Ill. Dec. 641 (Ill. 1997).

152 *Family Life League v. Dep of Public Aid*, 112 Ill.2d 449, 456, 493 N.E.2d 1054, 1057-58, 98 Ill. Dec. 33, 36-37 (1986).

153 5 ILCS 140/2(a).

154 *Copley Press Inc. v. Administrative Office of the Courts*, 271 Ill. App. 3d 548, 648 N.E.2d 324, 207 Ill. Dec. 868 (2d Dist. 1995); Att'y Gen. Op. 005 (1999).

- Case law has applied the act to entities receiving public funding while exempting others. Whether a nongovernmental body is subject to the act seems to be determined on a case-by-case basis.¹⁵⁵
- The act likely does not cover bodies whose members are also public officials unless those members act in an official capacity.
- The act prohibits granting exclusive rights to access records to certain individuals while denying others access to records, unlike in some states where a person of interest in the document itself may have a greater right to access that document.
- The definition of public records is quite broad and includes, though is not limited to, “all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, ... electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared... used, received, possessed or under the control of any public body.”¹⁵⁶
 - ▶ The physical format of the record is immaterial, and the act does not distinguish among which records are available for inspection or copying.

- Fees and costs:

- Agencies may charge reasonable fees to recover the actual costs of reproducing and certifying public records along with the use of any equipment necessary to copy the records.
 - ▶ Fees should exclude the cost of searching for and reviewing records.
 - ▶ Charges cannot exceed actual costs, unless otherwise provided by state statute.¹⁵⁷
- Waivers or reduction of fees must be granted if doing so would be in the public’s interest.

155 See *Hopf v. Topcorp*, 170 Ill. App. 3d 85, 527 N.E. 2d 1, 122 Ill. Dec. 629 (1st Dist. 1988); *Mid-America Television Co. v. Peoria Hous. Auth.*, 93 Ill. App.3d 314, 417 N.E.2d 210, 48 Ill. Dec. 808 (3d Dist. 1981); and *Family Life League v. Dep’t of Public Aid*, 112 Ill. 2d 449, 493 N.E.2d 1054, 98 Ill. Dec. 33 (1986) for examples.

156 5 ILCS 140/2(c).

157 5 ILCS 140/6(a).

The public interest is served if the requester intends to “disseminate information regarding the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit.”¹⁵⁸

- No case law has challenged the imposition of prohibitively high fees.

- Enforcement and sanctions:

- The individual denied access to records has the right to sue and obtain injunctive relief against the public agency in the circuit court for the county in which the agency is located or the requester resides.
 - ▶ There is no role for the Attorney General or an ombudsman.
- Sanctions include attorneys’ fees to the prevailing plaintiff.
 - ▶ Additionally, courts may impose a fine between the amounts of \$2,500 and \$5,000 if they find that agencies acted in bad faith, knowingly and willfully, in denying the public access to records.¹⁵⁹

- Exemptions:

- If a record is not expressly defined in a specific, narrowly construed exemption, it must be disclosed upon request.
- Moreover, the presumption of disclosure has encouraged custodians to use exemptions at their discretion. The statute only authorizes, not mandates, agencies to withhold certain documents.
- Certain exemptions were patterned after the federal Freedom of Information Act and the federal statute may be used to interpret the state statute in court.
- The Illinois Freedom of Information Act specifically exempts records pertaining to:
 - ▶ All child death review teams formed under the Child Death Review Team Act;¹⁶⁰

158 5 ILCS 140/6(c).

159 5 ILCS 140/11(j).

160 5 ILCS 140/2(a).

- ▶ Private or personal information;
- ▶ Law enforcement information;
- ▶ Preliminary, pre-decision work; and
- ▶ Trade secrets.
 - ◊ Other categories of records exempt under this particular act may be found beginning in Section 140/7(1).
- Records exempt by federal or state laws are to remain confidential. State statutes that relate to specific industries or professions can be found within the Illinois Compiled Statutes from the state legislature's website.¹⁶¹
- While the courts have served to interpret the act, they have not established common law exemptions.
 - ▶ In fact, one court expanded the practices of disclosure in ruling that it would not use a balancing test to weigh the burdens imposed on agencies against the public interest in disclosure.¹⁶²
- Agencies must segregate non-exempt material from exempt material if a public record is requested.
- Electronic Records:
 - Electronic records are covered under the act, and the electronic formatting does not affect a record's openness.
 - ▶ E-mails are treated as any other public record.
 - ▶ Software may be public or confidential depending on its nature and how closely it is related to records which are public or records which are exempt.
- Case law suggests that persons may request a specific format, but the practice of providing customized searches varies from agency to agency.
- The act does not specifically address fees that agencies may charge for providing electronic records.
 - ▶ The Attorney General, however, has opined that, though county officials may create a website providing access to information found in public records, agencies may not charge a fee for providing Internet access to records, unless a statutory provision permits otherwise.¹⁶³
- Money-Making:
 - Though the legislature excluded the furthering of commercial purposes in its declaration of intent, this statement is not part of the act itself and bears no authority.
 - The Illinois Freedom of Information Act does not prevent the use of public records for commercial purposes.

¹⁶¹ See www.illinois.gov/government/gov_legislature.cfm for a complete copy of the code.

¹⁶² *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977, 686 N.E.2d 1222, 1228, 227 Ill. Dec. 66, 72 (4th Dist. 1997).

¹⁶³ Ill. Att'y Gen. Op. 012 (2000).

Indiana

Access to Public Records Act

Codes: Indiana Access to Public Records Act: § 5-14-3 et seq.; Ind. Code § 4-1-10 et seq. (Regarding the release of Social Security numbers); Administrative Rule 9 (governs judicial records)

Relevant Court Cases: Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362, 1366 (Ind. App. 1980); *State ex rel. Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993); *Bobrow v. Bobrow*, 810 N.E.2d 726 (Ind. App. 2004); *Unincorporated Operating Div. of Indiana Newspapers v. Trs. of Indiana Univ.*, 787 N.E.2d 893 (Ind. App. 2003)

The Hughes Anti-Secrecy Act previously contained Indiana's open records provisions. The act's definition of public information was narrower than that established by common law and prompted much debate. The Access to Public Records Act adopted in 1983 was the result of legislative research which examined the need for revisions to the existing statute and took into consideration other states' open records laws. The new law is broader in its reach. The current statute, found in Chapter 3 of Article 14 of Title 5 in the Indiana Code, has been amended several times due to increasing concerns about terrorism and considerations of personal privacy.

- Who may request records and for what purpose:
 - Any person, defined as “an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity,” may request access to public records.¹⁶⁴
 - Unless specified by another applicable statute, the Indiana Access to Public Records Act does not require requesters to state the purpose for the request.¹⁶⁵
 - The use of public information is regulated and restricted under the act:¹⁶⁶
 - ▶ State and local agencies retain the authority to limit the commercial use of

public information received on a disk or tape.

- ◆ Persons may use these records for news, non-profit, or academic purposes without restriction.
- ▶ Lists of names, addresses, and e-mail addresses, may not be disclosed to entities seeking to use records for commercial or political purposes.
- Whose and which records are covered under the act:
 - The expansive definition found in parts 1-10 of section 5-14-3-2(m) covers all entities “exercising any part of the executive, administrative, judicial, or legislative power of the state.”
 - Though the act subjects the legislative branch to rules of disclosure, the Indiana Supreme Court held that it could not enforce the statutes against the Indiana General Assembly because it would violate the separation of powers.¹⁶⁷
 - The courts are covered under the act, but the act grants mandatory exemptions for information which is “declared confidential by or under rules adopted by the supreme court of Indiana.”¹⁶⁸
 - ▶ The Indiana Supreme Court, under this authority, has amended Administrative Rule 9 to regulate access to judicial records. Exemptions found therein mirror many exemptions from the Access to Public Records Act, though Administrative Rule 9 includes several others.
 - Non-governmental entities which receive public funding and are subject to governmental auditing are covered under the act.
 - The definition of “public record” was amended in 2003 and encompasses materials which are “created, received,

¹⁶⁴ Ind. Code § 5-14-3-2(k).

¹⁶⁵ Ind. Code § 5-14-3-3(a).

¹⁶⁶ Ind. Code § 5-14-3-3(e), (f).

¹⁶⁷ *State ex rel. Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993).

¹⁶⁸ Ind. Code § 5-14-3-4(a)(8).

retained, maintained, or filed by or with a public agency...”¹⁶⁹

- ▶ Previous acts contained the word “used” among the verbs found in the definition of public records. Whether this revision will have much effect on the public’s access to records remains to be seen.
- This definition applies to all records regardless of physical format.
- All records open to inspection are also available for copying unless the public agency lacks proper facilities. In these circumstances, the requester may resort to transcribing the public information by hand.¹⁷⁰
- Fees and costs:
 - The Access to Public Records Act authorizes the Indiana Department of Administration to adopt a uniform copying fee for all state agencies.
 - ▶ The fee is limited to the average cost of copying records or 10 cents for each page, whichever is the greater amount.¹⁷¹
 - Other public agencies may adopt a schedule of fees for certifying or reproducing documents. The charge may not exceed the actual cost, excluding labor and overhead costs, to the agency.¹⁷²
 - ▶ Public agencies may not charge a fee for inspecting or searching for documents or determining their eligibility for disclosure.
 - ▶ A “reasonable” fee, however, is allowed “for permitting a governmental agency to inspect public records by means of an electronic device.”¹⁷³
 - Various statutes throughout the Indiana Code also set fees for certain public records. Fees related to certain departments or functions can be found in their respective sections in the Code, which the Indiana state legislature’s website provides.¹⁷⁴

169 Ind. Code § 5-14-3-2(n).

170 Ind. Code § 5-14-3-8(e)(2).

171 Ind. Code § 5-14-3-8(c).

172 Ind. Code § 5-14-3-8(d).

173 Ind. Code § 5-14-3-8(i).

174 See www.in.gov/legislative/ic/code for the complete code.

- While there are no mandatory fee waivers, custodians have the discretion to waive or reduce fees for those seeking records for noncommercial purposes.
- Enforcement and sanctions:
 - Parties denied access to records may seek remedy through the courts.
 - The office of the Indiana Public Access Counselor (PAC) was established in 1999 to educate the public and answer inquiries from individuals and agencies.
 - ▶ The counselor also issues opinions interpreting the laws, as Attorneys General do in other states.
 - ▶ Plaintiffs must seek the opinion of the PAC in order to collect attorneys’ fees after litigating the matter in the courts.¹⁷⁵
 - The Attorney General of Indiana has no prescribed role under the Access to Public Records Act.
 - Prevailing parties may be awarded attorneys’ fees and costs if the other acted frivolously.¹⁷⁶
 - ▶ If the agency wrongfully denied access to records in a capricious manner, the requester may recover litigation costs.
 - ▶ If the requester brought the action in bad faith, the agency may recover litigation costs.
 - Any public employee who willfully and knowingly discloses confidential information is guilty of a Class A misdemeanor.¹⁷⁷
- Exemptions:
 - Exemptions found in the Access to Public Records Act are specific, though the Administrative Rule 9 that governs the release of judicial records contains a general, catch-all exemption along with a list of specific exceptions.
 - Mandatory exemptions often relate to records that are confidential by federal

175 Ind. Code § 5-14-3-9(i).

176 Ind. Code § 5-14-3-9(g).

177 Ind. Code § 5-14-3-10(a).

or state statute. Many others are to be exercised at the discretion of the custodian.

- ▶ Subsection (a) of Section 5-14-3-4 contains 12 categories of mandatory exemptions.

- ◊ A few of these categories include trade secrets, license examination scores, medical records, and social security numbers.

- ▶ Subsection (b) of Section 5-14-3-4 contains 23 categories of discretionary exemptions.

- ◊ A few of these categories include examination questions or data, deliberative materials, personnel files, and security-related documents.

- Other statutory exemptions are found throughout the Indiana Code. The PAC provides a handbook containing a list of records which are statutorily exempt from disclosure along with a list of records agencies must disclose.¹⁷⁸

- If a record contains exempt information, the public agency must redact that material and release the nonexempt information to the public upon request.

- Electronic Records:

- Electronic records are covered under the act.

- ▶ E-mail is treated as public.

- ▶ Software falls under a discretionary exemption.

- The act also defines the term “enhanced access” as “the inspection of a public record ... by means of an electronic device other than an electronic device provided by a public agency in the office of the public agency; or requires the compilation or creation of a list or report that does not result in the permanent electronic storage of the information.”¹⁷⁹

- ▶ Public agencies are not required to provide enhanced access. If they do, however, requesters may be able to choose a format or obtain a customary search.

- ▶ Any person seeking enhanced access from a public agency, rather than through an intermediary source, will be required to enter into a contract with the public agency, which may stipulate fees.¹⁸⁰

- For supplying a copy of a computer tape, disk, microfilm, or other electronic form of a public record, public agencies may charge a fee not exceeding the direct cost, which the act defines as 105% the sum of the initial program development cost, labor costs, and the cost of the medium utilized.¹⁸¹

- Money-Making:

- The Access to Public Records Act does not explicitly authorize public agencies to sell public information to raise revenues. It does, however, require subdivisions of the agencies which charge fees for enhanced access to establish a fund to receive those fees, which may be spent on statutorily specified purposes only.¹⁸²

- As mentioned, public agencies may regulate the private, commercial use of information received on a computer disk or tape.

178 See www.in.gov/pac/ for these lists.

179 Ind. Code § 5-14-3-2(e).

180 Ind. Code § 5-14-3-3.5(c)(1).

181 Ind. Code § 5-14-3-2.

182 Ind. Code § 5-14-3-8.3.

Iowa

Open Records Law

Codes: Iowa Code § 22 et seq.

Relevant Court Cases: *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981); *City of Dubuque v. Telegraph Herald Inc.*, 297 N.W.2d 523, 526 (Iowa 1980); *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988); *Northeast Council on Substance Abuse Inc. v. Iowa Dept. of Public Health, Div. of Substance Abuse*, 513 N.W.2d 757, 759 (Iowa 1994); *US West Communications Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 713 (Iowa 1993); *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999)

In response to complaints from the public regarding inaccessible public information, the Iowa General Assembly passed the Open Records Law in 1967. Amendments adopted in 1988 expanded the definition of those who could access records but also added several exemptions. Further revisions have since enhanced the statute's clarity. As it stands, "[t]he purpose of chapter 22 is to remedy unnecessary secrecy in conducting the public's business."¹⁸³

- Who may request records and for what purpose:
 - The Iowa Open Records Law does not restrict who may request records.
 - The law also does not restrict the purpose for which the records may be obtained or the subsequent use of the public information.
 - ▶ The Attorney General's opinions have expressly stated that the law does not prevent the use of public records for commercial or political purposes.¹⁸⁴
- Whose and which records are covered under the act:
 - The statute defines "public records" as "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school

corporation, political subdivision, nonprofit corporation... [which is] supported in whole or in part with property tax revenue..., or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."¹⁸⁵

- ▶ The law makes no provision to exclude the records of individual executives, such as the state's governor, or mayors.
 - ▶ Similarly, no exemption is made expressly for legislative or judicial bodies. Rather, it is the nature of the content of the record that determines its openness, not the body which possesses it.
 - ▶ Entities which have public officials as members are only covered if the member is acting in an official capacity.
 - ▶ Records of private investments using public funds are also public records.¹⁸⁶
- As the definition of the records covered under the act is quite broad, the Iowa Supreme Court has had the opportunity to clarify and establish a test to determine which records are indeed subject to disclosure:

"When, as is the case under section 22.7(11), a statutory exemption does not articulate precisely what records or information the legislature considers private, courts commonly apply the following factors as a means of weighing individual privacy interests against the public's need to know: (1) the public purpose of the party requesting the information; (2) whether the purpose could be accomplished without the disclosure of personal information; (3) the scope of the request; (4) whether alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy."¹⁸⁷

¹⁸³ *US West Communications Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 713 (Iowa 1993).

¹⁸⁴ 81 Op. Att'y Gen. 76,77 (April 6, 1981); 81 Op. Att'y Gen. 212 (August 13, 1981).

¹⁸⁵ Iowa Code § 22.1(3).

¹⁸⁶ Iowa Code § 22.14.

¹⁸⁷ *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999).

- The physical form and location of the record is immaterial.
- All records open for inspection are available for copying.
- Fees and costs:
 - Public agencies may not charge more than the cost of providing public records.
 - ▶ Because records must stay under the supervision of the custodian, rather than charging fees for searching, agencies may charge supervisory fees.
 - ▶ If the agency has inadequate facilities for copying records, the requester must pay the necessary expenses incurred in providing a place to reproduce the records.¹⁸⁸
 - While the statute does not mention fee waivers, the language of the law implies that custodians are not mandated to charge fees. All fees must be equally applied to all persons seeking records, however.
- Enforcement and sanctions:
 - Persons denied access to public records, the Attorney General, or other county attorneys have the right to bring an action against the custodian in the county district court in which the agency is located.
 - ▶ The Office of the Citizen's Aide/Ombudsman may also have statutory authority to investigate citizens' complaints resulting under the Open Records Law.
 - The courts have the authority to impose five types of sanctions:¹⁸⁹
 1. The court may provide injunctive relief in the form of an order compelling the agency to produce the requested documents.
 2. The court may issue an order to require the custodian to refrain from violating the act again for one year.
 3. The court may assess damages between \$100 and \$500 against the violators.

4. The court may reward attorneys' fees and costs to a successful plaintiff.
5. The court may remove a public official found guilty of a third violation.

- Those found in violation of the act are guilty of a misdemeanor.¹⁹⁰
- Exemptions:
 - Exemptions under the Open Records Law are specific and discretionary. Agencies do not have the authority to adopt rules that supersede the act.
 - The statute provides 64 categories of exemptions under Section 22.7. A few of these relate to medical, investigatory, and personnel records; trade secrets; and financial information.
 - Many other statutory exemptions relating to specific industries may be found in the Iowa Code.¹⁹¹
 - District courts also have the authority to exempt certain records if disclosure would not serve the public interest and would result in a substantial and irreparable injury to any person.¹⁹²
 - ▶ Causing inconvenience or embarrassment to public officials or other persons is not a sufficient reason to prevent disclosure.¹⁹³
 - Though the statute does not expressly require public agencies to produce segregable portions of otherwise confidential documents, case law has established that precedent.¹⁹⁴
 - ▶ Other provisions in the act presumably encourage public agencies to provide redacted materials to the public.

¹⁸⁸ Iowa Code § 22.3.

¹⁸⁹ Iowa Code § 22.10.

¹⁹⁰ Iowa Code § 22.6.

¹⁹¹ See the Iowa state legislature's website for a complete copy of the state code: www.legis.state.ia.us/IowaLaw.html.

¹⁹² Iowa Code § 22.8(1).

¹⁹³ Iowa Code § 22.8(3).

¹⁹⁴ *Des Moines Independent Community School District Public Records v. Des Moines Register & Tribune Company*, 487 N.W.2d 666, 671 (Iowa 1992).

- ▶ Other provisions in the Iowa Code also allow agencies to disclose the information that is not confidential within confidential documents.¹⁹⁵
- Electronic Records:
 - Electronic records are covered under the Iowa Open Records Law.
 - ▶ E-mail is not specifically mentioned but is presumably covered by the statute's definition of "data."
 - ▶ Software is not mandatorily public. Providing access is at the discretion of the government body.¹⁹⁶
 - Public agencies are not required to provide a customary search or tailor the records' format upon request but may do so at their discretion.
 - If the records are tailored to the request, an extra charge may be applied. Otherwise, fees may not exceed the cost of providing the information.
- If the governmental agency has a copyright to the data processing software, it may sell or license the software in accordance with any agreement between the parties. The public agency may also stipulate the subsequent use of the software in the agreement.
- Money-Making:
 - In general, public agencies are not permitted to charge any amount exceeding the cost of providing access to public records and may not profit from doing so. When providing data processing software, however, government agencies are allowed to establish a price "according to the discretion of the government body, and may be based upon competitive market considerations."¹⁹⁷
 - The commercial use of public records by private individuals is not prohibited.

195 See e.g. Iowa Code § 246.602(2)(1).

196 Iowa Code § 22.3A(2).

197 Iowa Code § 22.3A(2)(b).

Kansas

Open Records Act

Codes: K.S.A. 45-215, *et seq.*

Relevant Court Cases: *Stephens v. Van Arsdale*, 227 Kan. 676, 608 P.2d 972 (1980); *State, ex rel. Stephen v. Harder*, 230 Kan. 573, 641 P.2d 366 (1982)

Article 2 of Chapter 45 contains the Kansas Open Records Act. Replacing its predecessor in 1984, the current, more comprehensive statute extends beyond records that are simply “required to be kept,” as the repealed law had mandated. The state legislature voted in 2000 to sunset all exceptions in 2005 unless each exception was specifically re-enacted according to policy guidelines. The legislature in 2005, however, postponed the review until 2010. The statute is therefore likely to change, and those concerned with specific exemptions should check an updated version of the Kansas Statutes Annotated or consult a local freedom of information officer.

- Who may request records and for what purpose:
 - Any person may request records in under the Open Records Act in Kansas.¹⁹⁸
 - Persons may not request or obtain records to create or use lists of names and addresses for commercial purposes.¹⁹⁹
 - ▶ An opinion of the Attorney General has interpreted this provision to encompass the names and addresses of individuals as well as businesses.²⁰⁰
- Whose and which records are covered under the act:
 - The Kansas Open Records Act covers records of public agencies, which are defined as “the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending and supported ... by the public funds appropriated by the state or ... subdivision of the state.”²⁰¹

- ▶ The legislative and executive branches are covered in this definition.
- ▶ The act applies to the court system as a whole but not judges in particular.
- This definition includes nongovernmental bodies which receive or are supported by public funding. However, if an entity receives public funds in return for goods or services, it is not subject to the act.
- The term “public records” is broadly defined as “any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency...”²⁰²
 - ▶ This includes records related to the investments of public funds.
 - ▶ This definition, however, exempts records of individual legislators or private individuals which are unrelated to public operations.²⁰³
- While many states either make no distinction or state that every record available for inspection is likewise available for copying, the Kansas Open Records Act specifically states that public agencies are not required to provide copies of discs, tapes, films, pictures, illustrations and graphics, and other audio and visual records.²⁰⁴
- Fees and costs:
 - Fees charged for providing copies may not exceed the actual cost of producing them. This may include personnel costs.
 - The act does not supersede any other statutory provisions that dictate a schedule of fees for particular records or agencies.
 - The act contains only one mandatory fee waiver: a data processor working under a contract to develop programs to enable easier access may not be required to pay fees.

198 K.S.A. 45-218.

199 K.S.A. 45-220(c).

200 Op.Atty.Gen. 84-106 (1984).

201 K.S.A. 45-217(f).

202 K.S.A. 45-217(g)(1).

203 K.S.A. 45-217(g)(2).

204 K.S.A. 45-219(a).

- ▶ The language of the law states that agencies “may charge” fees; therefore, certain agencies may choose not to levy any at all.²⁰⁵
- Enforcement and sanctions:
 - Any person, district attorney, or attorney general may bring action in a district court against a public agency under the act.
 - Governing bodies of public agencies must also appoint a freedom of information officer whose role is to disseminate information regarding public access to records and help resolve disputes as they arise.²⁰⁶
 - Attorneys’ fees may be awarded to any prevailing party.²⁰⁷
 - Moreover, agencies found guilty of willfully violating the act may face a fine not exceeding \$500 for each violation.²⁰⁸
- Exemptions:
 - Exemptions under the act are discretionary.
 - Section 218(e) contains two general exemptions:
 - ▶ In particular, agencies may refuse to provide records if doing so would constitute an unreasonable burden on the agency. If a requester challenges such a refusal, the agency must justify the denial.
 - ▶ The custodian may also refuse a request if it appears the purpose of the requests is to disrupt the agency’s operations.
 - More than 45 specific provisions in the act relate to certain categories of records, including security information, personnel and library records, notes and preliminary drafts, and criminal investigation records.
 - More than 350 other statutes found throughout the Kansas Statutes Annotated exempt from disclosure specific types of records.²⁰⁹
- Any other document that is confidential by state or federal law or by order of the Kansas Supreme Court is also exempt.
- Segregable portions of otherwise confidential documents are generally available.
- Electronic Records:
 - The act covers public records in all forms, including electronics.
 - ▶ E-mails between public officials and sent through public servers are public records.
 - ▶ Agencies are not required to disclose software programs but must provide a description of the information stored on the computers as well as the form in which it may be made available with existing software.²¹⁰
 - The law does not explicitly address whether agencies must comply with requests for customized searches or tailored formats.
 - For providing access to records on computers, agencies may not charge more than the cost of computer services and the staff time required.
- Money-Making:
 - As mentioned, no one may obtain and use public records to compile lists of names and addresses to distribute for commercial purposes.

205 K.S.A. 45-218(f).

206 K.S.A. 45-226.

207 K.S.A. 45-222(c).

208 K.S.A. 45-223.

209 See the state legislature’s website: www.kslegislature.org

210 K.S.A. 45-221(a)(16).

Kentucky

Open Records Act

Codes: KRS 61.870 – 61.884

Relevant Court Cases: *Courier-Journal v. Jones*, 895 S.W.2d 6, 10 (Ky. App., 1995); *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978); *Kentucky Central Life Ins. Co. v. Park Broad. of Kentucky, Inc.*, 913 S.W.2d 330 (Ky. App. 1996); *Hardin County v. Valentine*, 894 S.W.2d 151 (Ky. App., 1995); *Amelkin v. McClure*, 936 F.Supp. 428 (W.D. Ky. 1996)

The Kentucky Open Records Act, enacted in 1976, has been amended several times in response to emerging technology and business concerns. Until the 1994 revisions, the Public Access to Government Databases Act governed the disclosure of electronic records, which could be denied if the request was made for commercial purposes. The Open Records Act, which now encompasses electronic records, permits the commercial use for any public record not specifically prohibited by other statutory provisions, though requesters may be charged additional fees for obtaining the information.

- Who may request records and for what purpose:
 - Under the Kentucky Open Records Act, “[a]ll public records shall be opened for inspection by any person, except as otherwise provided . . . and suitable facilities shall be made available by each public agency for the exercise of this right.”²¹¹
 - The term “person” includes “bodies-politic and corporate, societies, communities, the public generally, individuals, partnerships and joint stock companies.”²¹²
 - Custodians may require those requesting records to state their purpose or intended use of such records. Commercial use is permitted under the statute unless otherwise prohibited by other statutory provisions.

- ▶ Commercial use generally includes any use for which a person would expect to generate revenue but does not include:
 1. Use of public records for newspapers or periodicals,
 2. Use of public records for television or radio news programs, and
 3. Use of public records for litigation purposes.²¹³
- ▶ Those who obtain records without disclosing a commercial purpose may not disclose that information to those who will subsequently use that information for commercial purposes.
- Otherwise the use of public records remains largely unregulated.
- Whose and which records are covered under the act:
 - The phrase “public agency” encompasses but is not limited to
 - ▶ “Every state or local government officer;
 - ▶ Any body created by state or local authority in any branch of government;
 - ▶ Any body that derives at least 25 percent of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;
 - ▶ [and] Any entity where the majority of its governing body is appointed by a public agency...”²¹⁴
 - This includes the executive and legislative branches of state and local governments.
 - Though the definition appears to cover the judicial branch as well, the Kentucky Supreme Court has ruled that the statute does not apply, as it would violate the constitutional separation of powers.²¹⁵

211 KRS 61.872(1).

212 KRS 446.010(26).

213 KRS 61.870(4).

214 KRS 61.870.

215 *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978).

- Private entities which receive more than 25 percent of funding from the state are subject to the Open Records Act. Only the records relating to the operations funded through a public source are open in this case.
 - ▶ The act, Attorney General opinions, and outcomes of court cases have yet to address whether multi-state or regional entities are subject to the act under this definition.
- The term “public records” is equally broad and covers, regardless of physical format, all materials which “are prepared, owned, used, in the possession of or retained by a public agency.”²¹⁶
- All records available for inspection are available for copying.
- Fees and costs:
 - Fees may differ depending on the intended use of the records.
 - For noncommercial purposes, agencies may charge no more than the direct cost of duplicating records, excluding the related personnel costs.
 - ▶ The public agency may charge staff costs related to tailoring the records if a person asks for a customized search or for records in a format unlike the one in which they are regularly stored.
 - For commercial purposes, a person must enter into a contract with the agency and may be charged for personnel costs as well as the direct cost for materials.²¹⁷
 - The Attorney General has opined that public agencies may not charge a sales tax in providing copies for records.²¹⁸
 - The Open Records Act makes no provisions for fee waivers.
- Enforcement and sanctions:
 - Section 61.880 outlines the appeals process which entitles individuals who were denied access to records or charged unreasonable fees the right to complain to the state Attorney General.
- The Attorney General will then issue a decision, which either party may appeal in circuit court within 30 days. If an appeal is not filed within that time, the decision stands and has the force of law.
- Sanctions may include attorneys’ fees and costs to the prevailing plaintiff. In addition, the courts may assess a fine not in excess of \$25 each day the records were withheld.²¹⁹
- Exemptions:
 - Exemptions to the act are specific and discretionary.
 - Numerous exemptions within the Open Records Act may be found in Section 61.878. Types of exempted records include personal information, trade secrets, medical files, examination data, preliminary drafts or notes, and records relating to law enforcement.
 - ▶ Records which are exempt from disclosure to private individuals may be disclosed to government agencies if doing so would serve a legitimate public purpose.
 - ▶ Additionally, persons of interest may have greater access to the record which is exempt from disclosure to the general public.²²⁰
 - The act does not supersede other statutory exemptions found throughout the Kentucky Revised Statutes.²²¹
 - Public agencies must make the non-confidential portions of documents available upon request, unless redacting the confidential material would pose an unreasonable burden on the agency. Agencies must bear the costs of providing segregable records.
- Electronic Records:
 - The Open Records Act covers all public records, regardless of format.
 - ▶ E-mail is treated as a public record. In fact, any communication or records

216 KRS 61.870(2).

217 KRS 61.874.

218 98-ORD-88.

219 KRS 61.882(5).

220 KRS 61.884.

221 See the state legislature’s website for a complete version of the statutes: www.lrc.state.ky.us/Law.htm

- obtained or transmitted using a public computer is a public record.
- ▶ Software is likewise considered a public record unless protected through licensing agreements. Security information, such as access codes and user identification information, is not public.
- Persons may obtain either a hard copy or an electronic version of records which are stored electronically. Agencies are not, however, required to provide electronic versions of records which exist only in print format.²²²
 - ▶ The standard electronic format used by public agencies is called the American Standard Code for Information Interchange (ASCII) format. If a person prefers a different format, the agency may comply at its discretion and charge the requester for staff costs.²²³
- Fees for electronic requests that do not require a tailored format are similar to those assessed for other types of public records.
 - ▶ For noncommercial purposes, agencies may charge the direct cost, excluding staff time, of providing the record, “including the costs of the media and any mechanical processing cost incurred by the public agency.”²²⁴
- ▶ For commercial purposes, agencies may charge more by taking two factors into consideration:
 1. “Cost to the public agency of media, mechanical processing and staff required to produce a copy of the public records or records;
 2. Cost to the public agency of the creation, purchase or other acquisition of the public records.”²²⁵
- Money-Making:
 - The Kentucky Open Records Act does not address whether or not the state may generate revenues through the sale of public records, but most records may not be sold for more than the direct cost of reproducing them.
 - Private persons are permitted to use public records for commercial purposes, unless otherwise prohibited by other statutory provisions. Upon revealing the intended use of records, however, individuals may be required to pay an increased charge for obtaining the requested information.

²²² KRS 61.874(2)(a).

²²³ KRS 61.874(2)(b); KRS 61.874(3).

²²⁴ KRS 61.874(3).

²²⁵ KRS 61.874(4)(c).

Louisiana

Public Records Act

Codes: La. Rev. Stat. Ann. § 44 et seq., La. Const. art. XII, § 3.

Relevant Court Cases: *Hill v. Mamoulides*, 482 So. 2d 25 (La. App. 5th Cir. 1986); *Angelo Iafrate Constr., L.L.C. v. State*, 879 So. 2d 250 (La. App. 1st Cir. 2004); *Bester v. Louisiana Supreme Court Comm. on Bar Admissions*, 779 So. 2d 715 (La. 2001); *Times Picayune Publ'g Corp. v. Bd. of Supervisors*, 845 So. 2d 599 (La. App. 2003), writ denied, 852 So. 2d 1044 (La. 2003); *Landis v. Moreau*, 779 So. 2d 691 (La. 2001); *Vourvoulais v. Movassaghi*, 906 So. 2d 561 (La. App. 1st Cir. 2005); *Guste v. Nicholls College Foundation*, 564 So. 2d 682 (La. 1990); *Cable v. Brown*, 323 So. 2d 217, 220 (La. App. 2d Cir. 1975); *Diggs v. Pennington*, 849 So. 2d 756 (La. App. 2003)

The Louisiana state legislature enacted the Public Records Act in 1940. The new state constitution adopted in 1974 established a presumption of openness regarding the disclosure of public records, stating, "No person shall be denied the right to . . . examine public documents except in cases established by law."²²⁶ The constitutional right to privacy, however, has frequently been used by the courts as a catch-all exemption. The legislature made substantial revisions to the law in 1978. One revision expanded the definition of those who could request records from "state electors" and "state taxpayers" to "any person of the age of the majority." Another revision strengthened enforcement procedures and made any custodian who acts capriciously or arbitrarily in refusing access to public records personally liable for damages to a prevailing plaintiff.

- Who may request records and for what purpose:
 - "[A]ny person of the age of majority" may request records under the Louisiana Public Records Act.
 - ▶ A convicted felon who is in custody and has exhausted all available remedies may not request records except for the purpose of filing for post-conviction relief.²²⁷

²²⁶ La. Const. art. XII, § 3.

²²⁷ La. Rev. Stat. Ann. § 44:31.1.

- ▶ Though individuals who comprise public bodies may submit requests for records, public bodies as a whole may not.²²⁸
- With the exception of convicted felons, requesters' purpose for or intended use of the records is immaterial. Custodians may only ask for the age and identification of a person making a request.²²⁹
- The subsequent use of public records obtained is unrestricted. Opinions of the Attorney General have also affirmed individuals' right to use public records for commercial purposes.²³⁰
- Whose and which records are covered under the act:
 - The law defines a "public body" as "any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, . . . or any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function."²³¹
 - This definition embodies executive offices excluding the Office of the Governor. Records within the Governor's custody or related to the discharge of his/her duties are exempt.²³²
 - Legislative bodies are covered under the act.
 - Courts are not specifically mentioned in the act, though judicial agencies have been held subject to it. The Louisiana Supreme Court has established precedence in creating exemptions.

²²⁸ *Plaquemines Parish Council v. Petrovich*, 629 So. 2d 1322, (La. App. 4th Cir. 1993), writ denied 634 So. 2d 390 (La. 1994).

²²⁹ La. Rev. Stat. Ann. § 44:32

²³⁰ Op. Att'y Gen. 90-330.

²³¹ La. Rev. Stat. Ann. § 44:1.1.

²³² La. Rev. Stat. Ann. § 44:5.

- Records relating to the receipt and expenditure of public funds by nongovernmental entities are public.
 - ▶ Nongovernmental entities whose boards are comprised of public officials are subject to the act if the body receives most of its income from a public source and performs a public function.
- The act covers all records which relate to “the conduct, transaction, or performance of any business, transaction, work, duty, or function ...performed by or under the authority of the constitution or laws of this state, ... any ordinance, regulation, mandate, or order of any public body” or the receipt or expenditure of public funds.²³³
 - ▶ This broad definition reaches all records, regardless of physical format, not specifically exempted by statute or order of the court.
- All records open for inspection are also available for individuals to copy.
- Fees and costs:
 - Custodians may charge a “reasonable fee” established by the agency’s commissioner for the reproduction of public records, unless a schedule of fees is otherwise mandated by other statutory provisions.
 - Public agencies may not charge for the staff time involved in searching for or determining the confidentiality of any record. Custodians may only charge individuals for examining public records if the individual does so outside of the agency’s regular hours of operation.²³⁴
 - Custodians may grant fee waivers to indigent persons or for the reproduction of documents for a public purpose, such as a hearing before a governmental regulatory commission.²³⁵

- Enforcement and sanctions:
 - Individuals denied access to public records have the right to pursue action in the district court for the parish in which the agency is located.²³⁶
 - ▶ The courts have ruled that only the person who was denied access has this right. No one may file suit on his/her behalf.²³⁷
 - ▶ There is no prescribed role for the Attorney General, an ombudsman, or any particular agency or commission for enforcement.
 - The court may provide injunctive relief and order the reproduction of public records. The court may also award a successful plaintiff reasonable attorneys’ fees and costs.²³⁸
 - Moreover, if the court finds that the custodian acted arbitrarily, it may award the plaintiff actual damages resulting from the lack of disclosure and a fine not exceeding \$100 for each day the documents were withheld. The custodian may be personally liable for these charges.²³⁹
- Exemptions:
 - Most exemptions within the Louisiana Public Records Act are specific, and many are discretionary.
 - The courts, however, have used the constitutional right to privacy as a general, catch-all exemption for records, balancing the public’s right to know with the individual’s privacy interest.²⁴⁰
 - The Public Records Act enumerates several exemptions throughout:
 - ▶ Sections 44:2 and 44:3 exempt records relating to investigations and law enforcement operations. Other sections

²³³ La. Rev. Stat. Ann. § 44:1.2(a).

²³⁴ La. Rev. Stat. Ann. § 44:32(C).

²³⁵ La. Rev. Stat. Ann. § 44:32(C)(2).

²³⁶ La. Rev. Stat. Ann. § 44:35(A).

²³⁷ *Vourvoulais v. Movassaghi*, 906 So. 2d 561 (La. App. 1st Cir. 2005).

²³⁸ La. Rev. Stat. Ann. § 44:35(B), (D).

²³⁹ La. Rev. Stat. Ann. § 44:35(E).

²⁴⁰ See *Trahan v. Larriee*, 365 So. 2d 294 (3rd Cir. 1979); *Eastbank Consol. Special Serv. Fire Prot. Dist. v. Crossen*, 892 So. 2d 666 (La. App. 5th Cir.), writ denied, 897 So. 2d 608 (La. 2005).

discuss exemptions relating to the category for which the section is named.

- The Louisiana Revised Statutes contains many other exemptions. Section 44:4.1 cites where in the code individuals may find these exceptions.
- As mentioned, the courts have used the constitutional right to privacy to exempt certain documents. More specifically, the Louisiana Supreme Court held that records related to the bar exam were exempt, despite the lack of statutory provisions relating to these records. With this ruling, the court established its “inherent authority” vested by the legislature to create exceptions to the Public Records Act.²⁴¹
- Segregable portions of confidential documents must be made available to the public.²⁴²
- Electronic Records:
 - The act explicitly covers electronic records but does not mandate whether or not public agencies must provide a tailored format or customized searches upon request.
 - ▶ E-mail is treated as a public record unless its content is exempt from disclosure.
 - ▶ Software related to security measures is not public.²⁴³
 - The establishment of fees for electronic records follows the same guidelines as other types of records covered under the law. The commissioner of each agency is to adopt a schedule of “reasonable” fees unless a different statutory provision applies.
- Money-Making:
 - The Louisiana Public Records Act makes no provisions regarding public agencies generating a profit from the sale of public records. While fees are not limited to the direct material costs of reproduction (as they are in many states), they may not include staff time and must be “reasonable.”
 - The law does not restrict private individuals from using public records for commercial purposes.

241 *Bester v. Louisiana Supreme Court Comm. on Bar Admissions*, 779 So. 2d 715 (La. 2001); *Louisiana Supreme Court Comm. on Bar Admissions v. Roberts*, 779 So. 2d 726 (La. 2001).

242 La. Rev. Stat. Ann. § 44:33(A).

243 La. Rev. Stat. Ann. § 44:1.2(b).

Maine

Freedom of Access Act

Codes: 1 M.R.S.A. § 408 – 521.

Relevant Court Cases: *Town of Burlington v. Hosp. Admin. Dist.*, 2001 ME 59, 769 A.2d 857; *Great Northern Paper v. Penobscot Nation*, 2001 ME 68, 770 A.2d 574; *Doe v. Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 699 A.2d 422 (Me. 1997); *Moffett v. City of Portland*, 400 A.2d 340 (Me. 1979); *Morrell v. Bd. of Selectmen, Town of Wiscasset*, Docket No. CV-01-001, (Lincoln Superior Ct., Feb. 27, 2001); *Blethen Maine Newspapers v. State of Maine*, 2005 ME 56, 871 A.2d 523

Maine's Freedom of Access Act, sometimes referred to as the Right to Know Law, was enacted in 1959. Found in Chapter 13 of Title 1, the act broadly defines the records and bodies subject to its provisions but contains several exemptions. One of the more expansive exceptions to disclosure is all records that are statutorily mandated to be kept confidential.²⁴⁴ Numerous exemptions therefore exist throughout the Maine Revised Statutes. Following an independent report on the openness of the government in 2004, the state legislature amended the act to establish a schedule for regularly reviewing each title that contains exemptions.

- Who may request records and for what purpose:
 - Under the Maine Freedom of Access Act, “every person has the right to inspect and copy any public record.”²⁴⁵
 - The purpose of the request is generally irrelevant with a few exceptions.
 - ▶ For example, under certain circumstances, greater access may be allowed if the requester's intended purpose is research-oriented.
 - The law does not restrict the use of public records.
- Whose and which records are covered under the act:
 - The content of the record bears greater importance on its openness than does the

type of agency which possesses it. Any record which “has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business” is public.²⁴⁶

- The records of executives themselves are covered unless the content is purely private or personal.
 - Legislative records, excluding working drafts, are also subject to the act.
 - The judicial branch is not subject to the act, however.
 - When determining whether a nongovernmental body is subject to the act, the court uses four criteria:
 1. Whether the entity performs governmental functions;
 2. Whether the entity is supported with governmental funds;
 3. The extent to which the government is involved or retains control; and
 4. Whether the legislature created the entity.²⁴⁷
 - The physical form of the record itself is immaterial. Every record available for inspection is likewise available for copying.
- Fees and costs:
 - Agencies may not charge for allowing people to inspect records.
 - Custodians may, however, charge reasonable fees for providing reproductions. The fees may include:
 - ▶ A charge to cover the direct material cost of copying.
 - ▶ A charge to cover the personnel costs of finding and compiling records, including the cost of redacting confidential information.

²⁴⁴ 1 M.R.S.A. § 402(3)(A).

²⁴⁵ 1 M.R.S.A. § 408.

²⁴⁶ 1 M.R.S.A. § 402.

²⁴⁷ *Town of Burlington v. Hosp. Admin. Dist.*, 2001 ME 59, ¶ 16, 769 A.2d 857.

- ▶ A charge to cover the actual cost of translation, if necessary.²⁴⁸
- Custodians may waive fees for indigent individuals or if disclosure would serve the public's interest by significantly contributing to the public's understanding of the government's operations.
- The custodian must provide an estimate of the time and costs necessary to fulfill the request if the cost exceeds \$20.²⁴⁹
- Enforcement and sanctions:
 - Individuals denied access to public records may within five days of receiving notice of the denial file suit in any superior court of the state, which has the authority to order disclosure.
 - ▶ The law does not dictate a role for the Attorney General or an ombudsman or state agency for enforcement.
 - A successful plaintiff may be awarded attorneys' fees and litigation costs if the public agency acted in bad faith.²⁵⁰
 - Agencies may also be fined an amount not exceeding \$500 for each violation of the act.²⁵¹
- Exemptions:
 - Both mandatory and discretionary exemptions under the Freedom of Access Act exist throughout the statute.
 - ▶ The definition of "public records" found in Section 402 lists exemptions relating to medical and juvenile records, personal information, records relating to security, and those that are statutorily mandated to be kept confidential.
 - Many other statutory exemptions exist throughout the various titles of the Maine Revised Statutes.²⁵²

- ▶ Sections 431 – 434 of the Freedom of Access Act detail a process and provide a timetable for reviewing exemptions that exist within the state's code.
- The Maine Supreme Court has no authority to derive exemptions, only to interpret them. The court has held that exemptions are to be narrowly construed in favor of disclosure.²⁵³
- Though the act does not explicitly require all agencies redact records and release the public information from all otherwise confidential records, the Maine Supreme Court has held that such action would be appropriate.²⁵⁴
- Electronic Records:
 - Electronic records are covered under the act.
 - ▶ Both e-mails and software are considered public records.
 - Obtaining a tailored search or format may be possible depending on the record and the agency.
 - ▶ Custodians are permitted to charge costs for any personnel time necessary to comply with requests.
 - Maine uses a website called *InforME: The Information Resource of Maine* to provide the public with a resource for public records. It was designed to be "a self-supporting and cost-effective electronic gateway to provide and enhance access to the State's public information for individuals, businesses, and other entities." As such, the site may charge for providing certain information.²⁵⁵
- Money-Making:
 - The statute does not limit the commercial use of public records.

248 1 M.R.S.A. § 408(3).

249 1 M.R.S.A. § 408(4).

250 1 M.R.S.A. § 409.

251 1 M.R.S.A. § 410.

252 See the state legislature's website for a complete list of statutes: www.maine.gov/legis/

253 *Doe v. Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 699 A.2d 422 (Me. 1997).

254 *Blethen Maine Newspapers v. State of Maine*, 2005 ME 56, ¶ 38, 871 A.2d 523.

255 1 M.R.S.A. § 533.

Maryland

Public Information Act

Codes: Md. Code Ann., State Gov't §§ 10-611 to 10-628

Relevant Court Cases: *Belt v. Prince George's Co.*, 73 Md. 289, 20 A. 982 (1890); *Faulk v. State's Attorney*, 299 Md. 493, 506, 474 A.2d 880, 887 (1984); *A. S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068 (1983); *See Superintendent v. Henschen*, 279 Md. 468, 473, 369 A.2d 588, 561 (1977); *Office of The Governor v. Washington Post Co*, 360 Md. 520, 534-35, 759 A.2d 249 (2000); *The Baltimore Sun v. Mayor & City Council of Baltimore*, 359 Md. 653, 755 A.2d 1130 (2000)

Prior to the enactment of Maryland's Public Information Act in 1970, only persons who demonstrated an actual or legal interest retained the statutory and common law right to access public records. The federal government's adoption of the Freedom of Information Act prompted Maryland to codify its own statute. Using Colorado and Wyoming statutes as models, the state legislature passed what now provides the public with access to open records.

- Who may request records and for what purpose:
 - Any person, including partnerships, firms, associations, government bodies, and other entities, may request access to public records.
 - ▶ Those who are “persons of interest” may receive greater access to certain records, such as personnel records, that are exempt from disclosure to the general public.²⁵⁶
 - The Public Information Act does not restrict access to records based on the purpose of the request.
 - The subsequent use of information obtained may be restricted in specific circumstances. For example:
 - ▶ “A custodian shall permit inspection, use, or disclosure of a circulation record of a public library only in connection with the library's ordinary business and

²⁵⁶ § 10-616(i), (k).

only for the purposes for which the record was created.”²⁵⁷

- ▶ Custodians must give county auditors access to records, but the county official may not disclose information which would identify the person of interest.²⁵⁸
- ▶ Attorneys who request police reports related to traffic accidents, pending criminal charges, or traffic citations filed within the Maryland Automated Traffic System may not disclose the records to solicit legal services.²⁵⁹
- Whose and which records are covered under the act:
 - The act broadly defines public records and those who must disclose them:
 - ▶ “Public record” means the original or any copy of any documentary material... made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business.”²⁶⁰
 - Records of the executive branch and the executives themselves are subject to the act.²⁶¹
 - This definition encompasses the legislative branch, as well.
 - The judicial branch is also subject to the act. Common law has solidified the notion that courts may not seal records without an explicit statutory provision authorizing such action.²⁶²
 - The courts have held that non-governmental bodies which receive public

²⁵⁷ § 10-616(e)(2).

²⁵⁸ § 10-616(g)(3).

²⁵⁹ § 10-616(h)(2).

²⁶⁰ § 10-611(g).

²⁶¹ *Office of The Governor v. Washington Post Co*, 360 Md. 520, 534-35, 759 A.2d 249 (2000).

²⁶² *The Baltimore Sun v. Mayor & City Council of Baltimore*, 359 Md. 653, 755 A.2d 1130 (2000).

funding such that they are deemed an agent of the state are subject to the act.²⁶³

- Non-governmental bodies which receive no public funding may also be covered if they perform a public function, are controlled by the government, or are immune from tort liability.²⁶⁴
- If no agreement exists between the parties involved, an interstate entity is not subject to the Public Information Act.²⁶⁵
- The definition of public records lists several forms which are covered, including computerized records, tapes, films, maps, and others.
 - ▶ A “digital photographic image or signature of an individual, or the actual stored data thereof, recorded by the Motor Vehicle Administration,” however, is not included.²⁶⁶
- Generally all records available for inspection are also available for copying, which should occur under the supervision of the custodian at the location where the record is stored unless the agency lacks the necessary facilities.²⁶⁷
 - ▶ A person does not have the right to request in which format the agency provides a copy.
- Fees and costs:
 - Custodians may charge “reasonable” fees for searching for, preparing, and reproducing a requested record.²⁶⁸
 - ▶ Custodians may not charge for the first two hours of staff time.
 - ▶ Custodians may charge for providing facilities and supervision.
 - Laws that mandate specific fees for records supersede this act.

- Section 10-621(e) allows custodians to waive fees after considering “the ability of the applicant to pay the fee and other relevant factors.”

- The Maryland Court of Special Appeals clarified this vague provision by outlining certain factors custodians should take into consideration:

- ▶ The benefits to the public in making certain information available.
- ▶ The effect the fee may have on a requester’s First Amendment rights.²⁶⁹

- Enforcement and sanctions:

- Any person who has been denied access to public records may file a complaint in the county circuit court either where the complainant resides or where the record is located.
- The court may order the agency to produce the record and award attorneys’ fees and litigation costs, as well as actual damages, to a prevailing plaintiff.²⁷⁰
- Additionally, the court may send a copy of its findings to the public agency which employs the custodian.

- Exemptions:

- The Public Information Act provides four categories of exemptions.
 1. Section 10-615 exempts all records that are excluded by state or federal law or a rule or order of a Maryland Court of Appeals.²⁷¹
 2. Sections 10-616 and 10-617 exempt specific records and specific information, respectively.
 3. Section 10-618 gives custodians the discretion to exempt certain parts of records if they believe disclosure would be against the public interest.

263 *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975).

264 *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068 (1983)

265 *C.T. Hellmuth v. Washington Metro Area Trans. Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976).

266 § 10-611(g).

267 § 10-620.

268 § 10-621.

269 *Mayor of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683 (1985), *cert. denied*, 300 Md. 118, 507 A.2d 631 (1986); 81 Op. Att’y Gen. 25, 27-28 (1996).

270 § 10-623.

271 Local ordinances or regulations are insufficient to merit an exemption to the Public Information Act. See *Police Patrol Security Systems v. Prince George’s County*, 378 Md. 702, 710, 713-15, 838 A.2d 1191 (2003).

4. Section 10-619 allows custodians to temporarily deny access to entire records if they believe that releasing them would cause harm to the public. The custodian would then petition the courts to continue to withhold the documents.
- Because the Public Information Act does not override any state or federal statute that prohibits the disclosure of certain documents, many statutory exemptions exist throughout the Maryland Code.²⁷²
 - Segregable portions of otherwise exempt material may be provided if the cost to the agency is not too burdensome.²⁷³
- Electronic Records:
 - The act explicitly covers electronic records.
 - ▶ E-mails are treated as any other form of public records.
 - ▶ Information system software, with the exception of the portions which are related to security, are subject to disclosure.²⁷⁴
 - Public agencies are not required to provide records in any particular format upon request, though it is encouraged if the task would not be burdensome.
 - The Public Information Act does not establish separate provisions for fees for providing public records in an electronic format. The same guidelines apply.
 - Money-Making:
 - The act stipulates that the “reasonable fees” bear a “reasonable relationship to the recovery of actual costs incurred by a governmental unit.” In addition, agencies’ inability to charge for the first two hours of personnel time likely prevents profits from the sale of public records.
 - The commercial use of public records by private individuals is restricted under specific circumstances. For example:
 - ▶ As mentioned, attorneys may not use police reports concerning traffic accidents or citations or pending criminal charges to solicit services.
 - ▶ In general, those who access a record unavailable to others, such as student records,²⁷⁵ may not disclose the information therein, for commercial or any other purpose.

²⁷² See the state legislature’s site for the complete code:
<http://mlis.state.md.us/>

²⁷³ § 10-614(b)(3)(iii).

²⁷⁴ § 10-617(g).

²⁷⁵ § 10-616(k).

Massachusetts

Public Records Law

Codes: G.L. c. 4, § 7, cl. 26; G.L. c. 66; 950 CMR 32:01, et seq.

Relevant Court Cases: *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61, 354 N.E.2d 872, 876 (1976); *Pottle v. School Committee of Braintree*, 395 Mass. 861, 482 N.E.2d 813 (1985); *Attorney General v. Assistant Commissioner of Real Property Dep't of Boston*, 380 Mass. 623, 404 N.E.2d 1254 (1980); *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 823 N.E.2d 375 (2005); *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 433 n.11, 446 N.E.2d 1051, 1055, n.11; *Babets v. Secretary of Executive Office of Human Services*, 403 Mass. at 230, 526 N.E.2d 1261 (1988); *District Attorney for Norfolk v. Flatley*, 419 Mass. 507, 646 N.E.2d 127 (1995); *General Elec. Co. v. Dep't of Env'tl. Prot.*, 429 Mass. 798, 801 (1999)

Traditions of open government date back to colonial times in Massachusetts. The first statutory provision was enacted in 1851 and established the public's right to access governmental documents. Revisions in the 1970s expanded public access to all documents that were not exempt by narrowly construed exceptions. Judicial decisions act to interpret the existing exceptions rather than creating common law exceptions. The provisions collectively referred to as the "Public Records Law" can be found in two chapters of the Massachusetts General Laws. Clause 26 of Section 7 in Chapter 4 defines the phrase "public records." Chapter 66 further details the procedures surrounding access to public records. Finally, these provisions are supplemented by the administrative regulations set forth in the Code of Massachusetts Regulations. Overall, these statutes are patterned after the federal Freedom of Information Act "in a general way."²⁷⁶

- Who may request records and for what purpose:
 - "Any person" may request access to public records.²⁷⁷ Though not specifically defined in this statute, this term likely includes non-residents of the state and foreigners.

²⁷⁶ *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 433 n.11, 446 N.E.2d 1051, 1055, n.11.

²⁷⁷ G.L. c. 66, § 10(a).

- The requester's purpose is immaterial. Custodians may not inquire as to the intended use of the public record.²⁷⁸
 - ▶ Commercial use is not prohibited.
- The law does not restrict the subsequent use of public information.
- Whose and which records are covered under the act:
 - The Public Records Law covers materials "made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth, or of any political subdivision thereof, or of any authority established by the [Legislature] to serve a public purpose."²⁷⁹
 - At the state level, this definition includes records of the executive branch. At the county and municipal levels, the definition encompasses all records, except those which are statutorily exempt.
 - ▶ The executives themselves are covered under the act. Common law has not recognized the doctrines of an executive privilege or a deliberative process privilege.²⁸⁰
 - ▶ However, "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency" are exempt. Once the deliberative process is complete and the policy decided, the working documents are public.²⁸¹
 - Legislative records are exempt.²⁸²

²⁷⁸ 950 CMR 32:05(5).

²⁷⁹ G.L. c. 4, § 7, cl. 26.

²⁸⁰ *Babets v. Secretary of Executive Office of Human Services*, 403 Mass. at 230, 526 N.E.2d 1261 (1988); *District Attorney for Norfolk v. Flatley*, 419 Mass. 507, 646 N.E.2d 127 (1995).

²⁸¹ G.L. c. 4, § 7, cl. 26(d).

²⁸² G.L. c. 66, § 18; *Westinghouse Broad. Co. v. Sergeant-At-Arms of General Court of Mass.*, 375 Mass. 179, 375 N.E.2d 1205 (1978).

- Courts not covered by the act, but nearly all court records are open based on First Amendment litigation and common law tradition.²⁸³
- The Public Records Law does not explicitly cover non-public entities that receive public funding. Courts have ruled that receiving public funds does not make a private body public.²⁸⁴
- Likewise, bodies whose members also serve as public officials are not considered public entities and are not covered under the act unless the group is appointed by the government.
- Case law offers differing views as to whether or not advisory boards and commissions are covered under the act. Such issues will likely be determined on a case-by-case basis.
- Public records include “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics.”²⁸⁵
- The law does not distinguish among records which are available for copying and which are limited to inspection.
- Fees and costs:
 - The law provides a schedule of fees which does not supersede any other statutory provisions relating to specific documents or departments. Custodians may not charge more than:
 - ▶ Twenty cents per page for photocopies of paper records,
 - ▶ Twenty-five cents per page for records contained on microfilm or microfiche, or
 - ▶ Fifty cents per page for computer printouts.²⁸⁶
 - ◊ Custodians are not required to provide more than one copy of the requested records.²⁸⁷
- For non-computerized records, agencies may charge a pro-rated fee for the personnel costs incurred searching for and segregating public records. This fee should be “based on the hourly rate of the lowest paid employee capable of performing the task.”²⁸⁸
- Regulations encourage, but do not require, custodians to waive fees for accessing public records “where disclosure would benefit the public interest.”²⁸⁹
- Custodians must provide requesters with an estimate where total fees exceed 10 dollars.²⁹⁰
- Enforcement and sanctions:
 - Massachusetts has established the role of the Supervisor of Public Records as an administrative official within the office of the Secretary of the Commonwealth.
 - Individuals denied access to public records should appeal to the Supervisor of Public Records. The Supervisor has the discretion to review cases and may refuse to accept an appeal under certain circumstances:
 - ▶ If the records in question are under dispute in pending litigation, mediation, or administrative hearings;
 - ▶ If the Supervisor believes the request was meant to “harass, intimidate or assist in the commission of a crime;” or
 - ▶ If the request for records is solely for commercial purposes.²⁹¹
 - The Supervisor has the authority to order a custodian to comply with a request and disclose the documents. If the custodian does not comply, the Supervisor may report the case to the Attorney General or District Attorney.²⁹² The Attorney General then decides whether or not to pursue action and which measures may be necessary to assure compliance.
 - Should the requester appeal the agency’s decision in court the Supreme Judicial

283 *Commonwealth v. Doe*, 420 Mass. 142, 648 N.E.2d 1255 (1995).

284 *Bello v. South Shore Hospital*, 384 Mass. 770, 775, 429 N.E.2d 1011 (1981).

285 G.L. c. 4, § 7, cl. 26; 950 CMR 32:03.

286 950 CMR 32:06(1).

287 950 CMR 32:05(6).

288 950 CMR 32:06(1)(c).

289 950 CMR 32:06(5).

290 950 CMR 32:06(2).

291 950 CMR 32:08(2).

292 G.L. c. 66, § 10(b), 950 CMR 32:09.

- Court or Superior Court has the authority to order compliance, as well.²⁹³
- The law prescribes a fine not exceeding \$20 for each month the public officer “refuses or neglects to perform any duty required of him.”²⁹⁴
 - Exemptions:
 - Exemptions are specific. Several are clearly mandatory while the language of the law leaves some discretionary.
 - The definition of “public records” found in the 26th clause of Section 7 from Chapter 4 in the Massachusetts General Laws specifically describes 18 types of records which are not considered public.
 - ▶ Some of these include trade secrets, personal information, security and safety measures, medical records, and other materials required to be kept confidential by other statutes.
 - Because other statutory exemptions override the Public Records Law, various exemptions related to specific industries or professions may be found throughout the Massachusetts General Laws.²⁹⁵
 - The courts recognize common law privileges, such as the attorney-client privilege; however, common law precedent does not constitute an exemption from the Public Records Law.²⁹⁶
 - Agencies must segregate confidential material and provide requesters with the information which is public.
 - Electronic Records:
 - The statute does not explicitly discuss electronic records in depth, though records in electronic format are not exempt from the act.
 - ▶ E-mail is public and treated similarly to other paper documents.
 - ▶ Software remains unaddressed by the statute and case law.
 - If the agency maintains records in paper and electronic format, the requester may choose which format he/she prefers. Custodians, at their discretion, may comply with requests for customized searches and provide tailored documents.
 - Agencies may charge requesters the amount of the actual cost resulting from the use of computers.²⁹⁷
 - Money-Making:
 - ▶ Commercial use of public information is not prohibited.

293 G.L. c. 66, § 10(b).

294 G.L. c. 66, § 15.

295 See the state legislature’s website for a complete copy of the code: www.mass.gov/legis/laws/mgl/

296 *General Elec. Co. v. Dep’t of Env’tl. Prot.*, 429 Mass. 798, 801 (1999).

297 950 CMR 32:06(l)(e).

Michigan

Freedom of Information Act

Codes: Mich. Comp. Laws Ann. §§ 15.231 -.246

Relevant Court Cases: *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889); *Nowack v. Auditor Gen.*, 243 Mich. 200, 219 N.W. 749 (1928); *Proctor v. White Lake Twp. Police Dep't*, 248 Mich. App. 457, 639 N.W.2d 332 (2001); *Cashel v. Smith*, 117 Mich. App. 405, 324 N.W.2d 336, 338 (1982); *State Employees Ass'n v. Dep't of Management and Budget*, 428 Mich. 104, 404 N.W.2d 606 (1987); *Mullin v. Detroit Police Dep't*, 133 Mich. App. 46, 348 N.W.2d 708 (1984); *Tobin v. Michigan Civil Service Commn.*, 98 Mich. App. 604, 296 N.W.2d 320 (1980), *aff'd*, 416 Mich. 661, 331 N.W.2d 184 (1982); *Farrell v. City of Detroit*, 209 Mich. App. 7, 530 N.W.2d 105 (1995)

Common law right to access public information dates back to 1889. The enactment of Michigan's Freedom of Information Act in 1977 codified the open records law in sections 15.231 – 15.246 of the Michigan Compiled Laws Annotated. Courts have since interpreted the statute as favoring disclosure with narrowly construed exemptions. The statute also provides courts the authority to assess punitive damages against agencies which wrongfully and arbitrarily deny access to public records.

- Who may request records and for what purpose:
 - The Michigan Freedom of Information Act allows “any person” to request access to public records. Section 15.232 defines “person” as “an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity.
 - Inmates, however, are excluded from this definition and have restricted access to governmental records.
 - The purpose of the request is immaterial. The requester need not justify his/her interests or state the intended use of the information.²⁹⁸

²⁹⁸ *State Employees Ass'n v. Dep't of Management and Budget*, 428 Mich. 104, 404 N.W.2d 606 (1987).

- The subsequent use of public records is unrestricted.²⁹⁹
- Whose and which records are covered under the act:
 - The act covers every “state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government” as well as every “county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.”³⁰⁰
 - While most offices of the executive branch are covered, the act specifically excludes the office and employees of the governor and lieutenant governor and the governor and lieutenant governor themselves.³⁰¹
 - The legislative branch is also covered, though the state legislators themselves are exempt.³⁰²
 - The judiciary branch is exempt in its entirety.³⁰³
 - The act covers “[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority.”
 - ▶ Court rulings have indicated that the term “funded” does not include public money paid in exchange for goods or services.³⁰⁴
 - The act defines public records as any “writing prepared, owned, used, in the possession of, or retained by a public body

²⁹⁹ *Mullin v. Detroit Police Dep't*, 133 Mich. App. 46, 348 N.W.2d 708 (1984).

³⁰⁰ MCLA § 15.232(d).

³⁰¹ MCLA § 15.232(d)(i).

³⁰² 1985-86 Op. Att'y Gen. No. 6390 (1986).

³⁰³ MCLA § 15.232(d)(v).

³⁰⁴ *Breighner v. Michigan High School Athletic Ass'n*, 471 Mich. 217, 683 N.W.2d 639 (2004).

in the performance of an official function, from the time it is created.”³⁰⁵

- ▶ “Writing” is further defined to encompass multiple forms of media “or other means of recording or retaining meaningful content.”³⁰⁶
- All records open to inspection are also available for copying. Whereas some states make an exception when the task would be burdensome due to the volume of the record requested, the Attorney General has opined that such a circumstance does not constitute an exemption.³⁰⁷
- Fees and costs:
 - The Michigan Freedom of Information Act authorizes agencies to charge individuals requesting access to public records. Costs may include:
 - ▶ The actual cost of mailing,
 - ▶ The incremental cost of reproducing records,
 - ▶ The labor costs associated with searching for the records, and
 - ▶ The labor costs associated with segregating exempt material from public information.
 - ◆ The latter two costs may only be passed onto the requester if the costs would be “unreasonably high” for the agency.³⁰⁸
 - ◆ The cost of labor may not exceed the hourly salary of the lowest paid employee capable of performing the task.
 - ◆ The agency must produce the requested records using the most economical means available.
 - The fee provisions in the act do not supersede any other existing fee schedules found in other statutes within the Compiled Laws.

- Fee waivers may occur under two circumstances:

1. The first \$20.00 must be waived if the requester presents an affidavit proving he/she receives public assistance or demonstrating inability to pay the charges “because of indigency.”
2. Custodians may waive fees if providing copies at a reduced or no charge would benefit the general public.³⁰⁹

- Enforcement and sanctions:

- If denied access to a record, the requester has two options:
 1. Submit an appeal to the head of the public agency, or
 2. Pursue action in the circuit court with jurisdiction over the requester’s place of residence or business or the location of public agency within 180 days of denial.
 - ▶ If the appeal submitted to the head of the agency is again denied, the requester may choose to file action in court.
- The statute prescribes no role for the Attorney General, and ombudsman, or any particular enforcement agency or commission.
- Sanctions against agencies which wrongfully deny access to public records may include attorneys’ fees and litigation costs.
- Additionally, if the court finds that the custodian acted arbitrarily or capriciously, it may levy punitive damages up to \$500 and award the amount to the successful plaintiff.
- Public bodies which prevail in court may also recoup litigation costs.³¹⁰

- Exemptions:

- The act contains numerous specific and discretionary exemptions enumerated in Section 15.243.
 - ▶ Categories include personal information, law enforcement records, medical files, trade secrets, and preliminary drafts.

305 MCLA § 15.232(e).

306 MCLA § 15.232(h).

307 1979-80 Op. Att’y Gen. 255, 267 (1979).

308 MCLA § 15.234.

309 MCLA § 15.234(1).

310 MCLA § 15.240.

- ▶ Many of these exemptions resemble those found in the federal Freedom of Information Act, and the courts have turned to the federal statute to interpret the state's counterpart.
- The statute also includes a general, "catch-all" exemption that ensures the confidentiality of other records made exempt by other statutory provisions throughout the state code.³¹¹
- The act gives the courts the power to create common law exceptions by exempting "privilege[s] recognized by statute or court rule."³¹²
- Public agencies must provide segregable portions of exempt materials and may only charge for the personnel cost associated with the task if it would represent an unreasonably high cost to the agency.³¹³
- Electronic Records:
 - The Michigan Freedom of Information Act does cover electronic records.
 - ▶ While e-mail is not specifically addressed by the statute or case law, it is likely covered, as well.
 - ▶ Software, however, specifically excluded from disclosure requirements.³¹⁴
- The requester may choose a format for receiving records if more than one format is available.
- The statute has no separate provisions for fees related to electronic records. Charges will be assessed uniformly for all types of records.
- Money-Making:
 - Public agencies may charge rates that exceed the direct costs of reproducing records only if such a schedule of fees is statutorily prescribed.
 - Private individuals' use of public records is unrestricted. Individuals may use public information for commercial purposes.

311 See the state legislature's website for the complete code: www.legislature.mi.gov

312 MCLA § 15.243(h).

313 MCLA § 15.244(l).

314 MCLA § 15.232(e), (f).

Minnesota

Minnesota Government Data Practices Act

Codes: Minn.Stat. § 13.01, et seq.

Relevant Court Cases: *Star Tribune Co. v. Minnesota Bd. of Regents*, 683 N.W.2d 274, 283 (Minn. 2004); *Navarre v. South Washington Schools*, 652 N.W.2d 9, 25 (Minn. 2002); *Demers v. City of Minneapolis*, 468 N.W.2d 71 (Minn. 1991); *Northwest Publications Inc. v. City of Bloomington*, 499 N.W.2d 509, 511 (Minn. Ct.App. 1993)

The Minnesota Government Data Practices Act, found in Chapter 13 of the Minnesota Statutes, “establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.”³¹⁵ Relatively few court cases address the topic of open records. The statute provides some of the highest possible monetary sanctions against those who willfully violate its provisions, authorizing courts to assess damages up to \$15,000.

- Who may request records and for what purpose:
 - Any “person” may request public records. The term “person” includes “any individual, partnership, corporation, association, business trust, or a legal representative of an organization.”³¹⁶
 - Requesters are not required to state the purpose of the request. The only circumstance under which the purpose of the request may be material is if the courts decide to take this factor under consideration when balancing privacy rights against the public interest in disclosure.
 - The subsequent use of records is unrestricted. In fact, the law recognizes that commercial use may be the intent of the request without prohibiting that purpose.
- Whose and which records are covered under the act:
 - The act encompasses state agencies, defined as “any office, officer, department, division,

bureau, board, commission, authority, district or agency of the state,” along with all political subdivisions, including cities; towns; school districts; and “any board, commission, district or authority created pursuant to law.”³¹⁷

- This definition encompasses the executive branch, as well as the executives themselves.
- The legislative branch, however, is excluded from the act.
 - ▶ After a controversial discovery in 1993 regarding personal use of long-distance telephone cards funded by the state, new legislation was enacted to make those specific records public.³¹⁸
- The courts are not governed by the Michigan Government Data Practices Act, but rather the Rules of Public Access to Records of the Judicial Branch. The Rules generally favor disclosure but exempt several categories of records that would constitute an undue invasion of privacy.
- The act covers nonprofit organizations which is either
 - ▶ “A community action agency organized pursuant to the Economic Opportunity Act of 1964 (Public Law 88-452) as amended, to qualify for public funds, or
 - ▶ Any nonprofit social service agency which performs services under contract to a government entity, to the extent that ...[it] collects, stores, disseminates, and uses data on individuals because of a contractual relationship with a government entity.”³¹⁹
- Rather than defining “records,” the act refers to “government data,” which encompasses “all data collected, created, received, maintained or disseminated by any government entity.”³²⁰

317 Minn.Stat. § 13.02, subd. 17, 11.

318 Minn.Stat. § 10.46.

319 Minn.Stat. § 13.02, subd. 11.

320 Minn.Stat. § 13.02, subd. 7.

315 Minn.Stat. § 13.01, subd. 3.

316 Minn.Stat. § 13.02, subd. 10.

- The act includes all data, regardless of format or physical characteristics.
- Agencies must keep data “in such an arrangement and condition as to make them easily accessible for convenient use,” and all which is available for inspection is also available for copying.³²¹
- Fees and costs:
 - The act does authorize agencies to levy fees for providing reproductions of public data. Agencies may not, however, charge persons for inspecting public records.³²²
 - Custodians may charge the actual cost of duplication, including the personnel costs associated with searching for and retrieving the data.
 - ▶ The custodian may not, however, charge for separating confidential data from public records.
 - ▶ The act does provide one very specific limitation: for requests of fewer than 100 pages of letter or legal sized paper in black and white, charges are limited to 25 cents per page.³²³
 - Custodians may charge an additional “reasonable fee” if the requested data “has commercial value and is a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, database, or system developed with a significant expenditure of public funds by the government entity.” The public agency must be able to justify the fee, which should be related to the actual costs of developing the information.³²⁴
 - The statute contains no provisions for fee waivers or reductions.

- Enforcement and sanctions:
 - Anyone denied access to data may seek an opinion from the Commissioner of Administration. Public agencies are not bound by these opinions, but courts must defer to them in any proceedings regarding the request.³²⁵
 - Individuals aggrieved by public agencies’ decisions may also pursue action in district court. The courts have the authority to do any or all of the following:
 - ▶ Provide injunctive relief by issuing an order requiring disclosure,
 - ▶ Award attorneys’ fees and costs to the prevailing plaintiff,
 - ▶ Award damages between \$1,000 and \$15,000,
 - ▶ Assess a civil penalty up to \$1,000 against the agency for willful violations of the act.³²⁶
 - Moreover, the act states, “Any person who willfully violates the provisions of this chapter or any rules adopted under this chapter is guilty of a misdemeanor. Willful violation of this chapter by any public employee constitutes just cause for suspension without pay or dismissal of the public employee.”³²⁷
 - Public employees and agencies are immune from liability if they act in accordance with an opinion of Commissioner of Administration or follow the guidelines in Subsections 4-6 of Section 13.08.
- Exemptions:
 - The Minnesota Government Data Practices Act contains numerous specific exemptions from its broad definition of “government data.”
 - Many records containing private, personal information are accessible only to the person of interest within the record. Other records are inaccessible to all.
 - The act provides several categories of exempt material, including educational,

321 Minn.Stat. § 13.03, subd. 1, 3.

322 Minn.Stat. § 13.03, subd. 3(a).

323 Minn.Stat. § 13.03, subd. 3(c).

324 Minn.Stat. § 13.03, subd. 3(d).

325 Minn.Stat. § 13.072.

326 Minn.Stat. § 13.08.

327 Minn.Stat. § 13.09.

public health, medical, investigatory, and security-related data. These exemptions are found between Subsections 13.10 and 13.90.³²⁸

- As the act does not supersede any other statutory exemption, many are found throughout the Minnesota Statutes. The Government Data Practices Act often cites the sections under which exemptions related to each category may be found.
- Beyond the permanent, specific exemptions, Section 13.06 provides a general, but temporary, exemption. A public agency must apply to the Minnesota Department of Administration to receive permission to keep data private until the legislature has time to address the type of data under request. The Commissioner of Administration has 45 days to grant or reject the application.
- Electronic Records:
 - The act covers electronic records which contain government data.
 - ▶ Because the act addresses data, rather than records themselves, e-mails are presumably covered if they contain government data.
 - ▶ Software is exempt and treated as a trade secret if the public agency has patented it. Otherwise, agencies may charge additional fees to cover the cost of developing the program.

- If agencies maintain data in an electronic format, a person has the right to request a copy of the data in that format if the agency “can reasonably make the copy or have a copy made.”³²⁹

- Fees for data provided in electronic form are assessed in the same manner as other forms of records. Agencies may charge for the actual costs of searching for and retrieving and transmitting the copies of the data. Personnel time may be included, though the time spent separating confidential data from public data is not.

- ▶ If a person requests a customized search, additional fees for searching and retrieving the records may apply.

- ▶ If the data has commercial value, a reasonable, justifiable fee may be added.

- Money-Making:

- Public agencies may charge a reasonable fee for providing data of commercial value; however, the law specifies that this fee must “relate to the actual development costs of the information.”³³⁰

- Commercial use by individuals is permitted.

328 See www.revisor.mn.gov/statutes/?id=13 for the list and content of subsections.

329 Minn.Stat. § 13.03, subd. 3(e).

330 Minn.Stat. § 13.03, subd. 3(d).

Mississippi

Public Records Act

Codes: Miss. Code Ann. § 25-61-1 et seq.

Relevant Court Cases: *Logan v. Mississippi Abstract Co.*, 190 Miss. 479, 200 So. 716 (1941); *W. T. Rawleigh Co. v. Hester*, 190 Miss. 329, 200 So. 250, 254 (Miss. 1941); *Pollard v. State*, 205 So. 2d 286, 288 (Miss. 1967); *In re Coleman*, 208 F. Supp. 199, 201 (S.D. Miss. 1962), *affd.* 313 F.2d 867 (5th Cir. 1963); *Delta Democrat Times v. Greenville*, 13 Media L. Rptr. 1653 (Washington County Chancery Ct., 1986); *Roberts v. Miss. Republican Party State Executive Comm.*, 465 So. 2d 1050 (Miss. 1985)

Common law access to public records dates back to court decisions of 1941. It was not until forty years later, however, that the public's right to inspect and copy public records was codified in Chapter 61 of Title 25 in the Mississippi Code. Due to its relatively recent enactment and the availability of a commission to mediate disputes, case law interpreting the act is somewhat limited. Insight into the interpretation of the act primarily stems from opinions of the Attorney General.

- Who may request records and for what purpose:
 - The Mississippi Public Records Act grants “any person ... the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body.”³³¹
 - The purpose of the request is generally immaterial.
 - ▶ The purpose or identity of the person requesting records may affect access to those records when the person is the subject of those otherwise confidential records. These provisions may be found within clauses outside the Public Records Act that exempt certain materials from disclosure.
 - ◆ For example, the Department of Health's Bureau of Vital Statistics limits access to records to those who demonstrate a “legitimate and tangible interest.”³³²

331 § 25-61-5.

332 § 41-57-2.

- The subsequent use of public information is unrestricted.
- Whose and which records are covered under the act:
 - The act regulates the records of “public bodies” which are defined as “any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and any municipal corporation and any other entity created by the Constitution or by law...”
 - This definition covers executive and legislative agencies, as well as the courts.
 - ▶ However, executives, legislators, and judges themselves are exempt, as “the term ‘entity’ shall not be construed to include individuals employed by a public body or any appointed or elected public official.”³³³
 - ▶ Moreover, the act enables the legislature to adopt its own regulations for allowing access to public records.³³⁴
 - ▶ Though the courts are covered, certain statutes exempt the records developed among judges and between judges and their aides,³³⁵ as well as records among juries regarding judicial decisions.³³⁶
 - Bodies which receive public funding or are comprised of public officials are not subject to the act unless that entity was “created by the Constitution, or by law, executive order, ordinance or resolution.”³³⁷
 - The act defines “public records” as “all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, ... and any other documentary materials, regardless of physical form or characteristics,

333 § 25-61-3(a).

334 § 25-61-17.

335 § 9-1-38.

336 § 13-5-97.

337 § 25-61-3(a).

having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.”

- The lengthy, all-encompassing definition permits access to public information in any conceivable format or medium.
- All records open to inspection are also available for copying.
- Fees and costs:
 - The statute provides no specific limitation on fees but authorizes agencies to charge reasonable fees no greater than the actual cost of providing access to public records. These charges may include:
 - ▶ Personnel cost related to searching and reviewing records,
 - ▶ Direct cost of duplicating records, and
 - ▶ If applicable, the cost of mailing the records.³³⁸
 - In addition, agencies may charge for the time spent redacting confidential information from public records.³³⁹
 - The act does not provide for fee waivers, but the use of the word “may” implies that custodians have discretion in establishing a schedule of fees. Indeed, many records are available online at no charge.
- Enforcement and sanctions:
 - Individuals denied access to public records may appeal to the Ethics Commission and request an opinion from the commission. The law is unclear as to whether opinions are binding on the agency, but the courts must take these into consideration should a dispute arise.
 - ▶ The Ethics Commission may also mediate disputes between agencies and requesters.³⁴⁰
 - ▶ The act provides no role for the Attorney General.

- Requesters may also pursue action in the chancery court in the county in which the public agency is located. The court may impose sanctions against any public agency found guilty of willfully violating the act including:

- ▶ An order to disclose the requested records,
- ▶ Reasonable litigation costs to the prevailing plaintiff, and
- ▶ A fine up to \$100.³⁴¹

- Exemptions:

- Exemptions under the Public Records Act are specific and mostly discretionary with the exception of the catch-all exemption that covers all records deemed confidential by “constitutional or statutory law or decision of a court of this state or the United States.”³⁴²
- Two other sections in the act enumerate specific exemptions:
 - ▶ Section 25-61-9 exempts trade secrets and other confidential financial and commercial data, records related to waste minimization plans under the Mississippi Comprehensive Multimedia Waste Minimization Act of 1990, and data processing software which the agency obtained pursuant to a licensing agreement.
 - ▶ Section 25-61-12 exempts personal information of law enforcement, judicial and prosecutorial personnel and that of victims of crimes.
- Many other statutory exemptions exist, as the act does not supersede other state or federal laws regarding open records. The state legislature’s website contains a link to the full state code which has provisions regarding other exemptions and privileges as they relate to specific types of records.³⁴³
- The courts also have the authority to create exemptions and order disclosure.

338 § 25-61-7(1).

339 § 25-61-5(2).

340 § 25-61-13.

341 § 25-61-15.

342 § 25-61-11.

343 See www.sos.ms.gov/education_and_publications_mscode.aspx for more information.

- Agencies must redact confidential information from records before releasing the public information.
- Electronic Records:
 - Electronic records are covered under the Public Records Act.
 - ▶ E-mail remains unaddressed in the statute's provisions.
 - ▶ Software is not a public record if obtained under a licensing agreement.
 - Persons may request a specific format if the agency maintains records in that format.³⁴⁴
 - Each agency has the discretion to establish its own schedule of fees “to reimburse it for the costs of creating, acquiring and maintaining [any] electronically accessible data.” When setting these charges, the public entity may consider the following:
 - ▶ The type of data requested,
 - ▶ The intended purpose of the request, and
 - ▶ The commercial value of the data.³⁴⁵
- Money-Making:
 - In general, the state must charge no more than the actual cost of providing access to public records. For electronic records, however, agencies are permitted to consider the commercial value of the information requested.
 - The Public Records Act does not prohibit private persons from using legally obtained public information for commercial purposes.

344 § 25-61-10(2).

345 § 25-61-7(2).

Missouri

Public Records Law; Sunshine Law

Codes: *Missouri Public Records Law*: Mo.Rev.Stat. §§ 109.180 – .190

Missouri Sunshine Law: Mo.Rev.Stat. §§ 610.010 – .035

Missouri Arrest Records Law: Law, Mo.Rev.Stat. §§ 610.100 – .126

Relevant Court Cases: *State ex rel. Board of Public Utilities of City of Springfield v. Crow*, 592 S.W.2d 285, 289 (Mo.Ct.App. 1979); *State ex rel. Gray v. Brigham*, 622 S.W.2d 734, 735 (Mo.Ct.App. 1981); *Tipton v. Barton*, 747 S.W.2d 325, 329 (Mo.Ct.App. 1988); *Remington v. City of Boonville*, 701 S.W.2d 804, 807 (Mo.Ct.App. 1985); *MacLachlan v. McNary*, 684 S.W.2d 534, 537 (Mo.Ct.App. 1984); *Missouri Protection and Advocacy Services v. Allan*, 787 S.W.2d 291, 294 (Mo.Ct.App. 1990); *Pulitzer Publishing Co. v. Missouri State Employees' Retirement System*, 927 S.W.2d 477 (Mo.Ct.App. 1996)

The Missouri code contains two statutes which regulate the public's access to government records. The Sunshine Law, followed by the Arrest Records Law, is found in Chapter 610 of the Missouri Revised Statutes. Originally enacted in 1973, the law states a policy intent of disclosure which has been supported and upheld by decades of case law. Chapter 109 contains the Missouri Public Records Law, which was enacted in 1961. This statute is more limited in scope and applies only to records which agencies are required by statute to keep. Though most records obtainable under the Public Records Law could be accessible through the Sunshine Law, the lack of exemptions found in the Public Records Law affects the likelihood of disclosure.

- Who may request records and for what purpose:
 - Under the Sunshine Law:
 - ▶ Any member of the public may request access to public records.³⁴⁶ The Sunshine Law does not restrict access based on citizenry.
 - Under the Public Records Law:
 - ▶ Only Missouri citizens are granted access to public records.³⁴⁷

346 Mo.Rev.Stat. §§ 610.010-.030.

347 Mo.Rev.Stat. § 109.180.

- Requesters' purpose is generally immaterial under both acts.
 - ▶ However, persons of interest may have greater access to certain records that are covered by other statutory exemptions outside the act.³⁴⁸
- The two acts do not restrict the subsequent use of public information.
 - ▶ Other statutory exemptions, however, limit the use of information. For example information from certain records governed by the Vital Records Law may be used only for "legitimate research purposes."³⁴⁹
- Whose and which records are covered under the act:
 - Under the Sunshine Law:
 - ▶ "Public governmental bodies" and "quasi-public governmental bodies,"³⁵⁰ which include the legislative and executive branches of state and local governments, as well as the governing bodies of institutions of higher learning which are supported by state funds, are covered.³⁵¹
 - ▶ The records of executives themselves are subject to the act, even those which are deliberative or preliminary in nature.³⁵²
 - ▶ The Sunshine Law also covers advisory boards and commissions and entities which do business in the state and are regulated by the provisions of Chapters 352, 353, or 355. If the organization's primary purpose is to perform "activities carried out pursuant to an agreement or agreements with public governmental bodies" or any other "public function,"

348 For example, see the Vital Records Act, Mo.Rev. Stat. § 193.245 -.246.

349 Mo.Rev.Stat. § 193.245(2).

350 Mo.Rev.Stat. § 610.011.

351 Mo.Rev.Stat. § 610.010(4)(a).

352 MacLachlan v. McNary, 684 S.W.2d 534, 537 (Mo. Ct.App. 1984).

the records relating to those activities are subject to the act.³⁵³

- ▶ The act was also amended to include any “bi-state development agency established pursuant to Section 70.370, RSMo.”³⁵⁴
- ▶ The physical form of the records is inconsequential, as the Sunshine Law covers all records, “whether written or electronically stored.”³⁵⁵
- ▶ Under the Public Records Law:
 - ▶ “[A]ll state, county and municipal records kept pursuant to statute or ordinance” are open to citizens of Missouri for inspection.³⁵⁶
 - ▶ The records of executives themselves and the legislative branch are covered only if statutes and ordinances require the requested records to be kept. Many records relating to the decision-making process are therefore likely exempt from disclosure.
 - ▶ The Public Records Law provides no restrictions based on the physical format of the information requested but simply refers to “records, documents or instruments.”³⁵⁷ However, courts have ruled that access to records under the Public Records Law is subject to “reasonable rules and conditions imposed by proper authorities.”³⁵⁸ If providing data in a particular medium is deemed unreasonable by the “proper authority,” access may not be granted.
- The Sunshine Law and the Public Records Law do not cover judicial records, except when the courts act in an administrative capacity.³⁵⁹ Other provisions apply:
 - ▶ Article 1, § 14 of the Missouri Constitution states that “the courts of justice shall be open to every person.””

353 Mo.Rev.Stat. § 610.010(4)(f).

354 Mo.Rev.Stat. § 610.010(4)(g).

355 Mo.Rev.Stat. § 610.010.

356 Mo.Rev.Stat. § 109.180.

357 Mo.Rev.Stat. § 109.190.

358 *State ex rel. Gray v. Brigham*, 622 S.W.2d 734, 735 (Mo.Ct.App. 1981).

359 Mo.Rev.Stat. § 610.010(4).

▶ Moreover, the courts have established a strong common law right of access to judicial records. The Missouri Supreme Court reaffirmed the public’s common law right to access court records “to ensure confidence in the impartiality and fairness of the judicial system, and generally to discourage bias and corruption in public service.”³⁶⁰

- ▶ The information identifying juveniles in court records, however, must be kept confidential.³⁶¹ Custodians of these records must redact this information before providing the public access to the remaining material.
- In general, all records open to inspection are available for copying under both acts and common law.
- Fees and costs:
 - Under the Sunshine Law, custodians may charge fees comprised of the following:
 - ▶ Ten cents per page for the direct materials cost,
 - ▶ An hourly charge not greater than the average hourly rate for clerical staff of the public entity for the time spent duplicating records,
 - ▶ The actual cost of research time.
 - ◆ Public agencies must provide copies at the lowest possible cost and must provide an estimate upon request.
 - ◆ Custodians may waive or reduce charges if doing so would serve the public interest “because it is likely to contribute significantly to public understanding of the operations or activities of the public governmental body and is not primarily in the commercial interest of the requester.”³⁶²
 - The Public Records Law vaguely states that a custodian may charge “a reasonable rate for his services ... and for the use of the room or place where the work is done.”³⁶³

360 *Pulitzer Publishing Co. v. Transit Casualty Co.*, 43 S.W.3d 293, 301 (Mo. banc 2001).

361 Mo.Rev.Stat. § 211.321.

362 Mo.Rev.Stat. § 610.026(1).

363 Mo.Rev.Stat. § 109.190.

- Enforcement and sanctions:
 - “Any aggrieved person, taxpayer to, or citizen of, this state, or the attorney general or prosecuting attorney” may file action in the circuit court of the county in which the public agency has its principal place of business under the Sunshine Law.³⁶⁴
 - The Sunshine Law imposes civil penalties in addition to attorneys’ fees not exceeding \$1,000 against those who knowingly violate the Law.³⁶⁵ The fine may reach \$5,000 for a *purposeful* violation.³⁶⁶
 - Under the Public Records Law, public officials guilty of violating the act may be subject to removal from office and guilty of a misdemeanor punishable by a fine of no more than \$100 and/or 90 days in the county jail.³⁶⁷
- Exemptions:
 - The Public Records Law provides no explicit exemptions. Court rulings have granted custodians the authority to adopt their own rules, which likely govern exceptions to disclosure under the Public Records Law.
 - Exemptions, which are narrowly construed by policy intentions found in the Sunshine Law and by traditions set forth through common law, are mostly discretionary and specific.
 - Section 610-021 authorizes 22 exemptions, including privileged communications, personnel and medical records, testing materials, and bidding information.
 - ▶ Two of these statutory provisions contain a sunset stipulation. Subsections 18 and 19, which both concern safety and security, will sunset December 31, 2012 unless reenacted by the legislature.
 - The Missouri Revised Statutes contain many other exemptions relating to specific categories found in their respective sections of the code.³⁶⁸
- Public agencies are required to provide public information separated from otherwise confidential material.³⁶⁹
- Electronic Records:
 - Missouri adopted Section 610.029 in 1993 to address the issue of electronic records. Amended in 2004, this provision encourages public agencies to provide access to records in electronic format and stipulates that a governmental agency may not enter into a contract that would consequently hinder access to records.
 - ▶ E-mail is treated as public.³⁷⁰
 - ▶ Software, however, may be exempt.³⁷¹
 - If records are kept in an electronic format, custodians must provide them in that format upon request.³⁷²
 - Agencies are authorized, but not required, to provide customized data searches.
 - Fees for providing electronic access to public records may include:
 - ▶ The direct material cost of any disk or other medium provided,
 - ▶ The personnel cost equal to the average rate of “for staff of the public governmental body required for making copies and programming,” and
 - ▶ The cost of programming if the request requires more programming than customary.³⁷³
- Money-Making:
 - No provision enables public agencies to account for commercial value in assessing fees for providing access to public records.
 - The use of public records by private individuals is not restricted by the Sunshine or Public Records Laws.

364 Mo.Rev.Stat. § 610.027(1).

365 Mo.Rev.Stat. § 610.027(3).

366 Mo.Rev.Stat. § 610.027(4).

367 Mo.Rev.Stat. § 109.180.

368 See the state legislature’s website for a complete copy of the code: www.moga.mo.gov/

369 Mo.Rev.Stat. § 610.024.

370 Mo.Rev.Stat. § 610.026.1(1).

371 Mo.Rev.Stat. § 610.021(10).

372 Mo.Rev.Stat. § 610.023(3).

373 Mo.Rev.Stat. § 610.026(2).

Montana

Public Records Act

Codes: Mont. Code Ann. § 2-6-101 – 112; Article II, § 9 of the Montana Constitution

Relevant Court Cases: *Engrav v. Cragun*, 236 Mont. 260, 769 P.2d 1224 (1989); *Missoulain v. Montana Twenty-first Judicial District Court*, 281 Mont. 285, 933 P.2d 829 (1997); *Great Falls Tribune Co. Inc. v. Day*, 289 Mont. 155, 959 P.2d 508 (1998); *Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002); *Becky v. Butte Silverbow District No. 1*, 274 Mont. 131, 906 P.2d 193 (1995); *Jefferson County v. Montana Standard*, 318 Mont. 173, 79 P.3d 805 (2003); *Svaldi v. Anaconda-Deer Lodge County*, 325 Mont. 365, 106 P.3d 548 (2005); *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 319 Mont. 38, 82 P.3d 876 (2003)

Montana enacted its first open records law in 1895, six years after achieving statehood. This law provided a statutorily guaranteed right to access public records. When the state legislature rewrote the Montana Constitution in 1972, this guarantee was elevated to a constitutional level. The courts now apply a balancing test to weigh the interest of disclosure against the interest of personal privacy.

- Who may request records and for what purpose:
 - Though the Public Record Act grants “every citizen” the right to inspect and copy public writings, the Montana Constitution states that no one “shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies.”³⁷⁴ Because the constitutional provision takes precedence over the state statute, the broader scope applies, and any person, regardless of citizenship, may request access to public records.
- The purpose of the request only matters if the requester must demonstrate a strong public interest that outweighs the interest of privacy.³⁷⁵
- The law does not restrict the subsequent use of public information.

- Whose and which records are covered under the act:
 - Rather than defining which entities are subject to the act, the Public Records Act broadly defines the term “public records” as “the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country, except records that are constitutionally protected from disclosure.”³⁷⁶
 - Records of the executive branch are covered by the state constitution and the Public Records Act unless otherwise specifically exempted.
 - ▶ Moreover, state law requires municipalities to make records available for public inspection with the exception of personal or medical records or “when the right to individual privacy or law enforcement security exceeds the merits of public disclosure.”³⁷⁷
 - The act contains no exemption for the legislative or judicial branches.
 - The Public Records Act remains silent as to whether or not nongovernmental groups must disclose their records to the public. The state constitution, however, provides access to records of public bodies as defined by the open meetings statute, which does include entities supported by public funding.³⁷⁸
 - Whether or not multi-state bodies or entities comprised of public officials are also subject to the act remains largely unaddressed and is likely decided on a case-by-case basis.
 - The format of the public records is immaterial.
 - Documents available for inspection are also available for copying.

³⁷⁴ Mont. Const. Art. II, § 9.

³⁷⁵ *Engrav v. Cragun*, 236 Mont. 260, 769 P.2d 1224 (1989).

³⁷⁶ Mont. Code Ann. § 2-6-101(2)(a).

³⁷⁷ Mont. Code Ann. § 7-1-4144.

³⁷⁸ Mont. Code Ann. § 2-3-203(1).

- Fees and costs:
 - The Public Records Act authorizes custodians to provide copies of public records “on payment of the legal fees for the copy” but does not establish a specific schedule of fees for print sources.³⁷⁹
 - However, if treated like non-print media, the fees are likely limited to reasonable or actual costs of reproducing the requested records.
 - In accordance with an executive order from the governor in 1996, state government agencies customarily charge 10 cents per page for copies of agency records.
 - The Public Records Act contains no provisions for mandatory fee waivers.
- Enforcement and sanctions:
 - Those denied access to records may appeal to the district court of the county where the custodian resides. The court or judge then has the authority to order the disclosure of the requested material.³⁸⁰
 - The Attorney General has no prescribed role but may issue advisory opinions interpreting and applying the statute.
 - Though the act provides no provisions for sanctions, any prevailing plaintiff who brings suit under Article II, Section 9 of the constitution may be awarded attorneys’ fees and litigation costs.³⁸¹
- Exemptions:
 - The Montana Constitution establishes a general standard for creating exemptions. It states that no person should be denied access to records unless “the demand of individual privacy clearly exceeds the merits of public disclosure.”³⁸²
 - ▶ As this provision requires a balancing test, this general exemption may be considered discretionary.
 - ▶ A wealth of case law has established a balancing test which first asks whether the person of interest had an expectation of privacy and then whether that expectation was reasonable. If the answer to either of those questions is no, then the information is open to the public. If the answer to both is yes, then the court must weigh the merits of privacy as opposed to disclosure.³⁸³
 - The Public Records Act specifically adds exceptions for “legitimate trade secrets” and “matters related to individual or public safety.”³⁸⁴
 - Many other exemptions exist throughout the state code and cover specific categories, such as adoption records (§ 40-8-126), criminal justice information (§§ 44-5-103 and 44-5-302), and insurance company auditing reports (§ 33-1-412).³⁸⁵
 - The Montana Supreme Court has yet to address whether or not public information in documents containing confidential material may be segregated, but the Attorney General has opined that non-exempt information should be made available under the Montana Criminal Justice Information Act.³⁸⁶
- Electronic Records:
 - Electronic information is covered and is treated like printed materials under the Public Records Act.
 - ▶ E-mail, though largely unaddressed, is presumably public.
 - ▶ The statute and case law likewise gloss over the openness of software. Whether it is public likely depends on its origin, purpose, and any applicable proprietary laws.
 - People may request and obtain customized searches or tailored formats of electronic information.

379 Mont. Code Ann. § 2-6-102(2).

380 Mont. Code Ann. § 2-6-107.

381 Mont. Code Ann. § 2-3-221.

382 Mont. Const. Art. II, § 9.

383 See *Great Falls Tribune Co. Inc. v. Cascade County*, 238 Mont. 103, 775 P.2d 1267 (1989); *Bozeman Daily Chronicle v. City of Bozeman Police Department*, 260 Mont. 218, 859 P.2d 435 (1993); *Jefferson County v. Montana Standard*, 318 Mont. 173, 79 P.3d 805 (2003).

384 Mont. Code Ann. § 2-6-102(3).

385 A complete copy of the Montana Code Annotated may be found from the state legislature’s website: http://data.opi.mt.gov/bills/mca_toc/index.htm

386 42 A.G. Op. 119 (1988).

- Fees for access to non-print public records may have five components:

1. The actual cost of the electronic media purchased and used for transferring the requested data if the requester does not provide the necessary media;
2. Charges to cover the expense of the mainframe;
3. Expenses resulting from providing online computer access to the public;
4. Other expenses directly incurred from providing information, such as the retrieval or reproduction of e-mail;
5. Personnel costs exceeding half an hour.³⁸⁷

- Money-Making:

- Section 2-6-109 of the Public Records Act prohibits public agencies from selling or distributing mailing lists without first obtaining permission from those on the list. However, this provision contains many exceptions, including lists of
 - ▶ Registered electors and new voter lists;
 - ▶ Names of employees governed by Chapter 31 of Title 39;
 - ▶ Those with driver's licenses or Montana identification cards;
 - ▶ People with professional or occupational licenses;
 - ▶ Persons certified as claims examiners.
- Public agencies are therefore permitted to raise revenues from the sale of these public databases.
- Individuals are not restricted in compiling and selling mailing lists after obtaining public information.³⁸⁸

387 Mont. Code Ann. § 2-6-110.

388 Mont. Code Ann. § 2-6-109(3).

Nebraska

Public Records Law

Codes: *Neb. Rev. Stat. § 84-712, et seq.*

Relevant Court Cases: *State ex rel. Griggs v. Meekes*, 19 Neb. 106, 26 N.W. 620 (1886); *Grein v. Board of Education*, 216 Neb. 158, 164, 343 N.W.2d 718 (1984); *State ex rel. Upper Republican Natural Resources District v. District Judges of the District Court for Chase County*, 273 Neb. 148, 728 N.W.2d 275 (2007)

Nebraska's Public Records Law, found in Section 712 of Chapter 84 in the Nebraska Revised Statutes, encompasses all branches of government at every level. A relatively brief statute in comparison to other states' open records laws, the Nebraska Public Records Law enumerates only 18 exemptions. However, many more exist throughout the state code.

- Who may request records and for what purpose:
 - Nebraska's Public Records Law allows "all citizens of this state, and all other persons interested in the examination of the public records,"³⁸⁹ to access public records.
 - In Nebraska statutes, the term "person" generally encompasses "bodies politic and corporate, societies, communities, the public generally, individuals, partnerships, joint stock companies, and associations."³⁹⁰
 - The purpose for the request is immaterial, and the subsequent use of records remains unrestricted.
- Whose and which records are covered under the act:
 - The act defines "public records" as "all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing."³⁹¹
 - This definition covers the executive, legislative, and judicial branches. Records, not public entities, may be exempt under statutes.

- Other than mentioning districts which receive public funding, the statute does not elaborate on whether private entities which are supported by the state are subject to the act.
- The statute also does not address whether multi-state or regional bodies or bodies whose members are also public officials are covered.
- All records in possession of the state, regardless of physical characteristics, are subject to disclosure unless otherwise exempt.
- Anyone may examine records and obtain copies using their own equipment or that of the public agency.³⁹²

- Fees and costs:

- The fees levied for the reproduction of public records depend on the medium in which they were produced. This section will discuss the print sources, with the fees for electronic records appearing further below.
- If a person is simply inspecting records or uses his/her own resources for making copies, no fee may be charged.³⁹³
- Custodians may charge reasonable fees which "shall not exceed the actual cost of making the copies available." This may include the material costs as well as personnel costs incurred in providing copies of public records.³⁹⁴
- Other statutes specify costs for certain records. For example, Section 71-612 outlines fees for certified copies of death, birth, and marriage certificates.
- If the cost of providing copies is likely to exceed \$50, the custodian may require an advance deposit prior to producing the copies.
- Veterans may obtain free certified copies of records related to claims before the the United States Department of Veterans Affairs.³⁹⁵

389 Neb. Rev. Stat. § 84-712 (Cum.Supp. 2004).

390 Neb. Rev. Stat. § 49-801(16) (Reissue 2004).

391 Neb. Rev. Stat. § 84-712.01(1) (Cum.Supp. 2004).

392 Neb. Rev. Stat. § 84-712(1), (2).

393 Neb. Rev. Stat. § 84-712.01(2) (Cum.Supp. 2004).

394 Neb. Rev. Stat. § 84-712(3)(b).

395 Neb. Rev. Stat. § 84-712.02 (Reissue 1999).

- ▶ Other than that, the act contains no provision to waive fees when it might satisfy the public interest.

- Enforcement and sanctions:

- Anyone denied access to records may bring a lawsuit against the public agency in the district court.³⁹⁶
- Alternatively, the requester may petition the Attorney General who will then have fifteen days to issue an opinion regarding the openness of the document in question. The Attorney General has the authority to order the agency to disclose the document. If the custodian still denies access to the material, the requester may file suit in trial court or demand that the Attorney General file suit.³⁹⁷
- The court may award a “substantially” prevailing plaintiff attorneys’ fees and costs.³⁹⁸
- Moreover, any custodian found in violation of the statute is guilty of a Class III misdemeanor and may be impeached or removed from office.³⁹⁹

- Exemptions:

- The 18 exemptions found in Section 84-712.05 of the Public Records Law are specific and discretionary.
- Categories of exemptions include personal information, medical and law enforcement records, trade secrets, and several others.
- Statutory provisions exempting other types of records may be found throughout the Nebraska Revised Statutes, and such clauses supersede the Public Records Law.⁴⁰⁰
- There are no case law exemptions to the act.
- When certain documents are exempt because they contain confidential information, agencies must provide any “reasonably segregable public portion.”⁴⁰¹

- Electronic Records:

- Electronic records are covered under the act, which specifically states that “[d]ata

which is a public record in its original form shall remain a public record when maintained in computer files.”⁴⁰²

- ▶ E-mail remains unaddressed by the statute and case law specifically, but the Attorney General has opined that communications between elected officials in the form of e-mails, faxes, and other electronic media, are public records.⁴⁰³

- ▶ Software is also unaddressed.

- Requesters may choose a format for receiving public records if the agency already keeps the information in that form.⁴⁰⁴ Persons may also obtain a customized search if the records are available online.

- Fees for providing access to electronic records are limited to the actual cost, which may include:

- ▶ The “actual cost of computer run time and the cost of materials for making the copy” for providing paper printouts of computerized data;

- ▶ The “actual cost of the computer run time, any necessary analysis and programming, and the production of the report in the form furnished to the requester” for electronic data; and

- ▶ An approved fee for any gateway service provided.⁴⁰⁵

- Custodians may also charge a reasonable fee for transmitting data to an outside modem. This charge may include the amortization costs of the computer system and software.⁴⁰⁶

- Money-Making:

- Public agencies may levy no fees unrelated to actual costs of providing access to public records.

- The statute does not prohibit the use of public information for commercial purposes by private individuals.

396 Neb. Rev. Stat. § 84-712.03 (Cum.Supp. 2004).

397 Neb. Rev. Stat. § 84-712.03(2) (Cum.Supp. 2004).

398 Neb. Rev. Stat. § 84-712.07 (Reissue 1999).

399 Neb. Rev. Stat. § 84-712.09 (Reissue 1999).

400 See the state legislature’s website for the complete code: <http://nebraskalegislature.gov/>

401 Neb. Rev. Stat. § 84-712.06 (Reissue 1999).

402 Neb. Rev. Stat. § 84-712.01 (Cum.Supp. 2004).

403 Neb. Op. Att’y Gen. 04007.

404 Neb. Rev. Stat. § 84-712(3).

405 Neb. Rev. Stat. § 84-712(3)(b)(ii),(iii).

406 Neb. Rev. Stat. § 84-712.01(2).

Nevada

Open Records Act

Codes: N.R.S. 239.001, *et seq.*

Relevant Court Cases: *State v. Grimes*, 29 Nev. 50, 84 P. 1064 (1906); *Mulford v. Davey*, 64 Nev. 506, 509, 186 P.2d 360 (1947); *DR Partners v. Board of County Comm'rs of Clark County*, 6 P.3D 465 (2000); *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *Neal v. Griepentrog*, 108 Nev. 660, 665, 837 P.2d 432 (1992); *City of Reno v. Reno Gazette Journal*, 19 Nev 55, 63 P3d 1147 (2003)

The common law right to access public records dates as far back as 1906 in Nevada, though the requester had to show some interest in the requested records at that time.⁴⁰⁷ Five years later, the state legislature passed the state's first open records act, which remains little changed today. Found in Chapter 239 under Title 19, the act enables courts and public agencies to utilize a balancing test to weigh the merits of disclosure.

- Who may request records and for what purpose:
 - The Open Records Act allows “any person” to request access to records.⁴⁰⁸
 - Generally the purpose of the request does not affect that person's right to access records. Reporters, however, are statutorily entitled to greater access to records regarding criminal history “for communication to the public.”⁴⁰⁹
 - The act does not restrict the subsequent use of any public information provided.
- Whose and which records are covered under the act:
 - The Open Records Act defines “governmental entity” as the following:
 - ▶ “An elected or appointed officer of this State or of a political subdivision of this State;
 - ▶ An institution, board, commission, bureau, council, department, division, authority or other unit of government of

this State or of a political subdivision of this State;

- ▶ A university foundation, as defined in NRS 396.405; or
- ▶ An educational foundation, as defined in NRS 388.750, to the extent that the foundation is dedicated to the assistance of public schools.”⁴¹⁰
- This definition does not exempt the legislative, executive, or judicial branches.
- The act vaguely covers “all public books and public records of a governmental entity” without defining the terms “public books” or “public records.” These terms may therefore be construed to include all that is not specifically exempted by the act, other statutes, or court orders.
 - ▶ The physical format is likely immaterial.
 - ▶ The public has the right to inspect and copy records.
- Fees and costs:
 - Sections 239.052 – 239.055 authorize custodians to charge fees for providing copies of public records.
 - In general, agencies may not charge more than the actual cost of a copy of the record, and agencies must post a schedule of fees where requesters may view it.
 - Additional fees may be charged under the following circumstances:
 - ▶ The request is for a transcript of an administrative proceeding which was transcribed by a certified court reporter.
 - ▶ The request requires “extraordinary use of [the agency's] personnel or technological resources.”
 - Agencies may adopt a policy to waive or reduce fees at its discretion.

⁴⁰⁷ *State v. Grimes*, 29 Nev. 50, 84 P. 1064 (1906).

⁴⁰⁸ N.R.S. 239.010(1).

⁴⁰⁹ N.R.S. 179A.100(5)(l).

⁴¹⁰ N.R.S. 239.005 (2001).

- Enforcement and sanctions:

- Requesters denied access to public records may appeal the decision within a district court of the county in which the record is located.
- Prevailing plaintiffs may recover attorneys' fees and litigation costs from the public agency.⁴¹¹
- The Open Records Act does, however, classify the following violations as a category C felony:
 - "Stealing, altering or defacing records, documents or instruments;"⁴¹²
 - "Removing, injuring or concealing public records and documents;"⁴¹³
 - "Injury to, concealment or falsification of records or papers by public officer;"⁴¹⁴
 - "Offering false instrument for filing or record."⁴¹⁵
 - ▶ A category C felony is punishable by 1-5 years in prison and a fine not to exceed \$10,000.⁴¹⁶
- The Attorney General may issue opinions interpreting the act but has no prescribed role to enforce its provisions.

- Exemptions:

- The Open Records Act lists few specific exemptions but allows other statutes to demand confidentiality⁴¹⁷ and establishes a balancing test which is to be construed narrowly.⁴¹⁸
- Section 239.0105 exempts certain records of local government bodies. Records containing names, addresses, telephone numbers of natural persons when this information was provided to register or apply to use local recreational facilities must not be disclosed except under the following circumstances:

411 N.R.S. 239.011.

412 N.R.S. 239.300.

413 N.R.S. 239.310.

414 N.R.S. 239.320.

415 N.R.S. 239.330.

416 N.R.S. 193.130.

417 N.R.S. 239.010.

418 N.R.S. 239.001.

- ▶ A court has issued an order or subpoena to obtain these records;
- ▶ These records are pertinent to ongoing investigations or upcoming litigation;
- ▶ A reporter from a newspaper, press association, or federally licensed television or radio station requests these records.

- The act also specifically exempts library records.
- Other sections throughout the Nevada Revised Statutes require confidentiality. See the state legislature's website for a complete list of these statutes.⁴¹⁹
- Case law has established a balancing test to weigh the privacy interests in confidentiality against the public interest in disclosure.⁴²⁰
 - ▶ Nevada Supreme Court ruled in 2000 that public officials must demonstrate the existence of a privilege relating to the records if the custodian bases a refusal on confidentiality.⁴²¹
- Agencies must redact confidential information if a request is made for documents containing such data which can reasonably be separated from public information.⁴²²

- Electronic Records:

- The Open Records Act does not specifically address the issue of electronic records but applies to all "public records."
 - ▶ Neither case law nor opinions of the Attorney General have discussed the openness of e-mail, but whether or not e-mails are public likely depends on their content rather than their existence in an electronic format.
 - ▶ Software is not public if it is licensed by the state or protected by other intellectual property laws.⁴²³

419 www.leg.state.nv.us/nrs

420 *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).

421 *DR Partners v. Board of County Comm'rs of Clarke County*, 6 P.3d 465 (2000).

422 N.R.S. 239.010(3).

423 Nev. Op. Att'y Gen. 89-1 (February 6, 1989).

- ▶ Requesters may choose to receive records in any format in which the agency keeps the records, though agencies are not required to tailor the data upon request.⁴²⁴
 - ▶ Fees tend to vary from agency to agency. Some may charge for the use of public computers and time while others may charge nothing if the requester uses his/her own resources for downloading information. As with paper records, fees may not exceed the actual cost of providing access to public information unless otherwise provided by law.
 - ▶ Section 239.054 authorizes custodians to charge additional fees for requests requiring the use of geographic information systems, which are defined as “a system of hardware, software and data files on which spatially oriented geographical information is digitally collected, stored, managed, manipulated, analyzed and displayed.”
- Money-Making:
 - As mentioned, governmental entities are only allowed to charge additional fees for extensive use of personnel or technological resources. The statute allows little room for agencies to profit from the sale of public records.
 - The Open Records Act does not restrict the commercial use of public records.

⁴²⁴ N.R.S. 239.010(4).

New Hampshire

Right to Know Law

Codes: Chapter 91-A of Title VI

Relevant Court Cases: *Lodge v. Knowlton*, 118 N.H. 574, 576 (1978); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996); *Chambers v. Gregg*, 135 N.H. 478 (1992); *Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551 (2002); *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540 (1997); *The Associated Press v. State*, 888 A.2d 1236 (2005); *Menge v. City of Manchester*, 113 N.H. 533, 36-37 (1973); *Orford Teachers Ass'n v. Watson*, 121 N.H. 118, 121 (1981); *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001); *Brent v. Paquette*, 132 N.H. 415 (1989)

Enacted in 1976, Chapter 91A of the New Hampshire Revised Statutes Annotated contains the "Right to Know Law," which relates to both open records and open meetings. The preamble of the act, added one year after its adoption, states "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." Article 8 of Part 1 of the New Hampshire Constitution also stresses the importance of openness: "Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."

- Who may request records and for what purpose:
 - The open records portion of the act allows "every citizen" to request access to public record. The open meetings portion, however, enables "every person" to attend public meetings. The term "citizen" is therefore not likely to limit any person's ability to access public records.⁴²⁵
 - The purpose of the request is immaterial.
 - The act does not restrict the subsequent use public of information.

- Whose and which records are covered under the act:
 - The statute covers "governmental records" which means "any information created, accepted, or obtained by, or on behalf of, any public body."⁴²⁶
 - The term "public body" encompasses the following:
 - ▶ The legislature and its committees;
 - ▶ All agencies of the state executive branch (with the exception of the Department of Employment Security);
 - ▶ Commissions, boards, and advisory committees established by public bodies;⁴²⁷
 - ▶ Nonprofit corporations performing public services.⁴²⁸
 - This definition does not include the courts. Access to judicial records, however, may be obtained using Part I, Articles 8 and 22 of the New Hampshire Constitution.
 - In addition, the Attorney General has stated that the Governor's Office is not covered under the act, though these records may be accessible through the constitutional provisions.
 - All physical forms of records are covered.
 - The statute makes no distinction among which are available for copying and which are open to inspection only.
- Fees and costs:
 - Agencies are authorized to charge fees not in excess of the actual cost of providing copies of public records. The act does not state whether this may or may not include personnel costs incurred in providing access to records.

425 RSA 91-A:4; RSA 91-A:2.

426 RSA 91-A:1-a, III.

427 *Bradbury v. Shaw*, 116 N.H. 388 (1976).

428 *Professional Firefighters of N.H. v. Healthtrust Inc.*, 151 N.H. 501 (2004).

- If the legislature establishes a specific fee, however, the public entity may not levy any additional charges.⁴²⁹
- The statute does not require agencies to impose fees, though such charges may not be waived or reduced if dictated by statute.
- Enforcement and sanctions:
 - The Right to Know Law states that “[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief.”⁴³⁰
 - If the custodian wrongfully and knowingly denied access to public records, the public body will be liable for reasonable attorneys’ fees and costs.
 - If the custodian acted in bad faith, these fees may be charged against the custodian personally.
 - If the person denied access to records brings a lawsuit frivolously, he/she may be liable for the public agency’s attorneys’ fees and costs.⁴³¹
 - Section 91-A:9 states that anyone who “knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter” is guilty of a misdemeanor.
 - There is no prescribed role for the Attorney General in enforcement, though the office does disseminate information to public agencies and the public regarding the Right to Know Law.
 - The statute establishes a Right-to-Know Oversight Commission charged with researching agencies’ openness and providing interpretation and solutions to providing access to public records.⁴³²
- Exemptions:
 - The Right to Know Law contains several specific exemptions in Section 91-A: 5, including grand and petit jury records, school records, personal information, and preliminary drafts.
 - Section 91-A: 5, IV contains a general, catch-all phrase that exempts “other files whose disclosure would constitute invasion of privacy.”
 - The courts therefore use a balancing test which has become more refined as case law has handled privacy issues over time.
 - ▶ For example, in *Lamy v. New Hampshire Public Utilities Commission*, the court applied a three-pronged analysis to measure the invasion of privacy and weigh that against the public interest in disclosure.⁴³³
 - Other statutory exemptions exist throughout New Hampshire Revised Statutes Annotated. For example, welfare records, child abuse reports, motor vehicle records, and records relating to police investigations are not subject to disclosure.⁴³⁴
 - When exemptions apply to portions of documents, the remaining public information may be made available.⁴³⁵
- Electronic Records:
 - Electronic records are covered under the act.
 - ▶ Courts have ruled that the e-mails of individual legislators are not public but those of public agencies as a whole are.⁴³⁶
 - ▶ Software remains unaddressed in the statute.

429 RSA 91-A:4, IV.

430 RSA 91-A:7.

431 RSA 91-A:8.

432 RSA 91-A:11 - 15.

433 *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005).

434 See the state legislature’s website for the complete code: www.nh.gov/government/laws.html

435 *Hawkins v. N.H. Dep’t of Health and Human Services*, 147 N.H. 376 (2001).

436 *KingCast.net v. Martha McLeod, et al.*, No. 08-E-192.

- Public agencies retain discretion to provide copies of records in any format, whether in print or electronically, unless the requester demonstrates a burden necessitating a specific format.
- Public agencies are also not required to provide tailored searches or compile new records upon request.
- The statute does not establish a separate method for pricing public records in electronic format. As with print copies, fees charged must not exceed actual costs.

- Money-Making:

- Public agencies may charge no more than actual costs of producing records and thus generate no profits from providing access to public records.
- The use of public information by private individuals is unrestricted by the act. Commercial purposes are not prohibited.

New Jersey

Open Public Records Act

Codes: N.J.S.A. 47:1A-1, et seq.

Relevant Court Cases: *Home News v. New Jersey Dept. of Health*, 144 N.J. 446, 454, 539 A.2d 736 (1996); *Williams v. Board of Education of Atlantic City Public Schools*, 329 N.J. Super. 308, 747 A.2d 809 (App. Div. 2000) cert. denied 165 N.J. 488, 478 A.2d 648; *Loigman v. Kimmelman*, 102 N.J. at 105-106 (1986); *Higg-A-Rella Inc. v. County of Essex*, 141 N.J. 35, 53-55, 660 A.2d 1163 (1995); *Asbury Park Press v. Ocean County*, 374 N.J. Super. 312, (Law Div 2004); *Southern New Jersey Newspapers Inc. v. Township of Mt. Laurel*, 141 N.J. 56, 77, 660 A.2d 1173 (1995); *Wilson v. Brown*, 404 N.J. Super. 557 (2009); *MAG Entertainment v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534 (App. Div 2005)

In 2002, New Jersey replaced its previous Right to Know Act with the current Open Public Records Act, found in Title 47 of the New Jersey Statutes Annotated. More detailed in prescribing the processes of requesting and obtaining records, the new act also establishes a Government Records Council. The council hears complaints, issues opinions, establishes guidelines, and disseminates information to public agencies and individuals regarding open records practices.

- Who may request records and for what purpose:
 - The Open Public Records Act grants any “citizen of this State” access to public records. N.J.S.A. 47:1A-1.
 - ▶ Common law suggests that the requester should demonstrate some interest in the information sought. The media, however, usually has access, as reporters act as the “eyes and ears of the public.”⁴³⁷
 - The purpose of the request is immaterial.
 - ▶ Common law, however, dictates that purpose may be a relevant factor to outweigh the governmental interest in confidentiality.⁴³⁸

437 *Home News v. New Jersey Dept. of Health*, 144 N.J. 446, 454, 539 A.2d 736 (1996).

438 *Loigman v. Kimmelman*, 102 N.J. at 105-106 (1986).

- Only when records are obtained under common law rights may the courts regulate the subsequent use of the information.⁴³⁹

When the Open Public Records Act declares a record to be open, the use is unrestricted.

- Whose and which records are covered under the act:
 - The statute applies to “any officer, commission, agency or authority of the State or of any political subdivision thereof,” which covers the executive and legislative branches.
 - ▶ The judicial branch is not specifically addressed but is governed by New Jersey Court Rules which deem court records to be open unless specifically exempted.⁴⁴⁰
 - Certain functions of the executive branch are not considered public:
 - ▶ Records which fall under an executive privilege or subject to a grant of confidentiality recognized by the state constitution, statutes, court rules, or case law;
 - ▶ Portions of records which contain advisory or deliberative information, or any other records protected by an established privilege;
 - ▶ Portions of records which contain information that the sender, an identifiable person outside the Office of the Governor, is not required to provide if disclosure would constitute an unwarranted invasion of privacy.⁴⁴¹
 - Certain functions of the legislative branch are also exempt:
 - ▶ Information legislators receive from a constituent or about a constituent is not public unless the law required the information to be sent;

439 Cf. *McClain v. College Hospital*, 99 N.J. 346, 429 A.2d 991 (1985).

440 New Jersey Court Rule 1:38.

441 See Executive Order 26.

- ▶ Memoranda, notes, reports or other forms of communication created by or prepared for a legislator “in the course of the member’s official duties,” unless the record represents “an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members.”⁴⁴²
- Only entities of the state of New Jersey are subject to the act. Nongovernmental bodies are not covered. The applicability to multi-state bodies has not yet been decided.
- The statute opens all “government records” which are not exempt, regardless of physical format, for inspection, examination, and copying.⁴⁴³
- Fees and costs:
 - The act provides a specific schedule of fees for providing copies of public records based on the number of pages required:
 - ▶ The first through tenth pages cost \$0.75 per page;
 - ▶ The eleventh through twentieth pages cost \$0.50 per page;
 - ▶ All pages after the first twenty cost \$0.25 per page.
 - If agencies may demonstrate that the actual cost of providing these copies exceed these amounts, the agency may charge a fee not exceeding that cost.
 - ▶ The cost should not include personnel or overhead costs.⁴⁴⁴
 - Custodians may charge a reasonable additional fee if the task “involves an extraordinary expenditure of time and effort to accommodate the request.”⁴⁴⁵
 - The statute contains no provisions for fee waivers.
 - Custodians may require a deposit from anonymous requesters if the estimated costs exceed five dollars.⁴⁴⁶

442 N.J.S.A. 47:1A-1.1.

443 N.J.S.A. 47:1A-1.

444 N.J.S.A. 47:1A-5(b).

445 N.J.S.A. 47:1A-5(c).

446 N.J.S.A. 47:1A-5(f).

- Enforcement and sanctions:
 - ▶ Those denied access to records have two recourses:
 - ▶ File action in a Superior Court, or
 - ▶ File a complaint with the Government Records Council, which has the authority to adjudicate disputes.⁴⁴⁷
 - Prevailing plaintiffs may recover reasonable attorneys’ fees.
 - ▶ Custodians found guilty of willfully and knowingly violating the Open Public Records Act will be laible for the following civil penalties:
 - ▶ \$1,000 for an initial violation,
 - ▶ \$2,500 for a second violation within 10 years of the initial violation, and
 - ▶ \$5,000 for a third violation within 10 years of the initial violation.⁴⁴⁸
 - There is no prescribed role for the Attorney General.
- Exemptions:
 - Section 47:1A-1 enumerates nine distinct entities which may establish exemptions:
 1. The Open Public Records Act,
 2. Any other statute in the state code,
 3. Resolutions from either or both houses of the state legislature,
 4. Regulation implemented under authority derived from any statute or executive order of the governor,
 5. Executive orders of the governor,
 6. Rules of Court,
 7. Federal laws,
 8. Federal regulations, or
 9. Court orders.
 - The Open Public Records Act contains numerous exemptions within its definition of what constitutes a “government record” found in Section 47:1A-1.1, including criminal investigation records, trade secrets,

447 N.J.S.A. 47:1A-6.

448 N.J.S.A. 47:1A-11.

security information, personal information, and pension records.

- ▶ The language allows custodians to use some discretion regarding certain categories of exemptions.
- Other provisions scattered throughout the state's statutes exempt certain documents as well. Still more may be found in the New Jersey Administrative Code. See the state legislature's site for the complete set of New Jersey Statutes Annotated and Administrative Code.⁴⁴⁹
- Specific executive orders which address open records include:
 - ▶ Executive Order No. 9 issued by Governor Richard J. Hughes,
 - ▶ Executive Order No. 48 issued by Governor Richard J. Hughes,
 - ▶ Executive Order No. 11 issued by Governor Brendan Byrne,
 - ▶ Executive Order No. 69 issued by Governor Christine Todd Whitman,
 - ▶ Executive Order No. 18 issued by Governor James McGreevey,
 - ▶ Executive Order No. 21 issued by Governor James McGreevey,
 - ▶ Executive Order No. 26 issued by Governor James McGreevey.
- The statute expressly does not supersede any exemptions the courts establish through court orders or case law.
- The language of the statute specifically exempts "portions" which indicates that all public information in documents which contain confidential information may be made available.

- Electronic Records:

- Electronic records are covered under the Open Public Records Act.
 - ▶ E-mail is treated as public if the content is related to official business and does not fall under any specific exemption.
 - ▶ Software is exempt if the public agency obtains it through a licensing agreement which forbids disclosure or if disclosure would "jeopardize security."⁴⁵⁰
 - Agencies are not required to provide custom searches or tailored data.
 - Custodians must provide the records in the medium requested if the records are kept in that medium. Otherwise, the custodian may convert the requested records or provide a reproduction in "some other meaningful medium."
 - ▶ If custodians provide records in a medium other than that which the agency uses, or which are not maintained by the agency regularly, or require substantial programming, the requester may be charged additional fees based on the cost of information technology and personnel.⁴⁵¹
- Money-Making:
 - In exchange for a share of revenues from ultimate users, some public agencies have made portions of databases available to online services, such as CDB Infotek, which markets databases of public information to other businesses and individuals.
 - Individuals are also free to use public information however they choose, including for commercial purposes.

449 www.njleg.state.nj.us/

450 N.J.S.A. 47:1A-1.1.

451 N.J.S.A. 47:1A-5(d).

New Mexico

Inspection of Public Records Act

Codes: N.M. Stat. § 14-2-1, et seq.

Relevant Court Cases: *Lavelle v. Udall*, CV 94-0404M, Slip Op. (Feb. 16, 1996); (*Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995); *Revo v. Disciplinary Board of the Supreme Court for the State of New Mexico*, 106 F.3d 929 (10th Cir. 1997); *Crutchfield v. New Mexico Dept. of Taxation and Revenue*, 2005-NMCA-022, 106 P.3d 1273; *City of Las Cruces v. Public Employee Labor Relations Board*, 121 N.M. 688, 917 P.3d 451 (1996); *Crutchfield v. N.M. Dep't. of Taxation and Revenue*, 2005-NMCA-22, 106 P.3d 1273

Common law right to access and inspect certain public records dates back to 1925 in New Mexico.⁴⁵² The state's first Open Records Law was passed in 1947, though it failed to clearly define public records and limited access to "citizens" only. The legislature added more exceptions in 1973. Twenty years later, the act underwent a thorough overhaul. Public agencies became liable for court costs and damages, though the imprisonment sanctions for violators were eradicated. The legislature established procedures and exemptions modeled after the federal Freedom of Information Act. The revised statute includes a statement of legislative intent that engenders a policy that favors disclosure, as "a representative government is dependent upon an informed electorate."⁴⁵³

- Who may request records and for what purpose:
 - "Every person," which includes individuals, corporations and partnerships, associations, and other entities, has the right to request access to public records.⁴⁵⁴
 - The purpose of the request is immaterial. Requesters are not required to provide an intended use.⁴⁵⁵
 - The subsequent use of public records has been the subject of much litigation.
 - ▶ Section 14-2A-1 prohibits attorneys and healthcare providers from using

information contained in police reports to solicit business from victims or their relatives. This has been declared unconstitutional by a New Mexico Federal District Court.

- ▶ Section 14-3-15(C)(2) prohibits the commercial or political use of computerized databases. This issue remains unaddressed by the courts but may be of questionable constitutionality given the previously mentioned precedent.
- Whose and which records are covered under the act:
 - The act applies to "public bodies" which include "the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding."⁴⁵⁶
 - As clearly stated, the executive branch and presumably the executives themselves are subject to the act. The Attorney General has, however, noted an "executive privilege" as an exemption to the act.
 - The legislative branch is expressly covered.
 - While the statute does include the judicial branch, the courts have not yet addressed whether this clause would violate the separation of powers doctrine.
 - Non-governmental bodies which were not created by a public entity, whether or not they receive public funding, are not explicitly subject to the act.
 - Multi-state or regional bodies and advisory boards, commissions, and other quasi-governmental entities are presumptively subject to the act, depending on their purpose and origins. According to the Attorney General, the primary determining factor is whether the entity is "cloaked with

⁴⁵² 1925-26 N.M. Op. Att'y Gen. 10

⁴⁵³ § 14-2-5, NMSA 1978.

⁴⁵⁴ § 14-2-1(A), NMSA 1978.

⁴⁵⁵ § 14-2-8(C), NMSA 1978.

⁴⁵⁶ § 14-2-6(D), NMSA 1978.

some policy-making and decision-making powers.”⁴⁵⁷

- The term “public records” is defined as “all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials...used, created, received, maintained or held by or on behalf of any public body and relate to public business.”⁴⁵⁸
- The physical format of the public record is immaterial.
- This definition also applies to records which the law does not require public agencies to create or maintain.
- All records available for inspection are available for copying.
- Fees and costs:
 - Section 14-2-9(B) authorizes custodians to charge a reasonable fee for providing copies of public records.
 - The fee may not exceed one dollar for any page the size of 11” x 17” or smaller.
 - Custodians may require advance payment but may not charge for the time spent determining whether or not the requested records are subject to disclosure.
 - The Attorney General has issued opinions stating that fees should not exceed the actual cost of copying.
 - The language of the statute states that custodians “may charge” fees, which would seem to allow discretion. A fee waiver, however, may be ruled unconstitutional based on the New Mexico Anti-Donation clause.
 - ▶ One specific exemption to fees applies to those requesting records required by the veterans’ administration which are necessary to determine an applicant’s eligibility for benefits.
- Enforcement and sanctions:
 - Section 14-2-12 outlines enforcement procedures.
 - The Attorney General and District Attorney have the authority to enforce the act,

but enforcement is generally left to those who were denied access to records.

- ▶ The Attorney General does publish compliance guidelines and offers seminars to those interested in open records practices.
- The district court may issue a writ of mandamus or injunctive order to compel the agency to provide a copy of the requested record.
- The court “shall award damages, costs and reasonable attorneys’ fees” to successful plaintiffs.
 - ▶ Damages will be payable from the funds of the public agency and may not exceed \$100 for each day the records were not provided.⁴⁵⁹
- Exemptions:
 - Section 14-2-1(A) lists 12 specific and likely discretionary exemptions to the definition of “public records.”
 - A few of these include trade secrets, medical records, discharge papers, and security related plans.
 - The Inspection of Public Records Act also contains a clause that exempts all other records “as otherwise provided by law.”⁴⁶⁰
 - ▶ The New Mexico Statutes Annotated contains more than 100 other exemptions scattered throughout the code.⁴⁶¹
 - The New Mexico Supreme Court has used a vague “balancing test” to weigh the interest in disclosure against the interest in privacy and may therefore establish common law exemptions to the act.⁴⁶²
 - Custodians must provide public portions of records after separating them from the confidential information.⁴⁶³

459 § 14-2-11, NMSA 1978.

460 § 14-2-1(A)(12), NMSA 1978.

461 See the state legislature’s website for a complete copy of the code: www.nmlegis.gov/lcs/

462 *City of Las Cruces v. Public Employee Labor Relations Board*, 121 N.M. 688, 917 P.3d 451 (1996).

463 § 14-2-9(A), NMSA 1978.

457 N.M. Op. Att’y Gen. 90-27.

458 § 14-2-6(E), NMSA 1978.

- Electronic Records:
 - The act covers electronic records. The existence of information in electronic format does not affect its openness.
 - ▶ E-mail is subject to disclosure.⁴⁶⁴ The Attorney General has even opined that public information sent to or from private e-mail accounts is covered.
 - ▶ Software is generally not considered public, however.⁴⁶⁵
 - Public agencies retain discretion over which format public records are provided.
 - ▶ For example, custodians may provide computer printouts of data in order to “preserve the integrity of the computer data or the confidentiality of exempt information.”⁴⁶⁶
 - ▶ Courts have upheld public agencies’ authority to provide electronic records in a hard copy format.⁴⁶⁷
 - Public bodies are likewise not required to create or generate new public records upon request for a customized search. Providing tailored searches through computer databases is discretionary.⁴⁶⁸
- The Inspection of Public Records Act does not dictate the fees for providing access to electronic access to records. Custodians are authorized to charge a fee, however, and the practice of establishing fee schedules is typically done on a case-by-case basis.⁴⁶⁹
- Money-Making:
 - Public agencies may charge fees for providing electronic access to records. These fees may include a royalty agreed upon by the public agency and requester.⁴⁷⁰
 - Statutes prohibit commercial use of certain records, as previously discussed, though the constitutionality of these provisions has been challenged and at times refuted.

464 § 14-1-6(E), NMSA 1978.

465 § 14-3-15.1 and § 14-3-18.

466 § 14-2-9, NMSA 1978; See also, § 14-3-15.1(C), NMSA 1978.

467 *Crutchfield v. N.M. Dep’t. of Taxation and Revenue*, 2005-NMCA-22, 106 P.3d 1273.

468 § 14-2-8(B), NMSA 1978; § 14-3-15.1; and § 14-3-18.

469 § 14-3-15.1(A)(F), NMSA 1978.

470 § 14-3-15.1(C), NMSA 1978.

New York

Freedom of Information Law

Codes: N.Y. Pub. Off. Law § 84 – 90

Relevant Court Cases: *Lucas v. Pastor*, 117 A.D.2d 736, 498 N.Y.S.2d 461 (2d Dep't 1986); *New York News Inc. v. Grinker*, 142 Misc.2d 325, 537 N.Y.S.2d 770 (Sup. Ct. 1989); *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 496 N.E.2d 665, 505 N.Y.S.2d 576 (1986); *Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991); *Schulz v. New York State Board of Elections*, No. 4797-94 (Sup. Ct., Albany County, 1995); *New York 1 News v. President of the Borough of Staten Island*, 631 N.Y.S.2d 479 (Supreme Court Kings County 1995); *See Sheehan v. City of Syracuse*, 521 N.Y.S.2d 207 (1987).

Enacted in 1974, New York's first Freedom of Information Law enumerated records that public agencies were required to make available to the public and created the Committee on Public Access to Records (now known as the Committee on Open Government) designed to promulgate rules and regulations regarding open records. The statute was repealed and reenacted in 1977 with significant changes. The new law created a presumption of openness. Rather than listing records agencies must disclose, the law declared all records open unless specifically exempt by statute. Other amendments have served to clarify the act. In 1982, the legislature added a provision to authorize the courts to award attorneys' fees to substantially successful plaintiffs bringing action against public agencies for wrongfully denying access to records. Another revision in 1989 prohibited the destruction of public records with the intent to prevent disclosure.

- Who may request records and for what purpose:
 - The statute does not limit access to records based on the status of the requester, but rather states that "the public, individually and collectively and represented by a free press, should have access to the records of government."⁴⁷¹ The law is typically liberally construed to maximize access to public records.

⁴⁷¹ N.Y. Pub. Off. Law § 84 (McKinney 1988).

- The purpose of the request has been deemed generally immaterial by a wealth of case law.⁴⁷²

► Agencies may, however, withhold records or delete identifying details from data to prevent an unwarranted invasion of privacy. The statute's definition of an invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."⁴⁷³

- The subsequent use of any public records received is unrestricted by the act.
- Whose and which records are covered under the act:
 - The statute applies to agencies, which are defined as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function."⁴⁷⁴
 - The statutory definition includes the executive branch, while common law tends to grant access to records of the executives themselves.⁴⁷⁵
 - Judicial decisions have expanded the scope of the act in ruling that it is "not to be limited based on the purpose for which the document was produced or the function to which it relates."⁴⁷⁶
 - The definition of "agency" found in Section 86 includes local legislative bodies but

⁴⁷² For example, *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 688 N.Y.S.2d 472 (1999); *M. Farbman & Sons v. New York City*, 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).

⁴⁷³ N.Y. Pub. Off. Law § 89(2)(b)(iii) (McKinney 1988).

⁴⁷⁴ N.Y. Pub. Off. Law § 86(3) (McKinney 1988).

⁴⁷⁵ See *Rold v. Cuomo*, No. 1909-88 (Sup. Ct., Albany County, May 31, 1988); *Kerr v. Koch*, N.Y.L.J., Feb. 1, 1988 (Sup. Ct., New York County, 1988).

⁴⁷⁶ *Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).

excludes the state legislature, which is covered under Section 88.

- ▶ Section 88 authorizes the state legislature to create its own rules regarding the time, place, and specific fees (following certain limitations) for providing access to public records.
- ▶ The section also lists 13 categories of documents which must be made available to the public, including bills and resolutions, transcripts of minutes, external audits, and voting records of each member.
- The term “agency” also excludes the judicial branch.
 - ▶ However, once an agency has obtained court documents, these records become open unless the information is specifically exempt.⁴⁷⁷
 - ▶ Other laws make certain court records open to the public.⁴⁷⁸
- Nongovernmental bodies that provide public services or act on behalf of the government are subject to the Freedom of Information Law.⁴⁷⁹
- Lower courts have ruled that records pertaining to interstate bodies are exempt from disclosure, though the records of regional bodies are available open under the act.⁴⁸⁰
- The statute broadly covers “any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever.”⁴⁸¹ The content of the record need not be related to governmental affairs.⁴⁸²

477 *Newsday Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 746 N.Y.S.2d 855 (2002).

478 See N.Y. Jud. Law § 255 (McKinney 1988); N.Y. Unif. Just. Act § 2019-a (McKinney 1988).

479 *Perez v. City Univ. of New York*, 5 N.Y.3d 522, 806 N.Y.S.2d 460(2005).

480 *Metro-ILA Pension Fund v. Waterfront Commission*, N.Y.L.J., Dec. 16, 1986 (Sup. Ct., New York County, 1986).

481 N.Y. Pub. Off. Law § 86(4) (McKinney 1988).

482 *Capital Newspapers Division of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).

- All records available for inspection are likewise available for copying.

- Fees and costs:

- Unless otherwise dictated by statute the fees for providing public records shall not exceed either the \$0.25 per page smaller than 9” x 14” or the actual cost of copying.⁴⁸³
- The act contains no provisions regarding fee waivers.

- Enforcement and sanctions:

- Individuals denied access to records may first appeal to the head of the agency holding those records within 30 days of the denial. The agency must then forward a copy of the appeal to the Committee on Open Government.
- If the appeal is denied, the requester “may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.”⁴⁸⁴
- If the court determines that the requested record was of significant interest to the public and that the agency had no reasonable basis for refusing disclosure, the successful plaintiff may recover attorneys’ fees and costs.⁴⁸⁵
 - ▶ If Article 78 proceeding is brought against a public agency, the office of the Attorney General will defend that agency.
- The Committee on Open Government acts as an ombudsman and provides opinions, guidelines, and information regarding disclosure of public records.⁴⁸⁶

- Exemptions:

- Exemptions to the Freedom of Information Law are specific and discretionary.
 - ▶ Courts often refer to case law surrounding the federal Freedom of Information Act to interpret the nature of exemptions.⁴⁸⁷

483 N.Y. Pub. Off. Law § 87(1)(b)(iii) (McKinney 1988).

484 N.Y. Pub. Off. Law § 89(4)(b) (McKinney 1988).

485 N.Y. Pub. Off. Law § 89(4)(c) (McKinney 1988).

486 N.Y. Pub. Off. Law § 89(1) (McKinney 1988).

487 For example, *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979). *Accord Seeling v. Sielaff*, 201 A.D.2d 298, 607 N.Y.S.2d 300 (1st Dept. 1994).

- The statute enumerates ten categories of records which are exempt, including law enforcement records, trade secrets, examination questions, and security information.
- The act also provides an exception for any other record exempt by law. The state legislature's site leads to a list of the complete state code where numerous other exemptions may be found.⁴⁸⁸
- The courts have the authority to interpret the law but not establish common law exceptions.⁴⁸⁹
- Agencies may provide public portions of otherwise confidential documents.
- Electronic Records:
 - The Freedom of Information Law covers electronic records, as it covers all records regardless of physical characteristics.
 - ▶ E-mail and software remain unaddressed in the statute and by case law.
 - The New York State Personal Privacy Protection Law may apply to records contained within an indexed computer database so as to avoid the threats to invasion of personal privacy that access to electronic data may pose.⁴⁹⁰
- Public agencies are not required to create new records or compile data to comply with a request for customized searches or tailored formats.⁴⁹¹
- The statute does not establish a separate schedule of fees for electronic records. Fees are limited to \$0.25 per page or the actual cost of providing access to records.
- Money-Making:
 - Public agencies may charge no more than the actual cost of providing records under the Freedom of Information Law. The legislature does, however, have the authority adopt regulations establishing fees for specific records.
 - As discussed, commercial purpose for lists of names and addresses may constitute an unwarranted invasion of privacy and represent grounds for a denial of access to records or deletion of certain information. Once records are obtained, however, the use is unrestricted.

488 <http://assembly.state.ny.us/>

489 *Doolan v. Boces*, 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979). *Accord In Re Estate of Schwartz*, 130 Misc.2d 786, 497 N.Y.S.2d 834 (Sur. Ct. 1986).

490 See Public Officers Law article 6-A (McKinney); *Spargo v. New York State Commission on Government Integrity*, 140 A.D.2d 26, 531 N.Y.S.2d 417 (3d Dep't 1988).

491 N.Y. Pub. Off. Law. § 89(3) (McKinney 1988).

North Carolina

Public Records Law

Codes: N.C.G.S. §§ 132-1 – 132-10

Relevant Court Cases: *McCormick v. Hanson Aggregates Southeast Inc.*, 164 N.C. App. 459, 596 S.E.2d 431. cert. denied and appeal dismissed, 359 N.C. 69, 603 S.E.2d 131 (2004); *City of Burlington v. Boney Publishers Inc.*, 166 N.C. App. 186, 600 S.E.2d 872 (2004), disc. rev. improvidently allowed, 359 N.C. 422, 611 S.E.2d 833 (2005); *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 484, 412 S.E.2d 7 (1992); *Spangler and Poole. Piedmont Pub. Co. v. Surry County Board of Commissioners*, 24 Media L. Rep. (BNA) 1371 (N.C. Sup. Ct. 1995); *Durham Public Schools Bd. of Educ. v. Bussian*, Case No. 94 CVS 484, unpublished opinion (Durham Co. Sup. Ct. Feb. 18, 1994); *News & Observer v. Johnston County*, Case No. 95-CVS-1671, Johnston Co. Sup. Ct. (1995)

The Public Records Law of North Carolina dates back to 1935. The focal purpose of the original law, however, was to preserve public records, rather than disclose them. Significant amendments have been adopted due to pressures from citizens and groups desiring greater openness from the government. In 1975, for example, the legislature extended the law to electronic records and other non-traditional formats. Other, more recent changes open certain criminal information that was previously confidential, prohibit custodians from requiring requesters state their purpose for records, and require agencies to provide public information found commingled with confidential material and keep indexes of their databases.

- Who may request records and for what purpose:
 - Under the Public Records Law, “any person” may request access to public records, regardless of residence or citizenship.⁴⁹²
 - The purpose of the request is immaterial. In fact, custodians are prohibited from requiring individuals to state their purpose.⁴⁹³
 - The subsequent use of records is unrestricted for most documents. The statute provides

492 G.S. § 132-6(a).

493 G.S. § 132-6(b).

one exception for geographical information systems, which will be discussed in further detail.

- Whose and which records are covered under the act:
 - The law applies to every “agency of North Carolina government or its subdivisions” which includes “every public office, public officer or official (State or local, elected or appointed), institution, board, commission, ... or other unit of government of the State or of any county, unit, special district or other political subdivision of government.”⁴⁹⁴
 - This definition includes the executive branch and the executives themselves.
 - The legislative branch is also covered, though other provisions apply and may exclude certain documents from disclosure.
 - ▶ For example, one statute authorizes legislators to preserve the confidentiality of requests to staff members for information or assistance in drafting.⁴⁹⁵
 - ▶ The Attorney General has opined, however, that communication between legislators and their constituents is public information.
 - Court records are also covered in the act, though other statutes also apply.⁴⁹⁶
 - The receipt of public funds does not necessarily subject the recipient to the Public Records Law. Other statutes dictate reporting requirements for entities which receive public funding if the funds are not in exchange for goods or services. For example,
 - ▶ Any grantee which annually receives between \$15,000 and \$300,000 of state funding is required to file a sworn accounting statement of receipts and

494 G.S. § 132-1(a).

495 G.S. § 120-129.

496 See G.S. § 7A-109(a); G.S. § 7B-2901; G.S. § 31-11; G.S. § 15A-1333.

expenditures of those funds within six months following the end of the fiscal year during which the grantee received the funds.

- ▶ Any grantee which receives, uses, or expends more than \$300,000 in state funds annually is required to file an annual financial statement with the state auditor.⁴⁹⁷
- ▶ State auditors may require any nonprofit corporation or other organization which receives more than \$1,000 in state funding to submit to an audit, a copy of which must be filed with the Office of the State Auditor.
- ▶ Counties and cities which grant \$1,000 or more to a nonprofit corporation or other organization within a fiscal year may require the organization to have an audit performed for that year and filed with the county or city.⁴⁹⁸
- Advisory boards, commissions, and multi-state or regional bodies are covered if the records relate to public business.
- The records covered by the act include “all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business.”⁴⁹⁹
- This definition has been expanded by the courts to include all records kept by public agencies in the process of performing their duties.⁵⁰⁰
- All records open to inspection are available for copying.

497 G.S. § 143-6.1.

498 G.S. § 159-40.

499 G.S. § 132-1(a).

500 *News and Observer Publishing Company v. Wake County Hospital System*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981), *cert. denied*, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803, 103 S.Ct. 26, 74 L. Ed. 2d 42 (1982); 1996 WL 925098 (N.C.A.G.); 1996 WL 925156 (N.C.A.G.).

- Fees and costs:

- Fees for certification of public records are provided by statutes generally relating to the specific record itself.
- Fees for uncertified copies of are limited to actual cost of producing that copy. Actual costs do not include any costs that the agency would have incurred if no request had been made, such as overhead costs.
- Personnel costs may only be included in a special service charge if the request requires the extensive use of labor.
- The State Chief Information Officer is authorized to mediate any disputes should a requester find unreasonable or unfair fees.⁵⁰¹
- Agencies are not required to charge fees, and many do not for routine requests. The act does not, however, prescribe fee waivers or reductions explicitly.

- Enforcement and sanctions:

- Enforcement occurs through individuals filing civil suits against agencies in court.
- The Attorney General plays a limited role in enforcement and primarily issues opinions interpreting the act.
- A successful plaintiff may recover attorneys' fees at the judge's discretion if the court finds the agency lacked justification in denying access to records.
- The fees may be charged against the custodian personally if he/she intentionally violated the act.⁵⁰²
- Attorneys' fees may also be awarded to the public agency if the private individual brought the lawsuit frivolously.⁵⁰³

- Exemptions:

- The Public Records Law lists few exemptions, though many more are scattered throughout the North Carolina General Statutes.⁵⁰⁴ The exemptions listed are specific. Some are mandatory, while others remain discretionary.

501 G.S. § 132-6.2(b).

502 G.S. § 132-9(c).

503 G.S. § 132-9(d).

504 See the state legislature's website for the complete code: www.ncga.state.nc.us/

- Examples of these exceptions include the attorney-client privilege, trade secrets, tax information, and law enforcement records.
- Many other statutorily mandated exemptions apply to certain records, including adoption records, DNA profiles, emergency response plans, grand jury proceedings, health care records, library user records, public assistance records, and others.
- North Carolina courts have ruled that only statutory provisions can create exclusions to the law, not the courts, which only serve to interpret the act. There are no court-derived exclusions or privileges found in common law.⁵⁰⁵
- Agencies must provide public portions of documents containing confidential material and must bear the costs of redacting that information.⁵⁰⁶
- Electronic Records:
 - The Public Records Law does cover electronic records.
 - ▶ E-mail is presumably public if its content relates to public business.
 - ▶ Software, however, is not, according to the Attorney General. The records the software generates may be public, but the program itself is not subject to disclosure.⁵⁰⁷
 - Requesters may choose whichever medium in which they prefer to receive a copy of public records if the agency is capable of providing the record in that medium.⁵⁰⁸
 - Agencies are not required, however, to create or compile new records upon request. If the custodian chooses to do so, the two parties may negotiate a fee for such services.⁵⁰⁹
 - The Public Records Law explicitly states

that no public agency shall “purchase, lease, create, or otherwise acquire any electronic data-processing system for the storage, manipulation, or retrieval of public records unless it first determines that the system will not impair or impede the agency’s ability to permit the public inspection and examination, and to provide electronic copies of such records.”⁵¹⁰

- Fees for electronic records are assessed in a similar fashion to other forms. Public agencies may charge no more than the actual cost of providing the record.
 - ▶ If, however, “extensive use of information technology resources” is required to fulfill the request, a special service charge may be levied.⁵¹¹
- Money-Making:
 - Public agencies may generally charge no more than the actual cost of providing copies of public records. Special service charges assessed for providing tailored searches which involve extensive labor or technological resources still must be based on actual costs.
 - The use of public records by private individuals is generally unrestricted, though local governments may restrict the use of geographical information systems: “a county or city may require that the person obtaining the copy agree in writing that the copy will not be resold or otherwise used for trade or commercial purposes.” These purposes do not include
 - ▶ Publication or broadcast by news media;
 - ▶ Resale at cost by real estate trade associations, or by Multiple Listing Services operated by real estate trade associations;
 - ▶ Or the use of the information without resale by a licensed professional while practicing that profession.⁵¹²

⁵⁰⁵ *Virmani v. Presbyterian Health Services Inc.*, 350 N.C. 449, 515 S.E.2d 675, 27 Media L. Rep. (BNA) 2537 (1999); *Advance Publications v. City of Elizabeth City*, 53 N.C. App. 504 (1981).

⁵⁰⁶ G.S. § 132-6(c).

⁵⁰⁷ 1998 WL 459785, *1 (N.C.A.G.).

⁵⁰⁸ G.S. § 132-6.2(a).

⁵⁰⁹ G.S. § 132-6.2(e).

⁵¹⁰ G.S. § 132-6.1(a).

⁵¹¹ G.S. § 132-6.2(b).

⁵¹² G.S. § 132-10.

North Dakota

Open Records Statute

Codes: *North Dakota Century Code (N.D.C.C.)* §§ 44-04-17.1 – 44-04-32;

North Dakota Constitution, Article XI, Section 6

Relevant Court Cases: *Dickinson Newspaper Inc. v. Jorgensen*, 338 N.W.2d 72, 79 (N.D. 1983); *State ex rel, Williston Daily Herald v. O'Connell*, 151 N.W.2d 758 (N.D. 1967); *Adams County Record v. Greater North Dakota Association*, 529 N.W.2d 830 (N.D. 1995); *Forum Publishing Company v. City of Fargo*, 391 N.W.2d 169, 171 (N.D. 1988); *City of Grand Forks v. Grand Forks Herald*, 307 N.W.2d 572, 577-78 (N.D. 1981); *Hovet v. Hebron Public School District*, 419 N.W.2d 189, 191 (N.D. 1988)

Chapter 4 of Title 44 of the North Dakota Century Code contains the state's Open Records Statute. Court rulings and opinions of the Attorney General have interpreted the act so as to allow extensive access to public records. The presumption of openness dictates that all records are open unless closed specifically by statute. Article XI, Section 6 of the North Dakota Constitution also contains a provision opening government records to the public:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

- Who may request records and for what purpose:
 - Any person may request access to records under the Open Records Statute and the constitutional provision requiring public records to be open to inspection.
 - The purpose of the request is unimportant. Requesters need not disclose their purpose for obtaining the public information.
 - The subsequent use is largely unrestricted by the statute. However, if records containing trade secrets are released, the use of those

trade secrets may be regulated by other statutes.⁵¹³

- Whose and which records are covered under the act:
 - The statute applies to all “[p]ublic or governmental bodies, boards, bureaus, commissions, or agencies of the state [or any political subdivision of the state], ... or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function.”⁵¹⁴
 - This definition encompasses all executive and legislative entities.
 - While the act does not explicitly cover the judicial branch, there generally exists a common law access to court records when no specific exemption applies.⁵¹⁵
 - The statute explicitly covers organizations, even private entities, which expend or are supported by public funding.⁵¹⁶
 - Organizations which have government officials as members are not necessarily subject to the act unless they receive or expend public funding.
 - The statute broadly covers all “recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.”⁵¹⁷

513 N.D.C.C. Ch. 47-25.1 provides for civil action against the misappropriation of trade secrets.

514 N.D.C.C. § 44-04-17.1(12)(a)(b).

515 *State ex rel, Williston Daily Herald v. O'Connell*, 151 N.W.2d 758 (N.D. 1967).

516 N.D.C.C. § 44-04-17.1(12)(c).

517 N.D.C.C. § 44-04-17.1(15).

- Courts have interpreted this to include even those records which public agencies are not required to keep.⁵¹⁸
- In absence of a clear statutory provision, the Attorney General stated that records open to inspection should be available for copying.
- Fees and costs:
 - The statute authorizes public entities to charge reasonable fees not to exceed 25 cents per page for providing paper copies of public records.⁵¹⁹
 - ▶ Reasonable fees are defined as the actual cost to the agency, including the costs of materials, machinery, and labor.
 - ▶ Agencies may charge no more than \$25.00 per hour for each hour exceeding the first hour spent locating, redacting, or otherwise providing reproductions of public records.
 - ▶ Agencies may also charge the cost of mailing the record to the requester.
 - Agencies may require the advance payment of fees prior to providing the requested records.
 - Fees may not be charged for allowing individuals to inspect records.⁵²⁰
 - Waivers may be provided when disclosure would serve the public's interest.
 - The statute does not supersede any other provisions which establish fees for specific records.
- Enforcement and sanctions:
 - Individuals denied access to records have two courses of action at their disposal.
 - Within 30 days of receiving notice of denial, persons may request an opinion from the Attorney General, which will have the authoritative force of law. The Attorney General may review the confidential information and determine whether or not it should be made open to the public.

518 *Forum Publishing Company v. City of Fargo*, 391 N.W.2d 169, 171 (N.D. 1988).

519 N.D.C.C. § 44-04-18(2).

520 Attorney General's Opinion 89-7 (June 23, 1989) 26.

- ▶ Anyone found guilty of noncompliance with the opinion may be held personally liable for attorneys' fees and costs.⁵²¹
- Individuals may also pursue action in civil court within 60 days of receiving a notice of denial or 30 days after receiving the Attorney General's opinion, whichever is greater.
 - ▶ The court may award injunction, declaratory relief, a writ of mandamus, costs and reasonable attorneys' fees.
 - ▶ Moreover, if the court finds the custodian guilty of an intentional violation of the act, it may award the plaintiff actual damages or \$1,000, whichever amount is greater.⁵²²
- Exemptions:
 - All public records are open unless covered by a specific exemption.
 - The act distinguishes between the concept of "closed" and that of "confidential."
 - ▶ Confidential records are mandatorily exempt from disclosure.
 - ▶ Closed records may be disclosed at the discretion of the agency.⁵²³
 - Sections 44-04-18.1 – 44-04-18.21 contain numerous exemptions. A few include medical records; lists of minors; examination questions; proprietary, commercial, and financial information; and trade secrets.
 - Many other statutory exemptions exist throughout the North Dakota Century Code. A few of these include veterans discharge documents, grand jury records, certain reports or records from the Departments of Transportation, Corrections and Rehabilitation, and Human Services.⁵²⁴
 - The court has no authority to create common law exemptions. The North Dakota Supreme Court ruled that only statutory provisions from the state

521 N.D.C.C. § 44-04-21.1.

522 N.D.C.C. § 44-04-21.2.

523 N.D.C.C. § 44-04-17.1(2)(3).

524 See the state legislature's website for a complete list of the code: www.legis.nd.gov/information/statutes/cent-code.html

- legislature could constitute an exception to the act.⁵²⁵
- Public entities may not deny access to records on the grounds that they contain confidential or closed information. Rather, custodians must delete or otherwise withhold confidential portions and release the public information.⁵²⁶
 - Electronic Records:
 - Electronic records are covered under the Open Records Statute which applies to all public records regardless of format.
 - ▶ The statute does not expressly address the content of e-mails, though it does prohibit the disclosure of e-mail addresses.
 - ▶ Software is exempt from disclosure.⁵²⁷
 - The statute stipulates that access to electronic records should be free if the information can be recovered without using a computer backup.
 - Agencies may charge a reasonable fee for providing copies of electronic records, including the costs “attributable to the use of information technology resources.”⁵²⁸
 - The requester may choose to receive copies of public records in either electronic print format, or other available medium.⁵²⁹
 - Public agencies are not required to compile or create records which do not already exist.
 - ▶ However, if they choose to do so, as mentioned, agencies may charge up to \$25.00 for each hour of labor past the first hour devoted to providing a copy of the record requested.
 - Money-Making:
 - Public agencies, except where otherwise prescribed by law, may charge no more than the actual cost of providing public records.
 - The only limitation of use for private individuals is a prohibition against disclosing confidential material. The Open Records Statute does not restrict commercial use of public information.

525 *Hovet v. Hebron Public School District*, 419 N.W.2d 189, 191 (N.D. 1988).

526 N.D.C.C. § 44-04-18.10(1)(2).

527 N.D.C.C. § 44-04-18.5.

528 N.D.C.C. § 44-04-18(3).

529 N.D.C.C. § 44-04-18(4).

Ohio

Open Records Law

Codes: Ohio Rev. Code § 149.43 – 149.45

Relevant Court Cases: *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994); *State ex rel. Seveyega v. Reis*, 88 Ohio St. 3d 458, 727 N.E.2d 910 (2000); *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 99 Ohio St. 3d 1, 661 N.E.2d 187 (1996); *State ex rel. MADD v. Gosser*, 20 Ohio St. 3d 30, 485 N.E.2d 706 (1985); *State ex rel. Harmon v. Bender*, 25 Ohio St. 3d 15, 494 N.E.2d 1135 (1986); *State ex rel. WBNS TV Inc. v. Dues*, 101 Ohio St. 3d 406, 805 N.E.2d 1116 (2004); *State ex rel. Stys v. Parma Cmty. Gen. Hosp.*, 93 Ohio St. 3d 438, 755 N.E.2d 874 (2001); *State ex rel. Freedom Communications Inc. v. Elida Community Fire Company*, 82 Ohio St. 3d 578, 697 N.E.2d 210 (1998); *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St. 3d 580, 669 N.E.2d 835 (1996); *State ex rel. Toledo Blade Co. v. Seneca County Board of Comm'rs*, 120 Ohio St.3d 372 (2008)

The preservation of public records in Ohio predates statehood. Common law access to public information was first officially recognized in 1901.⁵³⁰ The state legislature codified the Open Records Law in 1963 within Chapter 143 of Title 1, which embodies the original intent to provide the public with access to information regarding the activities of government. Subsequent revisions and amendments have expanded the reaches of the statute since its enactment.

- Who may request records and for what purpose:
 - The Open Records Law enables “any person” to inspect or copy public records, regardless of state or country citizenship status.⁵³¹
 - ▶ Courts have broadly interpreted the term “any person” to permit “anyone, including any recognized business entity (defendants, newspapers, researchers, designees and/or nondesignees) to obtain records.”⁵³²

530 *Wells v. Lewis*, 12 Ohio N.P. 170 (Superior Ct. of Cincinnati 1901).

531 Ohio Rev. Code § 149.43(B).

532 *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994).

- ▶ However, the statute requires inmates to receive consent from a judge to gain access to records regarding criminal investigations or prosecutions.⁵³³
- The purpose of the request will not affect access to records but may have some bearing on costs or other factors regarding records.
 - ▶ Public offices are authorized to limit the number of copies requesters receive via U.S. mail to ten per month unless the requester states that the records or the information they contain will not be used for commercial purposes.⁵³⁴
 - ▶ The bureau of motor vehicles may charge extra fees for “bulk commercial special extraction requests.”⁵³⁵
- The statute does not restrict the subsequent use of public records obtained.
- Whose and which records are covered under the act:
 - The act defines “public record” as any “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity...”⁵³⁶
 - The definition of “public office” is equally broad and encompasses every “entity established by the laws of this state for the exercise of any function of government.”⁵³⁷
 - This definition covers the executive branch as well as the executives themselves, without distinguishing among records pertaining to different functions of the executive offices.
 - ▶ The Supreme Court has posited that the separation of powers doctrine found in

533 *State ex rel. Seveyega v. Reis*, 88 Ohio St. 3d 458, 727 N.E.2d 910 (2000).

534 Ohio Rev. Code § 149.43(B)(7).

535 Ohio Rev. Code § 149.43(F).

536 Ohio Rev. Code § 149.43(A)(1).

537 Ohio Rev. Code § 149.011(A).

- the constitution may prevent the statute from being applied to the Governor and Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, and Attorney General. The same doctrine does hold for local chief executives, including mayors.⁵³⁸
- The statute also covers legislative bodies. The Supreme Court has not yet ruled regarding the application of the statute to the state's General Assembly. The separation of powers doctrine may also preclude the statute's application to various internal records of the state legislators.⁵³⁹
 - The Supreme Court has applied the Open Records Law to court records.⁵⁴⁰
 - Nongovernmental entities are also subject to the act.
 - ▶ All records "pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school" are public.⁵⁴¹
 - ▶ The records of private entities charged with performing public functions by public agencies have been held subject to the statute by the Ohio Supreme Court.⁵⁴² The openness of the records basically depends on their relation to public business.
 - The state legislature expanded the types of records covered by the act from those which public agencies were required to keep to all those possessed by the agency.
 - Records do not lose their public status after being transferred to a private party.⁵⁴³
 - The physical format of the record does not affect whether or not it may be disclosed.
 - All records available for inspection may be reproduced for the public.
- Fees and costs:
 - The statute authorizes agencies to provide copies "at cost."⁵⁴⁴
 - The fees charged for reproductions of public records has been ruled as limited to the direct costs of supplies used to provide the copies request, excluding labor costs.⁵⁴⁵
 - ▶ The only exception is for special requests from the department of motor vehicles which will be discussed further.
 - Public agencies may not charge individuals for inspecting records, even if information must first be redacted.
 - The statute makes no provisions for fee waivers, and case law has yet to address this issue.
 - Enforcement and sanctions:
 - Individuals denied access to records may bring a mandamus action in court.
 - Courts may award attorneys' fees and costs to successful plaintiffs.
 - In addition, courts may award damages of \$100 for each day after the action was filed that the records were withheld, not exceeding \$1,000.⁵⁴⁶
 - Exemptions:
 - All records are open unless deemed confidential by a specific statute.
 - The language of the law creates discretionary exceptions. Custodians are not required to disclose certain records but are not forbidden from doing so either.
 - Several exemptions are found throughout Section 149.43A, including medical records, inmate records, trade secrets, certain law enforcement records, and financial information.

538 *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 99 Ohio St. 3d 1, 661 N.E.2d 187 (1996).

539 See footnote (two above).

540 *State ex rel. Scripps Howard Broad. Co. v. Cuyahoga County Court of Common Pleas, Juv. Div.*, 73 Ohio St. 3d 19, 652 N.E.2d 179 (1995).

541 Ohio Rev. Code § 149.43(A)(1).

542 For example, see *State ex rel. Fostoria Daily Review Co. v. Fostoria Hospital Ass'n*, 40 Ohio St. 3d 10, 531 N.E.2d 313 (1988); *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 99 Ohio St. 3d 1, 661 N.E.2d 187 (1996).

543 *State ex rel. Mazza v. Ferguson*, 49 Ohio St. 3d 37, 550 N.E.2d 464 (1990).

544 Ohio Rev. Code § 149.43(B).

545 *State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994).

546 Ohio Rev. Code § 149.43(C).

- Because the Open Records Law exempts all records which are held confidential by state or federal law, many more statutory exceptions exist throughout the state code.⁵⁴⁷
 - ▶ Several of these include preliminary state audit reports,⁵⁴⁸ communications between legislators and their staff members,⁵⁴⁹ and tax returns.⁵⁵⁰
- The courts have declined to create common law exemptions with one exception: a “judicial mental process” which exempts the notes of judges.⁵⁵¹ The courts otherwise serve to interpret and enforce the statute.
- Though the law does not explicitly address the issue, courts have ruled that custodians must provide the public information found among confidential data.⁵⁵²
- Electronic Records:
 - The Open Records Law explicitly covers records in electronic form.
 - ▶ E-mails are public if the content passes the same test that applies to paper records in determining their openness.
 - ▶ Proprietary software is not a public record.⁵⁵³
- Requesters may choose a format in which to receive the records, though custodians are not required to produce public information in any medium or format in which the information may not be compiled with existing software.⁵⁵⁴
- The fees charged for electronic records must not exceed the costs of copying paper records.⁵⁵⁵
- However, if copying computer tapes results in an “increased financial burden” on the agency, that burden may be passed to the requester.⁵⁵⁶
- Money-Making:
 - The only public agency specifically authorized to profit from the sale of public records is the Bureau of Motor Vehicles. The agency may charge for the labor costs associated with creating programs to comply with special requests made for commercial purposes in addition to the material costs of the supplies used. Moreover, the agency may charge an additional 10%.⁵⁵⁷
 - Private use of public information is unrestricted.

547 See the state legislature’s website for the complete code: <http://codes.ohio.gov/>

548 Ohio Rev. Code §§ 117.14, 15.

549 Ohio Rev. Code § 101.30.

550 Ohio Rev. Code §§ 718.13.

551 *TBC Westlake Inc. v. Hamilton County Board of Revisions*, 81 Ohio St. 3d 58, 689 N.E.2d 32 (1998).

552 *State ex rel. Outlet Communications Inc. v. Lancaster Police Dept.*, 38 Ohio St. 3d 324, 528 N.E.2d 175 (1988).

553 *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992).

554 *State ex rel. Scanlon v. Deters*, 45 Ohio St. 3d 376, 379, 544 N.E.2d 680 (1989).

555 *State ex rel. Recodat v. Buchanan*, 46 Ohio St. 3d 163, 546 N.E.2d 203 (1989).

556 *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992).

557 Ohio Rev. Code § 149.43(E).

Oklahoma

Open Records Act

Codes: 51 Okla. Stat. § 24A

Relevant Court Cases: *Oklahoma City News Broadcasters Ass'n Inc. v. Nigh*, 1984 Okla. 31, 683 P.2d 72; *Oklahoma Pub. Co. v. City of Moore*, 1984 Okla. 40, 682 P.2d 754; *Williams v. Austin*, 1994 Okla. Civ. App. 177, 890 P.2d 416; *Transportation Information Services Inc. v. Oklahoma Dep't of Corrections*, 1998 Okla. 108, 970 P.2d 166

For more than four decades, Oklahoma's Open Records Act remained one paragraph in Chapter 24 of Title 51:

It is hereby made the duty of every public official of the State of Oklahoma, and of its subdivisions, who are required by law to keep public records pertaining to their said offices, to keep the same open for public inspection for proper purposes, at proper times and in proper manner, to the citizens and taxpayers of the State, and its subdivisions, during all business hours of the day; provided, however, the provisions of this Act shall not apply to income tax returns filed with the Oklahoma Tax Commission, or other records required by law to be kept secret.

Since then, it has been expanded and amended. Concerns regarding individuals' right to privacy arose in several court cases. Though the Ohio Supreme Court sought to balance individuals' privacy interests with the public's interest in disclosure, the state legislature insisted that the specific exceptions to the act would sufficiently protect individuals' interests and amended the act to state:

The Oklahoma Open Records Act shall not create, directly or indirectly, any rights of privacy or any remedies for violation of any rights of privacy; nor shall the Oklahoma Open Records Act, except as specifically set forth in the Oklahoma Open Records Act, establish any procedures for protecting any person from release of information contained in public records. The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they

may efficiently and intelligently exercise their inherent political power.⁵⁵⁸

- Who may request records and for what purpose:
 - Any person, regardless of citizenship status, may request access to public records.
 - The purpose for which a request is made does not affect the individuals' access to records.
 - ▶ However, those seeking records for commercial purposes may be charged an additional fee.
 - The Open Records Act does not restrict the subsequent use of public information.
- Whose and which records are covered under the act:
 - The statute applies to public bodies, which are defined as "any office, department, board, bureau, commission, agency, ... or any entity created by a trust, county, city, village, town, ... court, executive office, advisory group, ... or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property..."⁵⁵⁹
 - This definition includes executive agencies and the executives themselves.
 - The act does not encompass the state legislature or legislators unless the records relate to the receipt or expenditure of public funding.
 - The act does cover court records but excludes the records of judges or justices unless the information relates to the receipt or expenditure of public funding.⁵⁶⁰
 - Entities which receive public funding are subject to the act.
 - All other entities involved in the transaction of public business may be held subject to the Open Records Act.

558 51 Okla. Stat. § 24A.2.

559 51 Okla. Stat. § 24A.3.2.

560 51 Okla. Stat. § 24A.4.

- The statute broadly defines public records as “all documents... received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.”⁵⁶¹
- The physical format of the record is irrelevant.
- All records available for inspection are available for copying.
- Fees and costs:
 - Public agencies are authorized to charge only “reasonable, direct costs of record copying” not exceeding 25 cents per page or \$1.00 per page for certified copies unless otherwise prescribed by law.
 - Agencies may charge for the cost of searching and copying under two circumstances:
 1. The request is for commercial purposes, or
 2. Fulfilling the request would create “excessive disruption of the essential functions of the public body.”⁵⁶²
 - ▶ Note that publication or broadcast for news purposes does not constitute a commercial purpose.
 - Section 24A.5.3 states, “In no case shall a search fee be charged when the release of records is in the public interest, including, but not limited to, release to the news media, scholars, authors and taxpayers seeking to determine whether those entrusted with the affairs of the government are honestly, faithfully, and competently performing their duties as public servants.”
 - The statute also demands that fees not be used to discourage requests.
- Enforcement and sanctions:
 - Those denied access to records may bring a civil suit to seek injunctive relief.
 - If successful, plaintiffs may recover reasonable attorneys’ fees.⁵⁶³

- If the suit was brought frivolously, the public agency will be entitled to collect attorneys’ fees.⁵⁶⁴
- Any public official found guilty of a willful violation of the act will be guilty of a misdemeanor, punishable by a fine not exceeding \$500 and/or imprisonment in a county jail up to 1 year.⁵⁶⁵
- Attorneys General may provide opinions interpreting the Open Records Act but have no role in enforcing the statute’s provisions.
- Exemptions:
 - The act recognizes nineteen specific and discretionary exemptions throughout sections 24A.7 through 24A.29.
 - ▶ Public agencies and officials are not civilly liable for damages resulting from disclosing records.⁵⁶⁶
 - Examples of exceptions found within the act are personnel records, personal notes, investigatory files, educational records, and trade secrets.
 - Approximately 150 other statutory exemptions exist throughout the state code.⁵⁶⁷
 - The Oklahoma Supreme Court has granted exceptions to certain types of records, including traffic collision reports⁵⁶⁸ and insurance commission reports.⁵⁶⁹
 - All reasonably segregable portions of records containing confidential information must be provided upon request.⁵⁷⁰
- Electronic Records:
 - The Open Records Act expressly covers electronic records.
 - ▶ E-mails received by or sent from public agencies may be public if their content

⁵⁶¹ 51 Okla. Stat. § 24A.3.1.

⁵⁶² 51 Okla. Stat. Supp 2005 § 24A.5.3.

⁵⁶³ 51 Okla. Stat. Supp 2005 § 24A.17.B.

⁵⁶⁴ 51 Okla. Stat. Supp 2005 § 24A.17.C.

⁵⁶⁵ 51 Okla. Stat. Supp 2005 § 24A.17.A.

⁵⁶⁶ 51 Okla. Stat. Supp. 2005 § 24A.17.D.

⁵⁶⁷ See the state legislature’s website for a copy of the complete code: www.lsb.state.ok.us/osstatuestitle.html

⁵⁶⁸ *Cummings & Associates v. City of Oklahoma City*, 1993 Okla. 36, 849 P.2d 1087.

⁵⁶⁹ *Farrimond v. Fisher*, 2000 Okla. 52, 8 P.3d 872.

⁵⁷⁰ 51 Okla. Stat. Supp. 2005 § 24A.5.2.

relates to the transaction of public business or the receipt or expenditure of public funds.⁵⁷¹

- ▶ Software is excluded from the definition of public records.⁵⁷²
- Though individuals may request a format in which to receive records, public agencies are not required to provide records in any format other than those already maintained by the agency.⁵⁷³
 - ▶ However, according to the Attorney General, public bodies may not provide records in electronic format if confidential information cannot be redacted.⁵⁷⁴
- Fees for electronic records are, as with paper records, limited to reasonable direct costs of reproduction. The Ohio Supreme Court and Attorney General have served to interpret the meaning of a reasonable charge:
 - ▶ The state supreme court ruled that charges may be “based upon the cost materials [and] labor needed for providing the computer program and service to produce the requested data.”⁵⁷⁵

▶ The Attorney General has opined that agencies may recover

- ◆ “(1) the storage media used, including disk, tape, or other format unless provided by the requester;
 - ◆ (2) any access or processing charges imposed upon the public body because of the request;
 - ◆ (3) any hardware or software specifically required to fulfill the request and reproduce the record in computer-readable format which would not otherwise generally be required or used by the public body; and
 - ◆ (4) the cost of labor directly attributable to fulfilling the request.”⁵⁷⁶
- Money-Making:
 - Public agencies may not generally profit from the sale of public records, as they are not allowed to charge personnel costs related to searching for documents unless the request is burdensome or for commercial purposes.
 - The Open Records Act clearly acknowledges that requests may be made for commercial purposes, though these requesters may face greater charges to obtain the information.

571 2001 Okla. Op. Att’y Gen. 46.

572 51 Okla. Stat. Supp. 2005 § 24A.3.1(a).

573 51 Okla. Stat. 2001 § 24A.18.

574 See footnote (-4).

575 *Merrill v. Oklahoma Tax Commission*, 1992 Okla. 53, 831 P.2d 634.

576 2005 Okla. Op. Att’y Gen. 21; 96 Okla. Op. Att’y Gen. 26.

Oregon

Public Records Law

Codes: ORS 192.410 – 192.595

Relevant Court Cases: *McEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961); *Jordan v. MVD*, 308 Or 433, 781 P.2d 1203 (1989); *Coos County v. Department of Fish & Wildlife*, 86 Or App 168, 739 P.2d 47 (1987); *Portland Adventist Medical Center v. Sheffield*, 303 Or. 197, 735 P.2d 372 (1987); *AFSCME v. State of Oregon, Dept. of Administrative Services*, 150 Or. App. 87, 945 P.2d 102 (1997)

Oregon adopted the Public Records Law in 1973. The State Department of Justice plays a focal role in interpreting the statute. Every two years the Attorney General publishes a Public Records and Meetings Manual, which may serve as a useful reference tool. The manual reviews the requirements for open records and contains an index and summary of relevant opinions from the Attorney General. This manual is available for purchase from the Oregon Department of Justice.

- Who may request records and for what purpose:
 - Any person, regardless of residency or citizenship status may request access to public records.⁵⁷⁷ ORS 192.410 defines the term “person” as including “any natural person, corporation, partnership, firm, association or member or committee of the Legislative Assembly.”
 - ▶ A person’s identity may be relevant when seeking access to a record subject to an exception that requires a person to show interest in disclosure.
 - The purpose of a request is generally immaterial.⁵⁷⁸
 - ▶ Purpose may only be taken into account when an individual is seeking access to records which fall under exemptions to the act.
 - The subsequent use of any public information obtained is unrestricted.

- Whose and which records are covered under the act:
 - The Public Records Law applies to every “public body” including “every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof, and any other public agency of the state.”⁵⁷⁹
 - ▶ ORS 192.410(5) defines “state agency” as “any state officer, department, board, commission or court created by the Constitution or statutes of this state.”
 - ▶ “Public corporations,” including the state health and sciences university, the state bar organization, and a state accident insurance company, have been held subject to the statute.
 - ▶ The Oregon Supreme Court has ruled that any entity which is the “functional equivalent” of a public agency, the act applies to it.
 - The executive branch and its officers are subject to the act.
 - Records of legislative entities excluding the state legislature are covered under the act. The state Legislative Assembly is not subject to the Public Records Law.⁵⁸⁰
 - The courts are subject to Article I, § 10, of the Oregon Constitution, which requires openness. Whether the judicial branch is subject to the Public Records Law, however, remains unclear.⁵⁸¹
 - The receipt of public funding or having public officials as members are, alone, insufficient to subject that entity to the statute. The court established a six part test in *Marks v. McKenzie High School* *Fact*

⁵⁷⁹ ORS 192.410(3).

⁵⁸⁰ ORS 192.410(5).

⁵⁸¹ *State ex rel. KOIN-TV v. Olsen*, 300 Or. 392, 711 P.2d 966 (1985).

⁵⁷⁷ ORS 192.420(1).

⁵⁷⁸ *McEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961); Attorney General Manual, § I(A).

Finding Team, which considers the following factors:

1. Whether the government created the entity;
 2. Whether the entity performs traditionally governmental or private functions;
 3. Whether the entity makes binding resolutions or merely recommendations
 4. The level and nature of public financial and nonfinancial support;
 5. The extent of governmental control over the entity's operations; and
 6. Whether the entity's staff or officers are public employees.⁵⁸²
- The language applying the statute to every public agency in the state makes it unclear if multi-state or regional bodies are subject to its provisions.
 - The statute defines public records as "any writing that contains information relating to the conduct of the public's business ... prepared, owned, used or retained by a public body."⁵⁸³
 - All public records are available, regardless of physical format or characteristics.
 - All records available for inspection may also be copied.⁵⁸⁴
- Fees and costs:
 - Agencies are authorized to charge a fee "reasonably calculated to reimburse" that agency for the actual cost of providing access to or copies of public records. These costs may include the following elements:⁵⁸⁵
 - ▶ Costs of compiling, summarizing, or tailoring records to fulfill the request;
 - ▶ Cost of the time an attorney spends reviewing the records and redacting confidential material from the public portions.

⁵⁸² *Marks v. McKenzie High School Fact Finding Team*, 319 Or 451, 878 P.2d 417 (1994).

⁵⁸³ ORS 192.410(4)(a).

⁵⁸⁴ ORS 192.440(1).

⁵⁸⁵ ORS 192.440(4).

- ◆ Agencies may not include the cost of determining the applicability of the provisions of the Public Records Law.

- The Attorney General has opined that public agencies may charge individuals for searches even if the requested records are not found.
 - Public bodies must provide an estimate if the fee will likely exceed \$25.00.
 - Under ORS 192.440(5), public bodies may provide a fee waiver or reduction if disclosure "primarily benefits the general public."
 - ▶ The Attorney General has decided that if public bodies whose funding comes from statutorily or constitutionally dedicated sources, they may not provide fee waivers or reductions and should charge the actual costs of providing access to public records.
 - ▶ Section 192.440(6) offers an appeals process for wrongful denials of fee waivers. Individuals may petition the Attorney General or district attorney.
 - ▶ State courts also have jurisdiction to review the reasonableness of fees.⁵⁸⁶
 - Agencies may require advance payment of estimated fees prior to compiling and providing records. Custodians must refund requesters any excess costs provided if actual charges are less than the original estimate.
- Enforcement and sanctions:
 - Those denied access to public records may petition the Attorney General to determine the openness of the record. The Attorney General must grant or deny the petition within seven days and has the authority to order the state agency to disclose the requested record.⁵⁸⁷
 - ▶ If the Attorney General grants the petition and orders disclosure, a state agency may seek injunctive or declaratory relief in civil court within seven days of receiving the order.

⁵⁸⁶ *In Defense of Animals v. OHSU*, 199 Or App 160, 112 P3d 336 (2005).

⁵⁸⁷ ORS 192.450.

- ▶ If the Attorney General denies the petition or allows the state agency to withhold records, the individual may then institute proceedings in civil court to receive injunctive or declaratory relief. In this case, the Attorney General will serve as the state agency's counsel.
 - ◆ Note that separate procedures may exist for those seeking records from different agencies.⁵⁸⁸
- These proceedings take precedence on the docket and must be expedited in court.⁵⁸⁹
- Courts have the authority to enjoin the public agency from withholding the requested information if it finds that it wrongfully denied access. The court may first view the materials in question prior to reaching a decision.⁵⁹⁰
- Prevailing plaintiffs may be awarded attorneys' fees at the court's discretion. The petitioner may also receive litigation costs if the agency failed to institute proceedings within seven days or if it failed to comply with the Attorney General's order, regardless of the outcome of the case.⁵⁹¹
- Section 192.541 outlines sanctions for violations of Sections 192.535, 192.537, 192.539 or 192.547, which primarily pertain to the disclosure of records containing genetic information.
 - ▶ Unlawfully obtaining or disclosing genetic information is a Class A misdemeanor.⁵⁹²
- Section 192.590 describes sanctions for violations of Sections 192.550 to 192.595, which relate to the disclosure of private financial information.

- Exemptions:

- The Public Records Law contains several specific exemptions, most of which are discretionary. Courts have ruled that these must be construed narrowly to permit the greatest possible access to public information.

- Section 192.501 contains 35 categories of exemptions which custodians may apply unless disclosure would serve the public interest.
 - ▶ A few of these include trade secrets, investigatory information, personnel disciplinary records, and security-related information.
- Section 192.502 contains another 37 categories which are exempt from disclosure.
 - ▶ Examples include personal information, library records, and several other specific records which relate to or are possessed by specific public agencies.
- The statute also provides exemptions to all other exceptions to disclosure found in federal laws or throughout the state code.⁵⁹³ The Attorney General Manual also provides a list of statutes relevant to open records.
 - ▶ Certain records exempt by other state or federal laws include medical records, private financial records, and educator personnel files.
- Courts do have the authority to establish common law exemptions.
- Section 192.505 requires public agencies to segregate confidential material from non-exempt information and make the latter available to the public.
- Electronic Records:
 - The Public Records Law covers electronic records.
 - ▶ E-mail is public if the content relates to public functions and meets the same standards which apply to paper records.
 - ◆ However, if the e-mail contains no public content and is stored on a privately owned computer, it falls outside the definition of a public record.⁵⁹⁴

⁵⁸⁸ See ORS 192.450(4)-(7).

⁵⁸⁹ ORS 192.490(2).

⁵⁹⁰ ORS 192.490(1).

⁵⁹¹ ORS 192.490(3).

⁵⁹² ORS 192.543.

⁵⁹³ See the state legislature's website for a complete list of the code: www.leg.state.or.us/ors/

⁵⁹⁴ ORS 192.410(4)(b).

- ▶ Section 192.501(15) exempts computer programs from disclosure, provided that the public interest does not require disclosure.
 - Requesters may choose a format if the record is maintained in electronic format.⁵⁹⁵
 - If existing software or computer programs allow, customized searches should be made available, according to the Attorney General.
 - Fees must be assessed under the same standards which apply to all other public records and are limited to actual costs. Agencies are permitted to charge for the cost of tailoring records upon request.
- Money-Making:
 - Public agencies may not profit from the sale of public records, as fees are limited to actual costs.
 - Individual use of public information is unrestricted and may presumably be used for commercial purposes.

⁵⁹⁵ ORS 192.440(2).

Pennsylvania

Right to Know Law

Codes: Act 3 of 2008

Relevant Court Cases: *Wiley v. Woods*, 141 A.2d 844, 849 (Pa. 1958); *Envirotest Partners v. Commonwealth Dep't of Transp.*, 664 A.2d 208, 213 (Pa. Commw. Ct. 1995); *Hoffman v. Pennsylvania Game Comm'n*, 455 A.2d 731 (Pa. Commw. Ct. 1983); *Compare Pastore v. Commonwealth Ins. Dep't.*, 558 A.2d 909, 913-14 (Pa. Commw. Ct. 1989); *Owens v. Horn*, 684 A.2d 208, 210 (Pa. Commw. Ct. 1996); *Times Publ'g Co. v. Michel*, 633 A.2d 1233, 1239 (Pa. Commw. Ct. 1993), *appeal denied*, 645 A.2d 1321 (Pa. 1994)

Note that these cases serve to interpret the prior act.

Pennsylvania's first Open Records Law, often referred to as the "Right to Know" Act, was originally adopted in 1957. In January 2008, the state legislature enacted a new Right to Know Law. Though certain provisions are entirely new, the Right to Know Law maintains some procedures from amendments made in 2002. One of the more significant changes is the new presumption of openness that requires state and local agencies to provide access to records unless the government agency is able to demonstrate that the requested records are not public records. The act contains a broader definition of what constitutes a record but provides a longer list of exceptions. Also, the new act applies to certain entities the prior act did not, including the General Assembly and state-related institutions, such as public universities and government contractors. Agencies now have fewer days to respond to requests and are liable for stricter civil penalties. The new Right to Know Law establishes the Office of Open Records which is charged with handling appeals, mitigating disputes, issuing opinions, and spreading information.

- Who may request records and for what purpose:
 - The act defines a "requester" as a "person that is a legal resident of the United States and requests a record pursuant to this act. The term includes an agency."⁵⁹⁶ Illegal aliens and foreign visitors therefore have no access to public records.
 - Consistent with prior case law, no public agency may deny a request for records

⁵⁹⁶ Section 102.

because of the requester's intended use of the information.⁵⁹⁷

- The statute does not explicitly restrict the subsequent use of information obtained, and case law has provided no restrictions either.⁵⁹⁸
- Whose and which records are covered under the act:
 - The statute defines several categories of public entities which are subject to its provisions in Section 102:
 - ▶ Commonwealth agencies include all offices, departments, boards, or commissions pertaining to the executive branch; all independent agencies; and all state-affiliated entities. This term also includes the offices of the Governor and Attorney General, the Treasury Department, and the Department of the Auditor General, along with any other organization which was established by a statute, executive order, or the state constitution and performs a governmental function.
 - ◆ Independent agencies are boards, commissions, or other agencies which are outside the policy supervision of the Governor.
 - ◆ The statute includes a list of boards and commissions which are considered "state-affiliated agencies," including the Pennsylvania Higher Education Assistance Agency, the Pennsylvania Gaming Control Board, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, and the State System of Higher Education.
 - ◆ Local agencies include all political subdivisions and intermediate units; charter, cyber charter, vocational, or trade schools; along with any "local, intergovernmental, regional

⁵⁹⁷ Sections 301 – 304.

⁵⁹⁸ See *Hoffman v. Pennsylvania Game Comm'n*, 455 A.2d 731 (Pa. Commw. Ct. 1983).

or municipal agency, authority, council, board, commission or similar governmental entity.”

- ▶ The statute defines “legislative agencies” with a list of 15 entities, including the Senate, the House of Representatives, the Joint State Government Commission, and several other legislative commissions and committees.
 - ◆ The previous act did not apply to the legislative branch.⁵⁹⁹
- ▶ Judicial agencies include all courts and offices of the judicial branch.
- These definitions encompass all three branches of all levels of government.
- The receipt of public funding or having public officials as members of the organization is not sufficient to deem an entity a public agency subject to the act, though most of these organizations appear to fall within one of the categories the act does cover.⁶⁰⁰
- Multi-state bodies are included in the definition of commonwealth agencies and are therefore subject to the act’s provisions.
- Agencies or commissions which function purely to serve as advisory boards were not included in the interpretations of the previous act, as they did not serve an “essential” function.⁶⁰¹
- Local and commonwealth agencies must provide “public records,” while legislative agencies provide “legislative records” and judicial agencies provide “financial records.”⁶⁰²
 - ▶ Public records, as defined in Section 102, include all records which are not protected under a privilege or exempt by Section 708 or other state or federal laws.
 - ▶ Section 102 provides a list of 19 types of records which are considered “legislative records,” including financial records,

fiscal notes, the journal and rules of a chamber, and other types of reports and manuals.

- ▶ Financial records, as defined in Section 102, include all accounts, vouchers, or contracts regarding the receipt or expenditure of funds or an agency’s obtainment or use of services, materials, or property. The definition also includes final financial audit reports and the salaries of public officials.
- The term “record” encompasses all physical formats of information.
- All records are available for inspection and duplication.
- Fees and costs:
 - Section 1307 divides the fees that may be charged for reproduction of paper records into three components:
 1. Postage: Fees should not exceed the actual cost of mailing records.
 2. Duplication: Fees for local and commonwealth agencies are established by the Office of Open Records. Legislative and judicial agencies establish their own fee practices. Fees must be “reasonable and based on prevailing fees for comparable duplication services provided by local business entities.”
 - ◆ For extensive or complex data sets, agencies may base fees on the fair market value of comparable information, unless the requester is a nonprofit organization conducting research or is connected to the news media with the intent to publish or broadcast the information.
 3. Certification: Agencies are authorized to charge a fee for certifying copies of public records.
 - Agencies may not impose fees for reviewing the record to determine whether it is subject to disclosure.
 - Agencies may waive fees if the requester duplicates the record using his/her own resources or if the custodian believes a waiver would serve the public interest.

599 *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).

600 *Mooney v. Board of Trustees of Temple Univ.*, 292 A.2d 395, 399 (Pa. 1972).

601 *Safety, Agriculture, Villages and Environment (S.A.V.E.) v. Delaware Valley Regional Planning Commission*, 819 A.2d 1235 (Pa. Commw. Ct. 2003).

602 See footnote (-5).

- Agencies may require requesters to pay estimated costs expected to exceed \$100.

- Enforcement and sanctions:

- Chapters 11 and 13 outline the process for appealing denials of requests for access to public records, including petitioning an appeals officer and instituting action through the courts.
- Appeals officers are appointed for each of the four categories of public entities⁶⁰³:
 - ▶ The Office of Open Records appoints appeals officers for commonwealth agencies and local agencies.
 - ▶ The Senate and the House of Representatives appoint their own appeals officers. The Legislative Reference Bureau appoints all other legislative appeals officers.
 - ▶ Judicial agencies appoint their own appeals officers.
 - ▶ Regarding law enforcement records and statewide officials, the Attorney General, State Treasurer and Auditor General must each designate an appeals officer. Also, the district attorney for each county must designate one or more appeals officers to hear any appeals concerning criminal investigative records held by a local agency of the county. The appointed officer has the authority to decide whether or not the requested record constitutes a criminal investigative record.
- Appeals officers may conduct hearings and have the authority to issue final determinations regarding the openness or confidentiality of the record.⁶⁰⁴
- Agencies and requesters may take action in courts to appeal the final determinations of appeals officers.
 - ▶ Disputes regarding records of commonwealth, legislative, and judicial agencies must be filed in the Commonwealth court.⁶⁰⁵
 - ▶ Petitions concerning records of local agencies must be filed with the court of

common pleas of the county in which the local agency is located.⁶⁰⁶

- The court may reverse or uphold the appeals officer's final determination. If the court finds that the agency willfully or wantonly denied access to public records or failed to base its decision on a reasonable interpretation of the law, the judge may award the successful plaintiff attorneys' fees.⁶⁰⁷
 - ▶ If the requester brought the lawsuit frivolously, the agency may be awarded litigation costs.
- Agencies may also be liable for civil penalties:⁶⁰⁸
 - ▶ Courts may assess a fine not exceeding \$1,500 if the agency denied a requester access to public records in bad faith.
 - ▶ Agencies which do not comply with court orders may be subject to a penalty up to \$500 for each day the records were not provided after the court order was issued.
- Exemptions:
 - Section 708 of the Right to Know Law provides 30 categories of records which are exempt from disclosure.
 - A few of the specific exceptions include security or defense-related records, medical and psychiatric records, personal information, trade secrets, and DNA or RNA records.
 - Two general exceptions exempt records if disclosure
 - ▶ "would result in the loss of Federal or State funds by an agency or the Commonwealth," or "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual,"⁶⁰⁹ or
 - ▶ would engender "a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system."⁶¹⁰

603 Section 503.

604 Section 1102.

605 Section 1301.

606 Section 1302.

607 Section 1304.

608 Section 1305.

609 Section 708(1).

610 Section 708(3).

- Certain records may be disclosed at the discretion of the custodian if federal or state laws or judicial orders do not prohibit disclosure, if the record is not protected under a recognized privilege, or if the agency head decides the public interest in disclosure outweighs the interest of confidentiality.⁶¹¹
- Public agencies are authorized to temporarily withhold records under certain conditions:
 - ▶ A requester makes repeated requests for the same record, placing an unreasonable burden on the public agency.⁶¹²
 - ▶ A fire, flood, or other disaster prevents timely access to public records.⁶¹³
 - ▶ A curator or custodian determines that a record cannot be released without causing irreparable damage to the historical or ancient document.⁶¹⁴
- Many other statutes throughout the state code exempt records from or require disclosure. A few exempt categories include adoption records, child abuse reports, and insurance information. Others may be found as they relate to specific industries or occupations in their respective portions of the state code.⁶¹⁵
- The act explicitly does not supersede judicial orders or decrees. The courts appear to have the authority to derive common law exceptions.
- Agencies must provide the public portions of otherwise exempt materials.⁶¹⁶
- Electronic Records:
 - The Right to Know Law covers electronic records.
 - ▶ E-mail stored on government servers are public records.
- ▶ Software is exempt if it constitutes proprietary material or if the release would jeopardize security.
- Requesters may choose a format in which to receive records if the agency keeps these records in multiple formats.
 - ▶ If the requester prefers a paper copy, the public agency must provide a printout of the electronic records within five days of receiving that request.⁶¹⁷
- However, agencies are not required to “create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.”⁶¹⁸
- As with other types of records, fees for electronic records must generally be reasonable and based on actual cost.
- If the record is not maintained in a paper format in addition to electronic format, agencies must charge the lesser of the two fees associated with either duplicating the records in the original format or on paper, provided that the requester does not explicitly ask for the more expensive medium.⁶¹⁹
- Agencies may charge additional fees in the form of a subscription fee, a flat rate, or a per-transaction charge for providing enhanced electronic access. Providing enhanced access does not permit agencies to cease providing access to records in accordance with the statute’s other provisions. The Office of Open Records must approve these fees, which may not be designed to hinder access to records or generate a profit for the agency.⁶²⁰
- Money-Making:
 - Public agencies may not profit from the sale of public records, as the charges they are authorized to assess must be based on actual cost.
 - Individual use of public information is not restricted by the Right to Know Law.

611 Section 506(c).

612 Section 506(a).

613 Section 506(b)(1)(i).

614 Section 506(b)(1)(ii).

615 See the state legislature’s website for a complete list of the code: www.legis.state.pa.us/

616 Section 706.

617 Section 704.

618 Section 705.

619 Section 1307(d).

620 Section 1307(e).

South Carolina

Freedom of Information Act

Codes: S.C. Code Ann. §§ 30-4-10 – 30-4-165

Relevant Court Cases: *Ex parte The Island Packet*, 417 S.E.2d 575 (S.C. 1992); *Weston v. Carolina Research and Development Found.*, 401 S.E.2d 161 (S.C. 1991); *Quality Towing Inc. v. City of Myrtle Beach*, 547 S.E.2d 862 (S.C. 2001); *Condon v. Reno*, 528 U.S. 141 (2000); *S.C. Tax Comm’n v. Gaston Copper Recycling Corp.*, 447 S.E.2d 843 (S.C. 1994); *Newberry County Pub. Co. v. Newberry County Com’n. on Alcohol and Drug Abuse*, 417 S.E.2d 870 (S.C. 1992)

South Carolina enacted the state’s first Freedom of Information Act in 1974. Subsequent Supreme Court cases led to significant revisions in 1978. Further amendments broadened the act and limited public agencies’ authority to adopt their own exemptions to the act. The current Chief Justice of the South Carolina Supreme Court Jean Hoefer Toal authored the 1978 act and sponsored the 1987 revisions while she was a member of the state legislature. Found in Chapter 4 of Title 30 of the South Carolina Code of Laws, the Freedom of Information Act grants access to all records not closed by specific statutes.

- Who may request records and for what purpose:
 - “Any person,” including individuals, corporations, firms, partnerships, associations and other organizations, has the right to request access to public records in South Carolina under the state’s Freedom of Information Act.⁶²¹
 - Where the use of information is restricted, an individual’s intended purpose may become relevant.
 - ▶ Requesters seeking records regarding the registration and licensing of motor vehicles are required to state the purpose of the request.⁶²²
 - ▶ The South Carolina Family Privacy Protection Act of 2002 forbids the commercial use of state-collected

personal information.⁶²³ (Note that local government records may not be subject to this state privacy legislation.⁶²⁴)

- ▶ Under the Freedom of Information Act, personal information, including the names, addresses and telephone numbers of handicapped or disabled persons should not be disclosed “when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap.”⁶²⁵
- ▶ Other information which Section 30-4-50(B) prohibits from being used for commercial purposes include:
 - ◆ Information contained in police incident reports;
 - ◆ Employee salary schedules;
 - ◆ Home addresses and telephone numbers of public employees.
- Whose and which records are covered under the act:
 - The act applies to all “public bodies” defined as “any department of the State, ... any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, ... any quasi-governmental body of the State and its political subdivisions...”⁶²⁶
 - This definition covers all agencies, officers, and functions of the executive branch.
 - Other than an exception for “memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate

621 S.C. Code Ann. § 30-4-30(a); S.C. Code Ann. § 30-4-20(b).

622 S.C. Code Ann. § 56-3-510.

623 S.C. Code Ann. §§ 30-2-10 et seq.

624 S.C. Code Ann. § 3-2-50(E).

625 S.C. Code Ann. § 30-4-40(a)(2).

626 S.C. Code Ann. § 30-4-20(a).

staffs,” all other legislative records are public.⁶²⁷

- Administrative records of the court are subject to the act. Records relating to court proceedings have been secured under provisions of the state and federal constitutions.⁶²⁸
- While bodies, including multi-state or regional entities, supported by public funding are subject to the act, those which receive funds in exchange for goods or services are not.⁶²⁹
- Having public officials as members of the organization does not subject it to the provisions of the act.
- The act also applies to advisory boards, commissions, and other quasi-governmental bodies.
- The act covers “public records” defined as “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.”⁶³⁰
- The physical format of the record is irrelevant to its openness.
- All records open to inspection are available for copying.⁶³¹
- Fees and costs:
 - Public agencies are authorized by Section 30-4-30(b) to collect fees not exceeding the lowest attainable actual cost of searching for and reproducing public records.
 - Agencies may not charge for the time spent determining if the information is public or confidential.
 - Custodians may waive or reduce fees if disclosure would serve the general public.
- Custodians must provide members of the General Assembly copies of records free of charge if the request is pertinent to their official duties.
- Agencies may require a “reasonable deposit” prior to providing copies of requested records.
- Enforcement and sanctions:
 - Citizens of the South Carolina may file action in the circuit court to seek declaratory judgment and injunctive relief within one year of a denial of access to records.⁶³²
 - Prevailing plaintiffs may recover reasonable attorneys’ fees and litigation costs.⁶³³
 - Anyone who commits a willful violation of the act may be found guilty of a misdemeanor punishable by the following sanctions:⁶³⁴
 - ▶ For the first violation, custodians “shall be fined not more than one hundred dollars or imprisoned for not more than thirty days;”
 - ▶ For a second violation, custodians “shall be fined not more than two hundred dollars or imprisoned for not more than sixty days;”
 - ▶ For a third violation, custodians “shall be fined three hundred dollars or imprisoned for not more than ninety days.”
 - The Attorney General issues opinions interpreting the law but has no prescribed role in enforcing its provisions.
- Exemptions:
 - Specific and discretionary exemptions are found in both the definition of public records and in Section 30-4-40 of the Freedom of Information Act.
 - The definition excludes “income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials

627 S.C. Code Ann. § 30-4-40(a)(1).

628 See, e.g., *Ex parte The Island Packet*, 417 S.E.2d 575 (S.C. 1992).

629 *Weston v. Carolina Research and Development Found.*, 401 S.E.2d 161 (S.C. 1991).

630 S.C. Code Ann. § 30-4-20(c).

631 S.C. Code Ann. § 30-4-30(a).

632 S.C. Code Ann. § 30-4-100(a).

633 S.C. Code Ann. § 30-4-100(b).

634 S.C. Code Ann. § 30-4-110.

which contain names or other personally identifying details ... records of the Board of Financial Institutions pertaining to applications and surveys for charters” along with information “relating to security plans and devices.”⁶³⁵

- Section 30-4-40 authorizes custodians to deny access to records falling under 19 different categories, including trade secrets, personal information, law enforcement records, autopsy records, and private investment records.
- As the act does not supersede any other statutes exempting records from disclosure, many such provisions exist throughout the state code.⁶³⁶ A few of these types of records include income tax information, reports of child abuse, and birth and death certificates.
- South Carolina has established statutory evidentiary privileges for the following:
 - ▶ Priest-penitent interactions,⁶³⁷
 - ▶ Mental health care providers,⁶³⁸ and
 - ▶ News media.⁶³⁹
- Public agencies must make nonexempt material available for inspection and copying after redacting the confidential information from records.⁶⁴⁰

- Electronic Records:

- The statute does not explicitly detail individuals’ right to access electronic records, though records which are public are open regardless of physical characteristics.
 - ▶ E-mail, if the content is public, is presumably public.
 - ▶ Software remains unaddressed within the statute.
- Public agencies must provide requesters with a format which is “convenient and practical for use” if “it is equally convenient for the public body to provide the records in this form.”⁶⁴¹
- Agencies may provide custom searches or tailored records, though they are not required to do so. Custodians may charge for these services, including the cost of writing a computer program for the search.
- As with other types of records, public agencies may charge for the actual costs, including personnel costs, for providing reproductions of public records.

- Money-Making:

- The act requires records be sold at actual cost and prevents public agencies from profiting.
 - ▶ The statute specifically forbids the Department of Motor Vehicles from selling personal information.
- Certain records, as discussed previously, may not be used for commercial purposes by any individual or entity.

635 S.C. Code Ann. § 30-4-20(c).

636 The Freedom of Information Act specifically notes Sections 9-16-80(B), 9-16-320(D), 59-153-80(B), and 59-153-320(D). See the state legislature’s website for a complete list of the code: www.scstatehouse.gov/

637 S.C. Code § 19-11-90.

638 S.C. Code § 19-11-95.

639 S.C. Code § 19-11-100.

640 S.C. Code Ann. § 30-4-40(b).

641 S.C. Code Ann. § 30-4-30(b).

South Dakota

Sunshine Law

Codes: S.D.C.L. § 1-27-1 – 1-27-46

Relevant Court Cases: The South Dakota Supreme Court has had no opportunity to address issues regarding access to open records. Case law has provided no precedents or guidance to follow.

The Sunshine Law of South Dakota opens governmental records to the public and creates a presumption of openness while allowing state agencies and local entities to promulgate their own rules regarding practices and fees for providing copies of public records. Largely similar to the original statute enacted in 1935, the Sunshine Law is found in Chapter 27 of Title 1 of the South Dakota Codified Laws.

- Who may request records and for what purpose:
 - Section 1-27-1 of the Sunshine Law empowers any person “interested in the examination of the public records” to request access.
 - ▶ Inmates may not have full access to records which other individuals may request. Section 1-27-1.13 authorizes the secretary of corrections to “prohibit the release of information to inmates or their agents regarding correctional operations, department policies and procedures, and inmate records of the requesting inmate or other inmates if the release would jeopardize the safety or security of a person, the operation of a correctional facility, or the safety of the public.”
 - The purpose of the request is generally irrelevant under the statute.
 - ▶ However, the act specifically bans the resale or redistribution of information obtained under its provisions, as will be detailed in the final section.
- Whose and which records are covered under the act:
 - The statute covers all “records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political

subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing,” except those exempted by statute.⁶⁴²

- This expansive definition encompasses the executive branch and its employees.
 - The legislature is also not excluded.
 - The courts have not been excluded from the act; however, in 2004, the Supreme Court adopted its own set of rules regarding court records, which are now codified at S.D.C.L. § 15-15A.
 - Entities which receive or expend public funding are not expressly covered in the statute and likely fall outside its scope.
 - Similarly, bodies whose members include public officials are not necessarily subject to the act.
 - Multi-state or regional bodies may be covered indirectly if they act as a governmental entity.
 - Other advisory boards and commissions may fall within the purview of the act to the extent that such entities serve as public offices.⁶⁴³
 - The definition of public records includes all materials regardless of physical format or characteristics.
 - Records are open for inspection and copying during normal business hours.⁶⁴⁴
- Fees and costs:
 - Other than authorizing “reasonable” fees for lists of the Department of Game, Fish and Parks and special service fees (discussed further in the section regarding electronic records), the statute does not stipulate a schedule of fees.

642 S.D.C.L. § 1-27-1.1.

643 Op. Att’y Gen. No. 80-32 (1980).

644 S.D.C.L. § 1-27-1.

- The Attorney General has advised agencies not to sell, but only to recover the costs of providing copies of public records, which “would include reasonable costs for labor, materials, and supplies”⁶⁴⁵
- Section 1-27-36 mandates custodians provide estimates for any request which is likely to cost more than \$50.
- Custodians may waive or reduce fees at their discretion if doing so would serve the public interest.
- Enforcement and sanctions:
 - Sections 1-27-38 through 1-27-41 outlines the procedures for those who wish to contest a denial to access to public records or an estimate of costs or time required to produce a record.
 - ▶ A person may instigate a civil action or seek an administrative review by filing a written notice with the Office of Hearing Examiners within 90 days of receiving a response from the public agency regarding the original request.
 - ▶ The public agency has 10 business days to respond.
 - ▶ The Office of Hearing Examiners may hold a hearing or act on all information provided by the disputing parties and make findings of fact and conclusions of law.
 - ▶ The Office of Hearing Examiners will then issue a decision, which may be appealed in circuit court.
 - The criminal code classifies certain actions regarding records as criminal actions.
 - ▶ Public employees who falsify or falsely alter public records are guilty of a Class 1 misdemeanor.⁶⁴⁶
 - ▶ Public employees who destroy, conceal, or impair the availability of public records are guilty of a Class 5 felony.⁶⁴⁷
 - ▶ Public employees who knowingly refuse to provide public records to anyone

⁶⁴⁵ Op. Att’y Gen. No. 96-01.

⁶⁴⁶ S.D.C.L. § 22-11-23.

⁶⁴⁷ S.D.C.L. § 22-11-24.

entitled to receive them is guilty of a Class 1 misdemeanor.⁶⁴⁸

- Enforcement of these violations would likely mirror enforcement of other misdemeanor or felony cases.
- Sanctions are prescribed in Section 22-11-26. Public officers found guilty of the three previous violations must forfeit the office or be discharged. Any public official with the authority to discharge the guilty officer but refuses to do so will be guilty of a Class 2 misdemeanor.
- However, public access is generally resolved through negotiations with the public agency which possesses the record or is decided by lower-level circuit courts, which provide little precedent on which to rely.
- Exemptions:
 - The Sunshine Law contains several specific and a couple general exemptions, which have generally been interpreted as mandatory, rather than discretionary.
 - Section 1-27-1.5 lists 27 categories of records which are not subject to disclosure.
 - ▶ A few specific ones include trade secrets, medical records, personnel files, and security information.
 - Two general provisions exempt records if the disclosure would either “constitute an unreasonable release of personal information”⁶⁴⁹ or “could endanger the life or safety of any persons.”⁶⁵⁰
 - Other sections within the Sunshine Law also exempt specific types of records:
 - ▶ Section 1-27-1.3 exempts documents relating to the use of funds for the purpose of criminal investigatory or confidential informants.
 - ▶ Section 1-27-1.6 exempts certain propriety, commercial, and financial information.
 - ▶ Section 1-27-1.7 exempts “drafts, notes, recommendations, and memoranda in

⁶⁴⁸ S.D.C.L. § 22-11-25.

⁶⁴⁹ S.D.C.L. § 1-27-1.5(22).

⁶⁵⁰ S.D.C.L. § 1-27-1.5(23).

which opinions are expressed or policies formulated or recommended.”

- ▶ Section 1-27-1.8 exempts certain records relating to court actions.
- ▶ Section 1-27-1.9 exempts materials relating to public officials’ decisional or deliberative process.
- The act does not supersede any other exemptions contained throughout the state or federal code. Several other exceptions exist throughout the South Dakota Codified Laws.⁶⁵¹
 - ▶ A few include tax return information, public library records, certain crime victims records, and adoption records.
- Section 1-27-10 authorizes custodians to redact portions of records containing “information precluded from public disclosure by § 1-27-3 or which would unreasonably invade personal privacy, threaten public safety and security, disclose proprietary information, or disrupt normal government operations.”
- Electronic Records:
 - Electronic records are not exempt from the act and are presumably covered in the same manner as other forms of public records.
 - ▶ E-mail is not specifically addressed by the statute.
 - ▶ Software is also unaddressed. However, if the software constitutes a trade secret or other form of proprietary information, it may fall within an exception to the statute.

- Section 1-27-4 relates to the format of open records. Records must be maintained in their original format or in a searchable electronic format capable of providing reproductions.

- ▶ Agencies are not required to keep any record in a particular format or tailor the format to comply with a request.
- Fees for reproduction of electronic formats are likely held to the same “reasonable” standard, though the act allows additional fees for specialized services. Custodians may charge a fee including the cost of equipment, software, and a portion of amortization costs associated with the computer equipment for transmitting a copy of a public record from one modem to an outside modem.⁶⁵²
- Money-Making:
 - The statute does not explicitly forbid public agencies from generating revenues from the sale of public records, though costs must be “reasonable.”
 - Section 1-27-1.11 specifically forbids commercial use of two types of records:
 - ▶ Individuals are prohibited from selling or redistributing lists of subscribers or license holders possessed by the Department of Game, Fish, and Parks.
 - ▶ Names and addresses of people licensed to drive motor vehicles may be obtained to verify information for insurance purposes but not for resale.
 - ◆ Violation of this provision is a Class 2 misdemeanor.

⁶⁵¹ See the state legislature’s website for a copy of the complete code: <http://legis.state.sd.us/statutes/TitleList.aspx>

⁶⁵² S.D.C.L. § 1-27-1.2.

Tennessee

Open Records Act

Codes: T.C.A. § 10-7-501 – 10-7-515

Relevant Court Cases: *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986); *Board of Education of Memphis City Schools v. Memphis Publishing Co.*, 585 S.W.2d 629 (Tenn. Ct. App. 1979); *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986); *The Capital Case Resource Center of Tennessee Inc. v. Woodall*, 17 TAM 8-8, p.14 (Tenn. Ct. App. Jan., 29, 1992); *Knoxville News Sentinel v. Huskey*, 982 S.W.2d 359 (Tenn.Crim.App. 1998); *Fodness v. Newport and Cocke County*, 2005 Tenn. App. LEXIS 148 (Tenn. Ct. App. Dec. 9, 2004); *Shabazz v. Campbell*, 63 S.W.3d 776 (Tenn. Ct. App. 2001); *The Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); *Roberson v. Rose*, 17 TAM 3-28 (Tenn. Ct. App. Dec. 31, 1991)

Tennessee's Open Records Act, originally enacted in 1957, opens government records to citizens of Tennessee. Found in Chapter 7 of Title 10, the act directs the courts to construe the act "so as to give the fullest possible public access to public records."⁶⁵³ In 2008, the state legislature modified the act and established the Office of Open Records Counsel. This office is charged with establishing policy guidelines and fee schedules for custodians of public records.⁶⁵⁴

- Who may request records and for what purpose:
 - Public records are open to any citizen of the state of Tennessee.⁶⁵⁵
 - ▶ Other entities may seek access to public records, as case law has specifically extended this term to include corporations.⁶⁵⁶
 - The intended purpose of the request is irrelevant.
 - The subsequent use of public information is unrestricted.

⁶⁵³ T.C.A. § 10-7-505(d).

⁶⁵⁴ T.C.A. § 8-4-604.

⁶⁵⁵ T.C.A. § 10-7-503(2)(A).

⁶⁵⁶ *Metropolitan Air Research Testing Authority Inc. v. The Metropolitan Government of Nashville and Davidson County*, 17 TAM 31-21 (Tenn. Ct. App. July 8, 1992).

- Whose and which records are covered under the act:
 - The act covers all "governmental agencies" and does not exempt any branch in its entirety.
 - While executive agencies are covered, Section 8-3-104(10) exempts "papers relating immediately to the executive department, and, in the governor's judgment, requiring secrecy."
 - The legislative branch is not exempt from the act but does retain the authority to prevent or permit access to a legislative computer system which stores confidential information.⁶⁵⁷
 - The judicial branch is covered, though certain specific records are exempt from disclosure by other statutes within the state code and provisions found in procedural rules associated with the courts.
 - ▶ The Supreme Court ruled that any provisions relating to the disclosure or confidentiality of court records in the Tennessee Rules of Civil Procedure supersede the Open Records Act.⁶⁵⁸
 - Courts have interpreted the act as covering nongovernmental bodies which receive public funds, advisory boards and commissions, and quasi-governmental bodies.
 - The Tennessee Supreme Court established a "functional equivalency test" to determine whether the act would apply to the private entity in question.⁶⁵⁹ Three relevant factors include:
 1. The level of government funding;
 2. The extent to which the government is involved or retains control;
 3. Whether the government created the entity.

⁶⁵⁷ T.C.A. § 3-10-108(a).

⁶⁵⁸ *Ballard v. Herzke*, 924 S.W. 2d 652 (Tenn. 1996).

⁶⁵⁹ *Memphis Publishing v. Cherokee Children & Family Services*, 87 S.W.2d 3d 67 (Tenn. 2002).

- The act does not explicitly cover multi-state or regional bodies, though the records of these entities may be subject to disclosure if retained by a public agency of the state.
- The terms “public records” or “state records” include “all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, ... or other material ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.”⁶⁶⁰
- The act covers all records, regardless of their physical characteristics.
- All records available for inspection are also available for copying.⁶⁶¹
- Fees and costs:
 - Custodians may charge requesters a fee to cover the “reasonable costs incurred” in fulfilling the request.
 - ▶ County records commissions has the authority to establish fees.⁶⁶²
 - ▶ These fees must comply with the standards established by the Office of Open Records Counsel, pursuant to Section 8-4-604.⁶⁶³
 - Custodians may not charge individuals for searching or inspecting records.⁶⁶⁴
 - If records, such as geographic data, have “commercial value,” additional fees may be assessed.⁶⁶⁵
 - ▶ This additional fee must not be imposed on individuals who request copies for themselves or when the news media requests the information for broadcasting or publishing the information.
 - ▶ The fees must be related to the actual development costs and may include the cost of labor; the costs of developing, testing, and implementing the necessary
- equipment or software; and the costs of updating and maintaining the data.
- The act contains no provisions regarding fee waivers.
- Enforcement and sanctions:
 - Any citizen denied access to records has the right to file a petition with the chancery or circuit court of the county in which the requester resides or the public office conducts business.⁶⁶⁶
 - The court may review the records in question to determine their openness.
 - The court may order the release or reaffirm the confidentiality of the records in question.
 - If the court finds the public official acted in willful violation of the Open Records Act, it may award the successful plaintiff costs of litigation.⁶⁶⁷
 - The Attorney General has a role only if the constitutionality of a statute is brought into question.
- Exemptions:
 - Section 10-7-504 lists 21 categories of records which custodians are required to keep confidential.
 - A few of these include medical records, proprietary information and trade secrets, investigative records, and security-related records.
 - More than 200 other statutory provisions and court orders declare certain records to be confidential in nature.⁶⁶⁸
 - One clause in the act requires the redaction of the material deemed confidential within that subsection,⁶⁶⁹ but courts have interpreted that to apply to other instances where a request was made for a record containing public and confidential information.⁶⁷⁰

660 T.C.A. § 10-7-503(a)(1).

661 T.C.A. § 10-7-506(a).

662 T.C.A. § 10-7-409.

663 T.C.A. § 10-7-503(7)(C)(i).

664 T.C.A. § 10-7-503(7)(A).

665 T.C.A. § 10-7-506.

666 T.C.A. § 10-7-505(a), (b).

667 T.C.A. § 10-7-505(g).

668 See the state legislature’s website for a complete copy of the Tennessee Code Annotated: www.tennesseeanytime.org/laws/laws.html

669 T.C.A. § 10-7-504(a)(20)(C).

670 *Hickman v. Board of Probation*, 2003 Tenn. App. LEXIS 187 (Tenn. Ct. App. March 4, 2003).

- Electronic Records:
 - Electronic records are expressly covered under the act.
 - ▶ E-mail may constitute a public record.⁶⁷¹
 - ▶ Software is not considered public.⁶⁷²
 - ▶ The joint legislative services committee has the authority to decide whether any citizen may be granted access to a legislative computer system which contains confidential information.⁶⁷³
 - ◆ No individual may be granted access if the confidential information cannot be protected.
 - ◆ Custodians are not permitted to provide information from the legislative computer system in printed form.
 - The act contains no provisions allowing individuals to request a certain format or a customized search of public information.
 - In fact, the act states that public officials are not required to sort through files and compile information upon request or create a new record which does not already exist.⁶⁷⁴
 - ▶ Redacting confidential information does not constitute generating a new record.
 - As with other forms of records, fees must be reasonable and may be established by the Office of Open Records Counsel.
- Money-Making:
 - Specific fees are established by statute or by the Office of Open Records counsel and generally allow for only the recovery of costs.
 - Individuals are not barred from using information for commercial purposes, though requesters may be charged additional fees for information which has commercial value.

⁶⁷¹ T.C.A. § 10-7-512.

⁶⁷² T.C.A. § 10-7-504(a)(18).

⁶⁷³ T.C.A. § 3-10-108.

⁶⁷⁴ T.C.A. § 10-7-503(4), (5).

Texas

Public Information Act

Codes: *Tex. Gov't Code Ann.* § 552.001, *et seq.*

Relevant Court Cases: *Jenkins v. State*, 75 S.W. 312, 312 (Tex. Crim. App. 1903); *Palacios v. Corbett*, 172 S.W. 777 (Tex. Civ. App.-San Antonio 1915, writ *ref'd*); *A & T Consultants Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 597 (1978), *Taylor v. Tex.*, 938 S.W.2d 754, 757 (Tex. App.-Waco 1997, no writ); *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994, no appeal); *Blankenship v. Brazos Higher Educ. Auth.*, 975 S.W.2d 353, 360 (Tex. App.-Waco 1998, pet. denied); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 358-59 (Tex. 2000)

In the years following Texas's independence from Mexico and subsequent union with the U.S., the state's courts established a common law right to access public records. One ruling stated that "[Texas's] policy has been found to be that all information kept by the government is of legitimate public concern unless the legislature rules that the need for confidentiality is outweighed by the public's right to know."⁶⁷⁵ Nonetheless, no open records statute was codified until 1973 after the conviction of several government officials in the Sharpstown scandal. Amendments in 1995 renamed the statute previously known as the Open Records Act to the Public Information Act and incorporated new provisions for electronic records. Ten years later, the legislature passed a bill which requires many public officials to participate in a training course concerning the Public Information Act. In 2005, the legislature passed a bill requiring most elected and appointed public officials to take training courses on the Texas Public Information Act.⁶⁷⁶ The act also established an Open Records Steering Committee which conducts studies and advises the Attorney General regarding open records practices.⁶⁷⁷

- Who may request records and for what purpose:
 - The Public Information Act places no restriction on who may request access to records and states that "each person is entitled ... to complete information about the affairs of government."⁶⁷⁸
 - ▶ However, governmental agencies are not required to comply with requests from incarcerated individuals.⁶⁷⁹
 - ▶ Persons of interest have greater access to records containing their own private information under Section 552.023.
 - The purpose for which the records is requested is immaterial.
 - The subsequent use of information obtained under the act is unrestricted.
- Whose and which records are covered under the act:
 - The act defines "public information" as all information "that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for a governmental entity.⁶⁸⁰
 - The statute defines a governmental body broadly with 12 categories of entities subject to the acts provisions in Section 552.003(1)(A).
 - The definition includes both the executive and legislative branches along with all agencies, committees, departments or other subunits created by the executive or legislative branches.
 - A few exemptions, however, relate to certain executive and legislative functions.
 - ▶ The statute provides for the confidentiality of working papers or drafts from the governor's office or of the legislature which relate to proposed legislation.⁶⁸¹

⁶⁷⁵ *Gill v. Snow*, 644 S.W.2d 222, 224 (Tex. App.-Fort Worth 1982, no writ).

⁶⁷⁶ *Tex. Gov't Code Ann.* § 552.012.

⁶⁷⁷ *Tex. Gov't Code Ann.* § 552.009.

⁶⁷⁸ *Tex. Gov't Code Ann.* § 552.001.

⁶⁷⁹ *Tex. Gov't Code Ann.* § 552.028.

⁶⁸⁰ *Tex. Gov't Code Ann.* § 552.002(a).

⁶⁸¹ *Tex. Gov't Code Ann.* § 552.006.

► Private correspondence sent by elected officials is also protected if the release of such would constitute an invasion of privacy.⁶⁸²

► Inter-agency and intra-agency memoranda or letters which would not be available to a party of litigation within that agency are exempt from disclosure.⁶⁸³

○ The judiciary is specifically excluded from the definition of governmental bodies. Open records practices are adopted by the Supreme Court of Texas rather than dictated by the Public Information Act.

○ The term “governmental body” also includes non-governmental entities and quasi-governmental entities, including “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds.”⁶⁸⁴

○ Additionally, section 552.0037 states that information collected, or maintained by a non-governmental entity which is authorized to exercise eminent domain is subject to the Public Information Act insofar as the records requested relate to the taking of private property.

○ The form and physical characteristics of the “public information” is irrelevant, as the act has been construed to cover all conceivable forms of information storage.

○ The act does not distinguish between which records are open for inspection and which are available for copying.

• Fees and costs:

○ The Public Information Act establishes limits on fees but authorizes the Attorney General to adopt rules for all state agencies subject to the act.

► Entities not defined as state agencies may establish their own fees, provided that the amount does not exceed 125% of the charges set forth by the Attorney

General, unless the entity applies for and receives an exemption.⁶⁸⁵

○ In general, fees “may not exceed the actual cost of producing the information or for making public information that exists in a paper record available for inspection.”⁶⁸⁶

○ Costs may include supplies, labor, and overhead components if the request exceeds 50 pages.

○ If an individual requests 50 or fewer pages, he/she may only be charged a flat rate for each page, unless the records are located in two separate buildings or in a remote storage facility.⁶⁸⁷

○ Section 552.2615 requires public agencies to provide requesters with an itemized list of costs if the charges exceed \$40.

○ Public agencies may require advance payment of fees under certain circumstances outlined in Section 552.263.

○ The statute allows for three circumstances which would merit a waiver or reduction of fees:

1. Custodians may waive or reduce fees if providing a copy of the requested records would benefit the general public.⁶⁸⁸

2. Custodians may waive charges if the costs of collecting the fee exceed the amount of the fee.⁶⁸⁹

3. Section 552.264 entitles members, committees, or agencies of the legislature to one free copy of public records.

• Enforcement and sanctions:

○ The Public Information Act details procedures for civil enforcement in Subchapter H.

○ Any individual denied access to records or the Attorney General may seek a writ of mandamus from a district court of the

682 Tex. Gov’t Code Ann. § 552.109.

683 Tex. Gov’t Code Ann. § 552.111.

684 Tex. Gov’t Code Ann. § 552.003(1)(A)(xii).

685 Tex. Gov’t Code Ann. § 552.262.

686 See footnote (-5).

687 Tex. Gov’t Code Ann. § 552.261(a).

688 Tex. Gov’t Code Ann. § 552.267(a).

689 Tex. Gov’t Code Ann. § 552.267(b).

- county in which the governmental body is located.⁶⁹⁰
- Substantially successful plaintiffs may be awarded attorneys' fees and costs of litigation if the public agency was not acting in accordance with the Public Information Act, a court order or published opinion, or a decision of the Attorney General.⁶⁹¹
 - ▶ A successful defendant or plaintiff in a suit brought by a government body may also recover litigation costs.⁶⁹²
 - The statute also provides for criminal sanctions for certain violations in Subchapter I.
 - ▶ The willful destruction, mutilation, or removal of public records is a misdemeanor punishable by a fine between \$25 and \$4,000, imprisonment for a time span between 3 days and 3 months, or both.⁶⁹³
 - ▶ The distribution or misuse of confidential information is a misdemeanor punishable by a fine not exceeding \$1,000, imprisonment for up to 6 months, or both.⁶⁹⁴
 - ▶ Any public officer who refuses to grant access to public records with criminal negligence is guilty of a misdemeanor punishable by a fine not exceeding \$1,000, imprisonment for up to 6 months, or both.⁶⁹⁵
 - Exemptions:
 - Several sections throughout Subchapter B of the statute require the disclosure of many categories of records,⁶⁹⁶ while other sections of Subchapter C contain exceptions and either mandate or permit custodians to keep specific categories of records confidential.
 - ▶ Custodians do retain some discretion in volunteering records which are not expressly confidential by statute.
 - Examples of categories of exempt records include trade secrets, law enforcement records, certain inter- or intra-agency memoranda, and student records.
 - Provisions in the Public Information Act exempt all other records deemed confidential by constitutional, federal, or state law, or by judicial orders.⁶⁹⁷
 - Common law also protects material which contains intimate or embarrassing information if disclosure would constitute a breach of personal privacy and is of no legitimate concern to the general public.⁶⁹⁸
 - ▶ Examples of information excluded include information concerning pregnancy, illegitimate children, sexual assault, mental and physical abuse in the workplace, psychiatric treatment of disorders, suicide attempts, and injuries to sexual organs.
 - Custodians must redact confidential information before releasing the public portions of records. The labor costs associated with this may be passed on to the requester.
 - Electronic Records:
 - Electronic records are covered under the Public Information Act.
 - ▶ E-mail may be subject to the act, even when sent from a personal computer, if its content meets the standards to fall within the definition of "public information."
 - ▶ The Attorney General has determined that software is not public.⁶⁹⁹

690 Tex. Gov't Code Ann. § 552.321.

691 Tex. Gov't Code Ann. § 552.323(a).

692 Tex. Gov't Code Ann. § 552.323(b).

693 Tex. Gov't Code Ann. § 552.351.

694 Tex. Gov't Code Ann. § 552.352.

695 Tex. Gov't Code Ann. § 552.353.

696 See Sections 552.022, 552.0221, 552.0225, and 552.025, for example.

697 See the state legislature's website for a complete list of the Texas Government Code Annotated:

698 *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

699 Tex. Att'y Gen. ORD-581 (1990).

- Requesters may choose a medium in which to receive public information if the original format is electronic. Governmental entities are required to comply with these requests if they have the necessary technological capabilities and do not have to purchase extra software or hardware and if complying with the request would not violate any copyright agreements.⁷⁰⁰
- Individuals may obtain customized searches but may be charged for the additional costs of programming software or compiling data pursuant to rules adopted by the Attorney General, who is charged with establishing a schedule of fees for state agencies.
- Money-Making:
 - Public agencies may charge no more than the costs associated with providing access to public records.
 - Private use of public information is unrestricted. Commercial purposes are not prohibited.

700 Tex. Gov't Code Ann. § 552.228(b).

Utah

Government Records Access and Management Act

Codes: *Utah Code Ann. § 63G-2-101, et seq.*

Relevant Court Cases: *Graham v. Davis County Solid Waste Management & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, 979 P.2d 363; *Mr. Pooper Scooper Inc. v. Murray City and Sandy City*, No. 02-06 (Utah State Rec. Comm. May 13, 2002); *Salt Lake Tribune v. Utah Dep't of Transp.*, No. 92-01 (Utah State Rec. Comm. Oct. 9, 1992); *Deseret News Publishing Co. v. Utah Dep't of Public Safety*, No. 92-02 (Utah State Rec. Comm. Nov. 12, 1992); *Jones v. U.S. Child Support Recovery*, 961 F. Supp. 1518, 1520 (D. Utah 1997); *KUTV Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1362 (Utah 1984)

In 1991, Utah replaced the two statutes which governed access to public records, the Information Practices Act and the Public and Private Writings Act, with the Government Records Access and Management Act, codified in Chapter 2 of Title 63G of the Utah Code. The provisions within the act create a balance of individuals' privacy interests and the public's interest in disclosure by establishing four categories of records, which are discussed further in following sections.

- Who may request records and for what purpose:
 - Under the Government Records Access and Management Act, “[e]very person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours . . .”⁷⁰¹
 - The purpose for the request is immaterial.
 - The statute does not restrict the subsequent use of public information obtained under its provisions.
 - ▶ Courts, however, may “limit the requester’s use and further disclosure” of certain private, protected, or controlled records.⁷⁰²

- Whose and which records are covered under the act:
 - The provisions of the act apply to every “governmental entity” as broadly defined in Section 63G-2-103(11)(a).
 - The definition of this term includes all agencies of the executive branch and its officers.
 - ▶ Records relating to the deliberative process within the office of the governor are protected.⁷⁰³
 - The legislative branch is also encompassed, though it excludes political parties, groups, caucuses, rules, or sifting committees of the legislature.
 - The judicial branch is subject to the statute along with other rules and regulations, such as Utah Code of Judicial Administration Rules 4-201 to 4-206.
 - The statute does not explicitly cover all nongovernmental bodies which receive public funding or benefits.
 - ▶ However, certain records which private entities create or maintain regarding contracts with public entities may be open to the public under the act.⁷⁰⁴
 - The act does not expressly cover multi-state or regional bodies.
 - Non-governmental or quasi-governmental advisory boards, commissions, and committees of any branch of government are subject to the act if they are “funded or established by the government to carry out the public’s business.”⁷⁰⁵
 - ▶ Records relating to the finances of “public associations,” such as the Utah Association of Counties, are considered public if the majority of the association’s

701 Utah Code Ann. § 63G-2-201(1).

702 Utah Code Ann. § 63G-2-404(8)(b).

703 Utah Code Ann. § 63G-2-305(29).

704 Utah Code Ann. § 63G-2-301(2), (3).

705 Utah Code Ann. § 63G-2-103(11)(b).

members are public officials of Utah and the association receives public funding.⁷⁰⁶

- The act applies to state-funded institutions of higher education.
- The Government Records Access and Management Act describes four distinct types of records in determining which should be made open to the general public.
 1. Private records may be released only to the person of interest within the record or a parent or legal guardian of the subject of the record.⁷⁰⁷ Section 63G-2-302 lists many categories of records deemed private.
 2. Controlled records may be released to physicians, psychologists, social workers, insurance providers, or government public health agencies if the subject of the record authorizes such disclosure.⁷⁰⁸ Section 63G-2-304 lists the few categories of records deemed controlled.
 3. Protected records may be released to those who submitted the records, someone with a power of attorney from those who benefited from the protection, or anyone who is granted permission from those whose interests were protected.⁷⁰⁹ Section 63G-2-305 lists 60 categories of records deemed protected.
 4. Public records are all other records which are not private, controlled, or protected and are therefore not exempt from disclosure.⁷¹⁰ Section 63G-2-301 lists 32 categories of records which are expressly public.
 - ◆ A few of these include laws, voter registration records, governmental contracts, audit reports, and professional licenses.
 - ▶ Public records include all materials, regardless of physical format, which are “prepared, owned, received, or retained

by a governmental entity or political subdivision.”⁷¹¹

- Certain statutes allow records to be inspected but not copied.
- Fees and costs:
 - Section 63G-2-203 details procedures regarding fees for providing access to public records but does not supersede any other existing statute providing for specific schedules of fees.
 - The legislature, political subdivisions, and the judicial council may establish fees for their respective public bodies.⁷¹²
 - The statute states that fees must be “reasonable” and only sufficient to cover the “actual cost of providing a record.”⁷¹³
 - If the custodian compiles a record for the requester in a form not normally maintained by the agency, costs may include
 - ▶ Labor costs associated with searching for and retrieving information;
 - ▶ Labor costs associated with formatting, compiling, and tailoring the record;
 - ▶ Any other direct administrative costs incurred in complying with the request.⁷¹⁴
 - The statute encourages agencies to waive charges under three circumstances:
 1. Disclosing the record requested would primarily benefit the general public rather than the individual requester;
 2. The requester is the subject of the record; or
 3. The legal rights of the requester “are directly implicated by the information in the record, and the requester is impecunious.”⁷¹⁵
 - Custodians may not charge individuals for inspecting records or for the time spent

706 Utah Code Ann. § 63G-2-901.

707 Utah Code Ann. § 63G-2-202(1).

708 Utah Code Ann. § 63G-2-202(2).

709 Utah Code Ann. § 63G-2-202(4).

710 Utah Code Ann. § 63G-2-103(21).

711 Utah Code Ann. § 63G-2-103(22)(a).

712 Utah Code Ann. § 63G-2-203(3).

713 Utah Code Ann. § 63G-2-203(1).

714 Utah Code Ann. § 63G-2-202(2).

715 Utah Code Ann. § 63G-2-203(4).

determining the applicability of the act to the record in question.⁷¹⁶

- Custodians may require advance payment of fees if the estimated amount exceeds \$50 or if the requester has failed to pay for previous requests.⁷¹⁷
- Enforcement and sanctions:
 - Those aggrieved by denials of access to public records have several channels through which to seek redress. These rights are not limited to those who actually requested the record, but to anyone who wishes to appeal the decision.
 - Section 63G-2-401 offers anyone the right to appeal to the head of the governmental agency. The chief administrative officer may then order the disclosure or affirm the confidentiality of the requested record.
 - If the chief administrative officer denies the request, any person aggrieved by the decision may petition the records committee or file action in court.
 - Section 63G-2-403 outlines the process for petitioning the State Records Committee, which has the authority to hold hearings, review the records in question, and order the disclosure of records. The Attorney General advises this committee.
 - ▶ Should an agency fail to comply with an order issued by the State Records Committee, it may be liable for a civil penalty not exceeding \$500 for each day of noncompliance. The committee may also send a notice of the noncompliance to the governor, the Legislative Management Committee, or the Judicial Council.
 - Anyone denied access after petitioning the State Records Committee may file action in a district court, which may grant injunctive relief by ordering the disclosure of records and grant litigation costs to a successful plaintiff.⁷¹⁸
 - Section 63G-2-801 makes the following violations of the act a Class B misdemeanor:

- ▶ Willfully disclosing or misusing private, controlled, or protected records;
- ▶ Gaining access to private, controlled, or protected records through theft or bribery or under false pretenses; and
- ▶ Failing to comply with or appeal an order from the agency, the State Records Committee, or the courts.

- Exemptions:

- All records are public unless otherwise categorized as private, protected, or controlled, as previously explained.
- The definition of “public record” found in Section 63G-2-103(2)(b) excludes 14 specific categories of records. A few of these include drafts, notes, and other deliberative process material; personal communications; and proprietary information.
- The act does not supersede any restrictions to disclosure found in the state code or federal regulations or those deemed confidential by court order.
- Examples of exemptions found in the state code include Health Department records, child abuse reports, mental health records, and tax returns.⁷¹⁹
- Using the clause found in Section 63G-2-302(2)(d), courts have ruled that the release of certain records would constitute a “clearly unwarranted invasion of personal privacy.” A few of these include:
 - ▶ Addresses of licensed dog owners,⁷²⁰
 - ▶ State computerized traffic accident databases,⁷²¹
 - ▶ Driver’s license records,⁷²² and
 - ▶ Child support payment records.⁷²³

- Custodians must redact confidential

⁷¹⁹ See the state legislature’s website for a complete list of statutes: www.le.state.ut.us/~code/code.htm

⁷²⁰ *Mr. Pooper Scooper Inc. v. Murray City and Sandy City*, No. 02-06 (Utah State Rec. Comm. May 13, 2002).

⁷²¹ *Salt Lake Tribune v. Utah Dep’t of Transp.*, No. 92-01 (Utah State Rec. Comm. Oct. 9, 1992).

⁷²² *Deseret News Publishing Co. v. Utah Dep’t of Public Safety*, No. 92-02 (Utah State Rec. Comm. Nov. 12, 1992).

⁷²³ *Jones v. U.S. Child Support Recovery*, 961 F. Supp. 1518, 1520 (D. Utah 1997).

⁷¹⁶ Utah Code Ann. § 63G-2-203(5).

⁷¹⁷ Utah Code Ann. § 63G-2-203(8).

⁷¹⁸ Utah Code Ann. § 63G-2-802.

information and release the public portions of requested records.⁷²⁴

- Electronic Records:

- Records in electronic format are expressly covered in the Government Records Access and Management Act.
 - ▶ E-mail may be subject to disclosure if its content is public; however, many forms of communication are exempt.
 - ▶ Proprietary software and computer programs are excluded from the definition of public records.⁷²⁵
- Requesters may choose a format in which to receive records or request a customized or tailored search but will be charged the additional personnel costs associated with fulfilling the requests.

- Fees assessed for providing reproductions of public records are subject to the same limits as fees for all other records. If the record is the “result of computer output other than word processing,” then “the actual incremental cost of providing the electronic services and products together with a reasonable portion of the costs associated with formatting or interfacing the information for particular users,” along with the administrative costs incurred, may be passed on to the requester.⁷²⁶

- Money-Making:

- Certain public agencies, such as the Driver License Division, the Tax Commission, and the Department of Natural Resources, generate revenue from the sale of databases to private companies.
- The private use of public records may be regulated by the courts if certain information is deemed protected, private, or controlled. However, the statute does not prohibit commercial use of information.

724 KUTV Inc. v. Utah State Bd. of Educ., 689 P.2d 1357, 1362 (Utah 1984).

725 Utah Code Ann. § 63G-2-103-22(b)(v).

726 Utah Code Ann. § 63G-2-203(2)(a)(iii).

Vermont

Public Records Law

Codes: 1 V.S.A. §§ 315 – 320

Relevant Court Cases: *Matte v. City of Winooski*, 129 Vt. 61, 271 A.2d 830 (1970); *State v. Vermont Emergency Board*, 136 Vt. 506, 394 A.2d 1360 (1978); *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 624 A.2d 857 (1993); *Wesco Inc. v. Sorrell*, 2004 VT 102, 177 Vt. 287, 865 A.2d 350 (2004); *Killington, Ltd. v. Lash*, 153 Vt. 628, 639, 672 A.2d 1368 (1990); *Herald Ass'n Inc. v. Dean*, 174 Vt. 350, 355-56, 816 A.2d 469, 474-75 (2002); *Finberg v. Murnane*, 159 Vt. 431, 436, 623 A.2d 979 (1992); *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 624 A.2d 857 (1993)

Common law in Vermont established a right to inspect governmental records prior to the codification of the Public Records Law in Sections 315 – 320 of Chapter 5 of Title 1 of the Vermont Statutes Annotated. The relatively short statute contains a policy statement highlighting the balance between individuals' right to privacy and the public need for transparency.

- Who may request records and for what purpose:
 - “Any person” may request access to public records under the Public Records Law.⁷²⁷ The act does not define or place restrictions on the term “person.”
 - The purpose of the request is immaterial.
 - The subsequent use of public information obtained is unrestricted.⁷²⁸
- Whose and which records are covered under the act:
 - The act applies to all public agencies, defined as “any agency, board, department, commission, committee, branch, instrumentality, or authority of the state or ... of any political subdivision of the state.”⁷²⁹
 - While this definition covers the executive branch, the courts have recognized an executive privilege protecting documents

727 1 V.S.A. § 316(a).

728 *Finberg v. Murnane*, 159 Vt. 431, 437, 623 A.2d 979 (1992).

729 1 V.S.A. § 317(a).

related to the deliberative process of creating policy. In this case only, the burden of proving that the document should be disclosed falls on the requester.⁷³⁰

- The definition encompasses legislative bodies.⁷³¹
- The courts generally adopt their own rules regarding open records practices.⁷³²
 - ▶ Moreover, the statute specifically excludes the “records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity.”⁷³³
- The Public Records Law does not explicitly cover entities receiving or expending public funds, multi-state or regional bodies, or advisory boards and commissions created by the government.
- The act defines public records or documents as “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.”⁷³⁴
- All records open to inspection are available for copying if the public agency has the necessary equipment for providing copies. If the agency does not have the proper resources, it is not required to arrange for the use of other facilities or provide personnel to make copies elsewhere.⁷³⁵
- Fees and costs:
 - Agencies are authorized to collect fees to cover the “actual cost of providing the copy” for individuals.⁷³⁶
 - Custodians may also charge for personnel costs under the following circumstances:

730 *Trombley v. Bellows Falls Union High Sch. Dist.*, 160 Vt. 101, 107 n.5, 624 A.2d 857, 861 n.5 (1993).

731 1966-68 Op. Atty. Gen. 101.

732 *State v. Schaefer*, 157 Vt. 339, 599 A.2d 337 (1991).

733 1 V.S.A. § 317(b)(24).

734 1 V.S.A. § 317(b).

735 1 V.S.A. § 316(g).

736 1 V.S.A. § 316(b).

- ▶ The time spent fulfilling the request exceeded 30 minutes;
- ▶ The public agency agrees to generate a new record;
- ▶ The agency agrees to tailor the format of the record upon request, and the custodian spends more than 30 minutes.
 - ◆ The agency may require advance payment of fees containing labor costs and must provide estimates of charges if requested.⁷³⁷
- The secretary of state establishes the actual cost for providing copies which state agencies may charge and adopts a uniform schedule for state agencies to follow.⁷³⁸
- The legislative body of a political subdivision establishes the actual cost for providing copies which those political subdivisions may charge. Schedules of charges must be posted in town offices.⁷³⁹
- The act contains no provisions regarding fee waivers.
- Enforcement and sanctions:
 - Those denied access to records may file action in the superior court of Washington County, the county in which the requester resides or has a place of business, or the county in which the records are located.
 - ▶ The court may examine the records and will expedite the process if possible.
 - ▶ The burden of proving a document should be withheld falls on the agency.
 - ▶ The court may award the successful plaintiff attorneys' fees and litigation costs.⁷⁴⁰
 - If the court finds the custodian acted arbitrarily or capriciously, it may issue a written finding to the human resources department of the public agency, which must determine whether the employee's action merits disciplinary action.⁷⁴¹

- Any person who knowingly and willfully sells, destroys, or misuses a public record without the authority to do so will be liable for fines between \$50 and \$1,000 for each violation.⁷⁴²
- Exemptions:
 - The 38 categories of exemptions found beneath the definition of "public records" in Section 317 are specific and to be construed narrowly in favor of disclosure.
 - A few of these include investigatory records, tax returns, exam materials, trade secrets, and student records.
 - Other statutory exemptions may be found throughout the state code.⁷⁴³ A couple examples include information regarding hazardous waste and information concerning endangered species.
 - The courts have the authority to create common law exceptions and privileges under the act.⁷⁴⁴
 - The act does not explicitly require custodians to redact all non-public information from otherwise public records. Case law, however, has suggested that agencies should do so.⁷⁴⁵
- Electronic Records:
 - The Public Records Law covers electronic records.
 - ▶ E-mail may be public if its content does not fall within one of the exemptions found in the statute.
 - ▶ Software is not addressed in the act.
 - If a public agency keeps records in an electronic format, the requester may choose between an electronic or paper format. Though they are not required to do so, custodians may transform paper records into an electronic format or create new records upon request.⁷⁴⁶

737 1 V.S.A. § 316(c).

738 1 V.S.A. § 316(d).

739 1 V.S.A. § 316(e).

740 1 V.S.A. § 319.

741 1 V.S.A. § 320(a).

742 1 V.S.A. § 320(c).

743 See the state legislature's website for a complete copy of the Vermont's statutes: www.leg.state.vt.us

744 1 V.S.A. § 317(c)(4).

745 *Herald Ass'n Inc. v. Dean*, 174 Vt. 350, 359, 816 A.2d 469, 477 (2002).

746 1 V.S.A. § 316(i).

- The requester has no statutory right to obtain a customized search of databases. Computer databases are no longer considered public records.
- Charges for electronic records are assessed no differently than charges for other forms of records. Fees are limited to the actual costs of providing copies, including the costs associated with transmitting the data by electronic means.⁷⁴⁷

- Money-Making:
 - The Vermont state legislature has not yet addressed the issue of selling public databases for generating profits.
 - ▶ Custodians are not permitted to sell records unless statutorily authorized to do so.⁷⁴⁸
 - Private use of public information is not restricted by the Public Records Law.

⁷⁴⁷ 1 V.S.A. § 316(b).

⁷⁴⁸ 1 V.S.A. § 317a.

Virginia

Freedom of Information Act

Codes: Va. Code Ann. §§ 2.2-3700 – 2.2-3714.

Relevant Court Cases: *Taylor v. Worrell Enterprises*, 242 Va. 219, 409 S.E.2d 136 (1991); *Hale v. Washington*, 241 Va. 76, 400 S.E.2d 175 (1991); *National Rural Utilities Cooperative Finance Corporation v. Greenlief*, 27 Va. Cir. 140 (1992)

In 1968, the Virginia General Assembly adopted the Freedom of Information Act and granted the public access to all governmental records not exempted by a specific statute. Subsequent amendments have lengthened the list of specific, discretionary exemptions and have enabled requesters to recover litigation costs if successful in court. The Attorney General publishes nonbinding opinions which public agencies may use for guidance. The Virginia Freedom of Information Advisory Council, established by the state legislature in 2000, may also serve as a source of informal and formal advice for public agencies and individuals. The nonbinding opinions of the council may be found online.

- Who may request records and for what purpose:
 - Any citizen of the state of Virginia may access public records during normal business hours. However, the act does not prohibit a citizen obtaining records for another person. Custodians may require requesters to provide their name and address.
 - ▶ The statute explicitly grants the media which operates in the state the right to access records.⁷⁴⁹
 - The purpose of the request is immaterial.⁷⁵⁰
 - The subsequent use of information obtained under the act is unrestricted.
- Whose and which records are covered under the act:
 - The expansive definition of “public bodies” found in Section 2.2-3701 include the following:
 - ▶ All agencies, commissions, departments, and officials of the executive and legislative branches at the local and state levels are covered.
 - ◆ Working papers related to the deliberative process and personal correspondences among executive and legislative officials, however, are exempt.⁷⁵¹
 - ▶ Public institutions of higher education are subject to the act.
 - ▶ Entities supported by public funding must disclose public records.
 - ▶ Moreover, the act encompasses any other “entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body.”
 - Courts have interpreted the act to cover multi-state and regional bodies, as well.⁷⁵²
 - Disclosure of judicial records is governed by other statutes and common law.
 - The definition of “public records,” also found in Section 2.2-3701, includes all materials, regardless of physical format, “prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”
 - The act does not distinguish among which records may be open for inspection and which are available for copying, but rather states “all public records shall be open to inspection and copying.”⁷⁵³

⁷⁴⁹ Va. Code Ann. § 2.2-3704(A)

⁷⁵⁰ *Associated Tax Service v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988).

⁷⁵¹ Va. Code Ann. § 2.2-3705.7(2).

⁷⁵² *Lee Jackson Motel Inc., et al v. Industrial Development Authority*, 4 Va. Cir. 125 (1983).

⁷⁵³ See footnote (-4).

- Fees and costs:
 - Section 2.2-3704(F) guides the practices of assessing fees for providing access to public records.
 - Custodians may charge reasonable fees not exceeding the actual cost of searching for and duplicating the records requested.
 - Charges shall not include the expenses of creating or maintaining records or any other cost that the public agency would have incurred had the request not been made.
 - ▶ One exception allows public bodies to charge “on a pro rata per acre basis, for the cost of creating topographical maps ... which encompass a contiguous area greater than 50 acres.”
 - Public agencies must estimate the costs of the request prior to requiring payment.
 - Custodians may require advance payment if the amount is likely to exceed \$200.⁷⁵⁴
 - The act contains no provisions for fee waivers.
- Enforcement and sanctions:
 - Section 2.2-3713 authorizes any person or the Attorney General to petition for a writ of mandamus or injunction if denied access to records.
 - ▶ Cases involving local or regional bodies must be filed in the general district or circuit court of the county or city in which the public agency is located.
 - ▶ Cases involving state agencies, committees of the General Assembly, or institutions of higher education must be filed in the general district or circuit court of the city of Richmond or of the county or city in which the requester resides.
 - Courts may award successful plaintiffs litigation costs.⁷⁵⁵
 - Civil penalties may be imposed against the individual custodian found guilty of

willfully and knowingly violating the act for the following amounts: ⁷⁵⁶

- ▶ Between \$250 and \$1,000, for a first offense
 - ▶ Between \$1,000 and \$2,500 each subsequent offense.
 - ▶ These penalties must be paid to the State Literary Fund.
- Exemptions:
 - The Freedom of Information Act contains approximately 100 specific exemptions between Sections 2.2-3705.1 and 2.2-3705.7. These may be discretionary unless confidentiality is required by law.
 - Examples of these exemptions include mental health records, child fatality records, trade secrets, information collected by the Virginia Port Authority, personal information, and certain investigatory records.
 - Several other exemptions exist throughout the state code, as the act does not require the disclosure of any record exempt by state or federal law.⁷⁵⁷
 - The courts have the authority to establish common law privileges and have used this ability in at least one instance by creating an executive privilege to prevent the Governor’s telephone records from being released.⁷⁵⁸
 - Segregable portions of public information must be disclosed, and custodians must cite the section of the code which exempts the confidential information withheld.⁷⁵⁹
 - Electronic Records:
 - The Virginia Freedom of Information Act expressly covers public records in electronic format.
 - ▶ E-mail is public if its content relates to the transaction of public business,

⁷⁵⁴ Va. Code Ann. § 2.2-3714(H).

⁷⁵⁵ Va. Code Ann. § 2.2-3713(D).

⁷⁵⁶ Va. Code Ann. § 2.2-3714.

⁷⁵⁷ See the state legislature’s website for a complete copy of the code: <http://legis.virginia.gov/>

⁷⁵⁸ Taylor v. Worrell Enterprises, 242 Va. 219, 409 S.E.2d 136 (1991).

⁷⁵⁹ Va. Code Ann. § 2.2-3704(B)(3).

regardless of whether it was sent or received on a personal computer.

- ▶ Software developed by the state or by a third party is exempt from disclosure.⁷⁶⁰
- Public agencies must make “reasonable efforts” to comply with a request for a certain format if the agency has the capacity to produce the records in the requested format.⁷⁶¹
- Fees for electronic records are assessed in the same fashion as fees for paper records. Charges must not exceed the actual costs of providing access to public records.

- Money-Making:

- The act does not permit public agencies to generate revenues from the sale of public records, as fees levied against requesters must reflect the actual costs incurred by the agency.
- Individuals may obtain public records for commercial purposes.

760 Va. Code Ann. § 2-3705.1(6), (7).

761 Va. Code Ann. § 2.2-3704(G).

Washington

Public Records Act

Codes: RCW 42.56

Relevant Court Cases: *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), *pet. for review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990); *The Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998); *Concerned Ratepayers Association v. PUD No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999); *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000); *Bonamy v. City of Seattle*, 92 Wn. App. 403, 994 P.2d 857 (1998); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002)

Washington voters passed Initiative 276 as part of the Public Disclosure Act in Chapter 17 of Title 42 in 1972. The primary objective was to reform campaign financing and lobbying practices by requiring certain information to be disclosed. In 2006, the state legislature reorganized and recodified what is now known as the Public Records Act in Chapter 56 of Title 42 of the Revised Code of Washington. New provisions require the Attorney General's Office to publish and update pamphlets to serve as guides for state and local agencies.⁷⁶² The legislature also established a public records exemptions accountability committee which regularly reviews the exceptions to the act. The state legislature has passed bills that will take effect in 2010 which will alter the language of certain subsections, most of which concern various exemptions found within the statute. The website of the state legislature contains the state's code in its entirety and clearly marks where changes in the statute will occur.

- Who may request records and for what purpose:
 - "Any person" may request access to public records under the Public Records Act.⁷⁶³
 - Custodians of public records may not provide lists of individuals when the request is for a commercial purpose.
 - ▶ Lists of individuals applying for professional licenses and individuals professionally licensed may be available

⁷⁶² RCW 42.56.570.

⁷⁶³ RCW 42.56.080.

to recognized professional associations or educational organizations.⁷⁶⁴

- ▶ Public entities not engaging in "profit expecting" operations may also receive lists.⁷⁶⁵
- There are no restrictions on the subsequent use of information obtained under the act.
- Whose and which records are covered under the act:
 - The act applies to all local and state "agencies," which include "every state office, department, division, bureau, board, commission, or other state agency" and "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency."⁷⁶⁶
 - This broad definition encompasses offices of the executive branch.
 - The Office of the Secretary of the Senate and the Office of the Chief Clerk of the House are charged with providing assistance to requesters seeking access to public records of the legislature.⁷⁶⁷
 - The Washington Supreme Court ruled that the act did not apply to the judicial branch, as the courts had recognized certain common law and statutory exemptions not found in the statute at the time of the ruling.⁷⁶⁸ The state legislature amended the act the following year to exempt all other records which were statutorily declared confidential; the prior holding may therefore be void.
 - The act does not specifically apply to entities which are supported by state funds or which have members who are elected officials.

⁷⁶⁴ RCW 42.56.070(9).

⁷⁶⁵ 1983 Op. Atty. Gen. No. 9.

⁷⁶⁶ RCW 42.56.010(1).

⁷⁶⁷ RCW 42.56.100.

⁷⁶⁸ *Nast v. Michaels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

- Multi-state or regional bodies, along with advisory boards and commissions, presumably fall within the purview of the act, but court rulings have not yet officially decided on this issue.
- The statute defines “public records” as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency.”⁷⁶⁹
- The physical format of the record is irrelevant to its openness.
- The act does not distinguish among which records may be available for copying and which are only open to inspection. Custodians are, however, authorized to “protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.”⁷⁷⁰
- Fees and costs:
 - Section 42.56.120 authorizes custodians to charge a “reasonable” fee no greater than the actual cost of providing copies of public records.
 - The statute instructs agencies to adopt a per page charge which may include personnel costs directly associated with providing copies.⁷⁷¹
 - If agencies have not determined the actual per page cost, they may charge up to 15 cents per page.
 - Agencies may require requesters to pay a deposit which may not exceed ten percent of the total estimated charges.
 - Agencies may not charge individuals for inspecting records or for the costs of searching for and locating requested records.
 - The act contains no provisions regarding fee waivers or reductions.
- The act does not supersede other statutes establishing charges for specific records.⁷⁷²
- Enforcement and sanctions:
 - Those denied access to records may petition the Attorney General to review the situation and provide a written opinion.⁷⁷³
 - Alternately, those denied access to records may file action in the superior court of the county in which the record is located.
 - Agencies bear the burden of proof to demonstrate that the record is not subject to disclosure.⁷⁷⁴
 - Courts are instructed to construe the policy in favor of disclosure because “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”⁷⁷⁵
 - Successful plaintiffs may be awarded litigation costs and attorneys’ fees.
 - In addition, the court, at its discretion, may award the requester an amount between \$5 and \$100 for each day the records were withheld.⁷⁷⁶
 - With regards to actions against counties brought under this section, the provisions of RCW 36.01.050 concerning venue apply.
- Exemptions:
 - Exemptions found within the statute are specific and discretionary. Many are loosely patterned after the federal Freedom of Information Act.
 - The statute explicitly recognizes a right to privacy which is violated “only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.”⁷⁷⁷
 - ▶ However, this acknowledgement does not serve as a blanket exemption to be

⁷⁶⁹ RCW 42.56.010(2).

⁷⁷⁰ See footnote (-3).

⁷⁷¹ RCW 42.56.070(7)(b).

⁷⁷² RCW 42.56.130.

⁷⁷³ RCW 42.56.530.

⁷⁷⁴ RCW 42.56.550(1).

⁷⁷⁵ RCW 42.56.550(3).

⁷⁷⁶ RCW 42.56.550(4).

⁷⁷⁷ RCW 42.56.050.

applied to any record not specifically exempt by provisions within the Public Records Act or other statutes throughout the state code.

- Sections 42.56.210 through 42.56.480 contain numerous exemptions relating to specific categories of records, industries, or sectors. A few of these include health care records, library records, proprietary information, security-related records, and preliminary drafts or notes.
- Other records exempt in statutory provisions throughout the state code include coroner records, juvenile records, and other criminal records, for example.⁷⁷⁸
- Certain court rulings have created exemptions in the past. The language in the statute as it was rewritten provides that records may be exempt only by statutory provisions. Courts may interpret these provisions rather than creating new categories of exemptions.⁷⁷⁹
- Agencies must redact the confidential portions of public records and provide the otherwise public information found therein.
- The Public Records Act establishes a public records exemptions accountability committee, composed of 13 members, which is charged with regularly reviewing the necessity of each exemption.⁷⁸⁰

- Electronic Records:

- The Public Records Act covers public records in electronic format.
 - ▶ E-mail is treated as any other type of record.
 - ▶ Software may be exempt if the disclosure would threaten security.⁷⁸¹
- Requesters may choose any format in which the record is available.
- Individuals may also request customized searches from databases if agencies have the capacity to fulfill the request.
- There is no prescribed formula for assessing fees for access to electronic records. Agencies are limited to charging actual costs associated with providing reproductions of records, as with other formats.

- Money-Making:

- Agencies may charge no more than actual costs unless the fee is set by law.
- Individuals are not permitted to request lists of names for commercial purposes.

⁷⁷⁸ See the state legislature's website for a complete list of the code: <http://apps.leg.wa.gov/rcw/>

⁷⁷⁹ *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994), partial reconsideration denied (Feb. 1, 1995).

⁷⁸⁰ RCW 42.56.140.

⁷⁸¹ RCW 42.56.420.

West Virginia

Freedom of Information Act

Codes: W.Va.Code § 29B, et seq.

Relevant Court Cases: *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996); *Ogden Newspapers v. City of Charleston*, 192 W. Va. 648, 453 S.E.2d 631 (1994); *Charleston Mail Association v. Kelly*, 149 W. Va. 766, 770, 143 S.E.2d 136, 139 (1965); *Daily Gazette v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738, 746 n.9 (1986); *Affiliated Construction Trades Foundation v. Regional Jail And Correctional Authority*, 200 W. Va. 621, 490 S.E.2d 708 (1997); *4-H Road Community Association v. W. Va. University Foundation*, 182 W. Va. 434, 388 S.E.2d 308 (1989)

The West Virginia Freedom of Information Act is a relatively short statute found in Chapter 29B of the West Virginia Code. Subject to numerous amendments over the past several decades, the act has been changed in response to changing technology and other events. In 1992, the state legislature altered the language of the law to encompass electronic records. In response to the attacks on September 11, 2001, the state legislature adopted more exemptions to protect security-related information. The state's courts have consistently interpreted the disclosure provisions of the act liberally and its exemptions narrowly. According to one ruling of the Supreme Court of West Virginia, "the fullest responsible disclosure, not confidentiality, is the dominant objective."⁷⁸²

- Who may request records and for what purpose:
 - "Every person" has the right to request access to records under West Virginia's Freedom of Information Act.
 - ▶ The term "person" includes "any natural person, corporation, partnership, firm or association."⁷⁸³
 - The purpose generally does not affect one's right to obtain public records.
 - ▶ The Supreme Court, however, has ruled that inmates may not use the Freedom

⁷⁸² *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799, 810 (1985).

⁷⁸³ W.Va.Code § 29B-1-2(2).

of Information Act to request records for the purpose of petitioning for habeas corpus.⁷⁸⁴

- ▶ Requesters have greater access to personal records of which they are the subject.⁷⁸⁵
- ▶ In certain cases, the requester's purpose represents one factor of the balancing test courts use to determine whether or not to grant access to a record.⁷⁸⁶
- The statute places no restrictions on the subsequent use of information obtained.
 - ▶ However, courts may impose limits on the use of personal information disclosed.⁷⁸⁷
- Whose and which records are covered under the act:
 - The statute applies to every "public body" which includes "every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission council or agency thereof."⁷⁸⁸
 - This definition encompasses the executive branch as well as records of its officers if the content relates to public business.⁷⁸⁹
 - The legislature and its committees are covered under the act.
 - The judicial branch is subject to the act and the guarantee found in Section 17 of Article III of the West Virginia Constitution.

⁷⁸⁴ *State v. Brotherton*, 214 W. Va. 434, 589 S.E.2d 812 (2003).

⁷⁸⁵ W.Va.Code § 29B-1-4(2).

⁷⁸⁶ *Robinson v. Merritt*, 180 W. Va. 26, 375 S.E.2d 204 (1988).

⁷⁸⁷ *Child Protection Group v. Cline*, 350 S.E.2d at 543.

⁷⁸⁸ W. Va. Code § 29B-1-2(3).

⁷⁸⁹ *Daily Gazette v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1986).

- ▶ Many court records are exempt by other statutes found in the state code, such as juvenile records, divorce records, and adoption records.⁷⁹⁰
- Any other entity created by state or local authority is also covered in the definition of “public body.”⁷⁹¹
 - ▶ Multi-state or regional bodies, advisory boards and commissions, and quasi-governmental entities are subject to the act if created by the state.
- Also, bodies supported primarily with public funding must disclose public records.
- Having members who are also public officials is insufficient to qualify an entity as public.
- The act broadly defines “public records” as “any writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.”⁷⁹²
- The Supreme Court has expansively interpreted this definition as if it read “or retained by a public body” in prior rulings.⁷⁹³
- The physical format or characteristics of the record is immaterial.
- Most records available for inspection are also available for copying unless doing so would cause damage to the record.⁷⁹⁴
- Fees and costs:
 - With regards to fees, the Freedom of Information Act merely states that every “public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records.”⁷⁹⁵
 - The statute provides no definition of “actual cost” or whether or not labor or overhead costs should be included.
- The language allows custodians to use discretion but provides no mandatory provisions regarding fee waivers.
- Other statutes may specify charges for certain records.
 - ▶ For example, W. Va. Code § 59-1-10 establishes a schedule of fees county clerks adhere to in providing access to county records.
- Enforcement and sanctions:
 - Any individual denied access to public records may file action in the circuit court of the county in which the record is located.⁷⁹⁶
 - Courts may view the records in question and have the authority to order the disclosure. Custodians who fail to produce the records if ordered to do so may be found in contempt of court.⁷⁹⁷ Courts must expedite the process when practical.⁷⁹⁸
 - Successful plaintiffs may recover litigation costs.⁷⁹⁹
 - In addition, custodians who willfully violate the Freedom of Information Act may be found guilty of a misdemeanor punishable by a fine between \$200 and \$1,000 and/or imprisonment for a period not exceeding 20 days.⁸⁰⁰
 - The Attorney General may issue opinions regarding circumstances arising under the statute.
- Exemptions:
 - The Supreme Court has ruled that three rules should guide exceptions to the Freedom of Information Act:⁸⁰¹
 1. Provisions requiring disclosure should be liberally construed.
 2. Exemptions should be narrowly construed.

790 W. Va. Code § 49-5-17; 48-2-27; 48-4-10.

791 *Queen v. W. Va. University Hospitals*, 179 W. Va. 95, 365 S.E.2d 375 (1987).

792 W. Va. Code § 29B-1-2(4).

793 For example, *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996).

794 W. Va. Code § 29B-1-3(3).

795 W. Va. Code § 29B-1-3(5).

796 W. Va. Code § 29B-1-5(1).

797 W. Va. Code § 29B-1-5(2).

798 W. Va. Code § 29B-1-5(3).

799 W. Va. Code § 29B-1-7.

800 W. Va. Code § 29B-1-6.

801 *Daily Gazette v. W. Va. Development Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996).

3. Those withholding records bear the burden of proving a specific exemption applies to the record in question.
- Section 29B-1-4 lists 19 specific categories of records exempt from disclosure. The language of the law does not imply whether these exemptions are either mandatory or discretionary.
 - Examples of these categories include trade secrets, personal information, test questions, national security records, and internal memoranda or letters.
 - Other statutes throughout the state code exempt specific documents.⁸⁰²
 - The courts have recognized privileges that implicitly exist within the Freedom of Information Act without expressly asserting a right to create new exemptions not explicitly granted within the act.
 - ▶ The Supreme Court ruled that Section 29B-1-4(8) which exempts “internal memoranda or letters received or prepared by any public body,” encompasses “such recognized evidentiary privileges as the attorney-client privilege, the attorney-work-product privilege, and the executive ‘deliberative process’ privilege.”⁸⁰³
 - Non-exempt portions of records containing confidential material must be disclosed.⁸⁰⁴

- Electronic Records:
 - Electronic records are explicitly covered under the Freedom of Information Act.
 - ▶ The act does not mention e-mail, but whether it is public or private likely depends on its content as with other forms of records.
 - ▶ Software remains unaddressed within the act.
 - Agencies are required to provide copies of public records in electronic media upon request if the records are regularly maintained in that format.⁸⁰⁵
 - Public agencies are not explicitly required to comply with requests for customized searches.
 - The statute provides no separate provisions for establishing fees for electronic records. Custodians may charge a certain amount to recover the costs of providing records.
- Money-Making:
 - Some public agencies offer services online on a pay-per-use basis. Whether these agencies may generate revenues greater than the direct costs of providing access to public records is unclear.
 - ▶ For example, the Legislative Automated System Division of the state’s legislature keeps the West Virginia Legislature’s Integrated Computer System and offers different services providing different amounts or types of online information for varying charges.
 - Individuals are not prohibited from using public information for commercial purposes under the statute, though courts may limit the disclosure of personal information obtained under the act.

802 See the state legislature’s website for a complete list of the code: www.legis.state.wv.us/

803 See footnote (-2).

804 *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004).

805 W.Va.Code § 29B-1-3(3).

Wisconsin

Open Records Law

Codes: Wis. Stat. §§ 19.31 – 19.39

Relevant Court Cases: *International Union, UAW v. Gooding*, 251 Wis. 362, 372-73, 29 N.W.2d 730, 735-36 (1947); *State ex rel. Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154, 163 (1987); *Cavey v. Walrath*, 229 N.W.2d 105, 106, 598 N.W.2d 240, 242 (Ct. App. 1999); *Journal/Sentinel Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 453, 521 N.W.2d 165, 170 (Ct. App. 1994); *State ex rel. Milwaukee Police Ass'n v. Jones*, 237 Wis. 2d 840, 852, 615 N.W.2d 190, 196 (Ct. App. 2000); *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991); *Mayfair Chrysler-Plymouth Inc. v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638, 647-48 (1991); *Osborn v. Board of Regents*, 2002 WI 83 ¶45, 254 Wis. 2d 266, 302, 647 N.W.2d 158, 175

Some of the very first statutes the Wisconsin legislature enacted after statehood granted access to public records and meetings.⁸⁰⁶ The current Open Records Law, found in Subchapter II of Chapter 19 of the Wisconsin Statutes maintains the same presumption of openness. Rather than relying solely on statutory exemptions, the statute expressly allows common law precedents to remain in effect.⁸⁰⁷ The text of the state code available from the state legislature's website contains explanatory notes and references to cases which serve to define and interpret the Open Records Law.⁸⁰⁸

- Who may request records and for what purpose:
 - The Open Records Law states that “any requester has a right to inspect any record,” though certain restrictions may apply.⁸⁰⁹
 - ▶ Individuals who are “committed or incarcerated” have restricted access to public records.⁸¹⁰
- The subject of records may have greater right to access those records if the information was

not collected and kept in connection with a complaint or investigation or if the release would not endanger security or safety.⁸¹¹

- Requesters are not required to state their purpose.
 - ▶ However, the requester's motivation may be used in context of a balancing test should a denial of access to records be appealed in court.⁸¹²
- The use of records obtained under the act may be restricted by other statutory provisions, as Section 19.35(1)(j) requires requesters to “comply with any regulations or restrictions upon . . . use of information which are specifically prescribed by law.”
- Whose and which records are covered under the act:
 - The act applies to every “state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation...; any court of law; the assembly or senate...”⁸¹³
 - This definition covers the executive and legislative branches and their officers.
 - The judicial branch is also subject to the Open Records Law as well as Wis. Stat. § 59.20(3).
 - Non-governmental entities are subject to the act if they receive more than half of their funding from any county or municipality and provide public health or safety services.
 - Contractors must disclose records related to the contract as if the contractor were a public official subject to the act.⁸¹⁴

806 Wis. Rev. Stat. Ch. 10, §§ 29, 37, 137 (1849).

807 Wis. Stat. § 19.35(1)(a).

808 See the state legislature's website for the complete Wisconsin Statutes: www.legis.state.wi.us/RSB/STATS.HTML

809 See footnote (-2).

810 Wis. Stat. § 19.32(3).

811 Wis. Stat. § 19.35(1)(am).

812 *Hempel v. City of Baraboo*, 2005 WI 120 ¶ 66, 284 Wis. 2d 162, 599 N.W.2d 551, 568.

813 Wis. Stat. § 19.32(1).

814 Wis. Stat. § 19.36(3).

- Quasi-governmental entities and advisory boards or commissions fall under the definition, as well.⁸¹⁵
- Multi-state and regional bodies are not expressly covered, though the records held by a public official relating to public duties would be subject to disclosure.
- The act covers all public records, including “any material ... which has been created or is being kept by an authority.”⁸¹⁶
- This broad definition encompasses all physical formats of records and is not limited to only those which public officials are required by law to maintain.⁸¹⁷
- Unless the form of the record or its fragility prevent, all records open to inspection are available for copying.⁸¹⁸
- Fees and costs:
 - Section 19.35(3)(a) authorizes custodians to levy fees against requesters which shall not exceed the “necessary and direct cost of reproduction and transcription of the record,” unless a separate statute specifically establishes a charge for a particular record.
 - Custodians may charge the actual cost of locating records if the cost exceeds \$50 and the cost of mailing or shipping copies of records if applicable.⁸¹⁹
 - Agencies may reduce or waive charges if such a waiver or reduction is “in the public interest.”⁸²⁰
 - In the event a fee is estimated to exceed five dollars, custodians may require advance payment.⁸²¹

- Enforcement and sanctions:
 - Requesters denied access to records may seek the opinion of the Attorney General regarding the particular record in question.⁸²²
 - Alternately, within 90 days of the denial, the requester may bring action for mandamus in court or petition the district attorney or Attorney General to do so.⁸²³
 - Successful plaintiffs may be awarded litigation costs, attorneys’ fees, and damages of an amount no less than \$100.⁸²⁴
 - If the violation was committed willfully or intentionally, the requester may be entitled to actual damages.⁸²⁵
 - Any custodian who arbitrarily or capriciously delays responding to a request, charges gratuitous fees, or denies a request for public records is liable for a fine not exceeding \$1,000. The forfeiture is awarded to the state if the action was brought by the Attorney General or to the county if the action was brought by the district attorney.⁸²⁶
 - Courts may also award punitive damages to the requester under the same circumstances.⁸²⁷
- Exemptions:
 - Wisconsin relies heavily on common law to interpret and enforce the Open Records Law. The Supreme Court has effectively created a general exemption in ruling that the public interest in disclosure must be balanced against interest in confidentiality.⁸²⁸
 - The Open Records Law therefore contains relatively few exemptions, some of which are mandatory while others remain discretionary.

815 *Outagamie County v. Smith*, 38 Wis. 2d 24, 155 N.W.2d 639 (1968).

816 Wis. Stat. § 19.32(2).

817 *Hathaway v. Green Bay Joint School District No. 1*, 116 Wis. 2d 388, 393-94, 342 N.W.2d 682, 685 (1984).

818 Wis. Stat. § 19.35(1)(k).

819 Wis. Stat. § 19.35(3)(c), (d).

820 Wis. Stat. § 19.35(3)(e).

821 Wis. Stat. § 19.35(3)(f).

822 Wis. Stat. § 19.39.

823 Wis. Stat. § 19.37(1), (1m).

824 Wis. Stat. § 19.37(2)(a).

825 Wis. Stat. § 19.37(2)(b).

826 Wis. Stat. § 19.37(4).

827 Wis. Stat. § 19.37(3).

828 *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470, 474 (1965), modified on reh’g, 28 Wis. 2d 672, 139 N.W.2d 241 (1966).

- The definition of “records” found in Section 19.32(2) excludes certain material from disclosure:
 - ▶ Drafts, notes, and preliminary computations;
 - ▶ Personal property unrelated to official duties;
 - ▶ Copyrighted or patented materials;
 - ▶ Published works kept by custodians outside a public library which are available for sale.
- Other exemptions are outlined in Section 19.36.
 - ▶ A few of these include law enforcement records, trade secrets, personnel records, and financial information.
- Numerous exemptions exist throughout the state code, which may be found from the state legislature’s website.
 - ▶ Examples include accident reports, grand jury transcripts, mental health records, and tax returns.
- As mentioned, courts have asserted the authority to establish common law exemptions. The Wisconsin Statutes Annotated notes where these exemptions may apply within the context of the act.
 - ▶ One example of a common law exemption is any material gained under a pledge of confidentiality if the information would not have been available otherwise.⁸²⁹
- Custodians must provide the public portions of records which contain exempt material.⁸³⁰

- Electronic Records:
 - The Open Records Law is applicable to electronic records.
 - ▶ E-mail is considered a public record.⁸³¹
 - ▶ Computer programs are exempt from disclosure, though the input and output of the software are not.⁸³²
 - Requesters may choose any format in which the record is available or elect to receive a paper form of any record “which is not in a readily comprehensible form.”⁸³³
 - Custodians are not, however, required to “create a new record by extracting information from existing records and compiling the information in a new format.”⁸³⁴
 - As with other forms of records, fees are limited to actual costs.
- Money-Making:
- Public agencies, unless otherwise prescribed by law, may not sell copies of public records for an amount exceeding the actual cost.
- The Open Records Law does not expressly prohibit obtaining records for commercial purposes, though it does stipulate that individuals must comply with any other statutes restricting the use of information.

829 *Mayfair Chrysler-Plymouth Inc. v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638, 647-48 (1991); *State ex rel. Youmans*, 28 Wis. 2d at 681, 137 N.W.2d at 474.

830 Wis. Stat. § 19.36(6).

831 *McCullough Plumbing, Inc. v. McFarland*, 288 Wis. 2d 657 (2005).

832 Wis. Stat. § 19.36(4).

833 Wis. Stat. § 19.35(1)(e).

834 Wis. Stat. § 19.35(1)(L).

Wyoming

Sunshine Law

Codes: Wyo. Stat. §§ 16-4-201 – 16-4-205

Relevant Court Cases: *Laramie River Conservation Council v. Dinger*, 567 P.2d 731 (Wyo. 1977); *Sheridan Newspapers v. City of Sheridan*, 660 P.2d 785, 792, 796 n.14 (Wyo. 1983); *Houghton v. Franscell*, 870 P.2d 1050, 1052-53 (Wyo. 1994); *Wyoming Department of Transportation v. International Union of Operating Engineers Local Union 800*, 908 P.2d 970, 973 (Wyo. 1995); *Sublette County Rural Health Care District v. Miley*, 942 P.2d 1101 (Wyo. 1997); *University of Wyoming v. Gressley*, 978 P.2d 1146 (Wyo. 1999); *Allsop v. Cheyenne Newspapers*, 2002 Wyo. 22, 39 P.3d 1092 (2002)

The Wyoming Sunshine Law, found in Article 2 of Chapter 4 of Title 16 within the Wyoming Statutes, is a relatively short statute that grants any person the right to access governmental records. In the few instances in which the Wyoming Supreme Court has addressed the act, rulings have indicated a liberal construction of the provisions granting access to records and narrow construction of the exemptions.

- Who may request records and for what purpose:
 - The Wyoming Sunshine Law permits “any person” to request access to public records.⁸³⁵
 - The purpose of the request does not affect an individual’s right to obtain records.⁸³⁶
 - The statute does not restrict the use of public information once obtained.
- Whose and which records are covered under the act:
 - The act defines “public records” as any materials “that have been made by the state of Wyoming and any counties, municipalities and political subdivisions thereof and by any agencies of the state, counties, municipalities and political subdivisions thereof, or received by them in connection with the transaction of

public business, except those privileged or confidential by law.”⁸³⁷

- The law covers the executive, legislative, and judicial branches at every level of government.
- Records of nongovernmental bodies are not subject to disclosure under the language of the act. The Supreme Court has not yet addressed this issue.
- As the Supreme Court has ruled that the act is to be interpreted liberally, the records of advisory boards and commissions may be subject to disclosure.
- The physical form or characteristics of the record in question is irrelevant to its openness.
- All records open to inspection are available for copying with the exception of promotional examinations, which may be inspected but not copied.⁸³⁸
- Fees and costs:
 - Custodians are authorized to establish a “reasonable” fee for providing copies of public records but may not charge for allowing individuals to inspect records.⁸³⁹
 - If the agency lacks the proper facilities for providing copies, the custodian must make arrangements for copies to be made elsewhere and may charge the requester “a reasonable fee” for these services.⁸⁴⁰
 - ▶ Neither the statute nor Supreme Court has defined what constitutes a “reasonable fee.”
 - State agencies are permitted to adopt regulations regarding fees in accordance with the Wyoming Administrative Procedure Act.⁸⁴¹

835 Wyo. Stat. § 16-4-202(a).

836 *Laramie River Conservation Council v. Dinger*, 577 P.2d 731, 773 (Wyo. 1977).

837 Wyo. Stat. § 16-4-201(a)(v).

838 Wyo. Stat. § 16-4-203(b)(ii).

839 Wyo. Stat. § 16-4-204(a).

840 Wyo. Stat. § 16-4-204(b).

841 Wyo. Stat. § 16-4-204(d).

- All fees must be authorized by rule, statute, resolution, executive order, or other form of authority.⁸⁴²
- The act contains no provisions for fee waivers, but the language of the law seems to allow the custodian to exercise discretion in levying charges.
- Enforcement and sanctions:
 - Those denied access to records may request a statement explaining the reason for denial. The custodian must cite the law or regulation which exempts the record in question.⁸⁴³
 - Any person who has been denied access to public records may file action in the district court in which the record is located.⁸⁴⁴
 - Custodians may likewise file action in the district court to request permission to withhold records if the disclosure of which would harm the public interest.⁸⁴⁵
 - Any person convicted of violating the act is guilty of a misdemeanor punishable by a fine not exceeding \$750.⁸⁴⁶
- Exemptions:
 - The Wyoming Sunshine Law contains both general and specific exemptions. Certain exemptions are mandatory, while others remain discretionary.
 - Mandatory exemptions include any record which is confidential by state or federal statute or by court order.⁸⁴⁷
 - ▶ See the state legislature's website for a complete copy of the code. Exemptions regarding certain industries or professions may be found in their respective titles or chapters of the Wyoming Statutes.⁸⁴⁸
 - Section 16-4-203(d) enumerates 13 categories of records which the custodian must not disclose unless required to do

so by law. A few of these include medical and adoption records, personnel files, trade secrets, and library records.

- Section 16-4-203(b) contains six types of records which custodians may withhold at their discretion if disclosure would be "contrary to the public interest." The six categories are:
 1. Investigatory records,
 2. Exam materials,
 3. Research projects conducted by state institutions,
 4. Real estate appraisals,
 5. Interagency or intra-agency memoranda,
 6. Security-related information.
- Custodians may also petition the courts to grant a record confidential status. Court rulings have directed custodians to use a balancing test to weigh the public interest in disclosure against the interest in privacy.⁸⁴⁹
- Some of these exemptions are similar to the federal Freedom of Information Act, and the courts have used interpretations of the federal statute as guidance for interpreting Wyoming's counterpart.⁸⁵⁰
- Electronic Records:
 - Electronic records are covered under the act.
 - ▶ E-mail is not specifically addressed within the statute. Content may be public unless it falls within communications exempt from disclosure.
 - ▶ Software is exempt for security and proprietary reasons.⁸⁵¹
 - Section 16-4-202(d) discusses the procedures regarding public records in electronic format.
 - Upon request, custodians must provide an electronic record in an alternative format unless the task would prove impossible or impractical.

842 Wyo. Stat. § 16-4-204(c).

843 Wyo. Stat. § 16-4-203(e).

844 Wyo. Stat. § 16-4-203(f).

845 Wyo. Stat. § 16-4-203(g).

846 Wyo. Stat. § 16-4-205.

847 Wyo. Stat. § 16-4-203(a).

848 <http://legisweb.state.wy.us/statutes/menu.aspx>

849 *Sheridan Newspapers v. City of Sheridan*, 660 P.2d 785 (Wyo. 1983); *Houghton v. Franscell*, 870 P.2d 1050 (Wyo. 1994).

850 *Sheridan Newspapers Inc. v. City of Sheridan*, 660 P.2d at 791-97.

851 Wyo. Stat. § 16-4-202(d)(iv).

- Custodians are not required to create new records by extracting and compiling data to fulfill any request if doing so would interfere with the agency's regular operations.
- Custodians are not required to permit individuals to inspect or copy electronic records if doing so would compromise the security or integrity of the record.
- Agencies may charge the reasonable costs associated with producing copies of electronic records, which may include the cost of reproducing the record and the programming and computer services costs incurred while constructing the record.
- Money-Making:
 - Public agencies, unless otherwise prescribed by law, may charge no more than the direct costs of providing copies of public records.
 - The private use of public information obtained under this law is unrestricted.

Section II:

Tables



Open Records Tables

State	Requester		Entities subject to the act		Exemptions					
	Limits status of requester	Restricts purpose or use	Covers all 3 branches	Non-governmental entities supported by public funds	General exemption for "public interest"	Allows discretion	Resembles federal FOIA	Courts create common law exemptions	Executive privilege or deliberative process privilege	Sunset provisions or regular reviews
Alabama	X	X	X		X			X		
Alaska		X		X		X		X	X	
Arizona		X	X	X	X ⁱ	X		X		
Arkansas	X	X		X			X			
California		X		X	X	X	X	X	X	
Colorado		X		X	X	X	X	X		
Delaware				X	X		X	X	X	
Florida		X				X				X
Georgia		X		X						
Hawaii			X		X	X	X		X	
Idaho		X	X			X		X	X	
Illinois				X		X	X		X	
Indiana		X	X	X		X	X	X	X	
Iowa			X	X		X				
Kansas		X	X	X	X	X			X	X
Kentucky				X		X	X		X	
Louisiana	X			X	X ⁱ	X		X	X	
Maine				X		X			X	X
Maryland		X	X	X	X	X				
Massachusetts						X	X			
Michigan	X			X		X	X	X	X	
Minnesota				X		X			X	X
Mississippi			X			X		X		
Missouri	X ⁱⁱ			X		X				X

i As a result of common law practices within the state

ii The Public Records Law of Missouri permits only citizens of the state to request records, but the Sunshine Law has no such restrictions.

iii Applies to the records of the courts

iv The Ohio Supreme Court has only established a "judicial mental process" privilege.

Open Records Tables (continued)

State	Requester		Entities subject to the act		Exemptions					
	Limits status of requester	Restricts purpose or use	Covers all 3 branches	Non-governmental entities supported by public funds	General exemption for "public interest"	Allows discretion	Resembles federal FOIA	Courts create common law exemptions	Executive privilege or deliberative process privilege	Sunset provisions or regular reviews
Montana			X	X	X	X		X		
Nebraska			X			X				
Nevada			X		X	X		X		
New Hampshire	X				X			X	X	
New Jersey	X	X			X	X		X	X	
New Mexico		X	X			X	X	X		
New York		X				X	X			
North Carolina		X	X	X		X				
North Dakota				X		X				
Ohio			X			X		X ^{iv}	X ^{iv}	
Oklahoma				X		X		X		
Oregon						X	X	X		
Pennsylvania	X		X		X	X		X	X	
South Carolina		X	X	X		X	X	X	X	
South Dakota	X	X	X		X				X	
Tennessee	X		X	X				X		
Texas	X			X	X ⁱ	X	X	X	X	
Utah		X	X		X			X	X	
Vermont							X	X	X	
Virginia	X			X		X		X	X	
Washington		X				X	X		X	X
West Virginia		X	X	X			X	X	X	
Wisconsin	X	X	X	X	X ⁱ	X		X	X	
Wyoming			X		X	X	X			

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Open Records Tables (continued)

State	Fees				Enforcement and Sanctions				State committee or commission on open records	Constitutional right to open records
	Higher for commercial purposes	Includes personnel costs	Discretionary waivers	Mandatory waivers	Attorneys' fees for prevailing plaintiff	Attorneys' fees awarded to custodian	Civil fines	Criminal sanctions		
Alabama		X	X		X ⁱ					
Alaska		X	X	X	X					
Arizona	X	X	X	X	X	X				
Arkansas	X	X	X		X	X		X		
California			X		X	X				X
Colorado		X	X		X	X	X	X		
Delaware		X	X		X	X				X ⁱⁱⁱ
Florida		X			X					X
Georgia		X			X	X		X		
Hawaii		X		X	X		X	X		
Idaho		X		X	X	X	X			
Illinois				X	X		X			
Indiana	X	X	X		X	X		X	X	
Iowa		X			X		X	X		
Kansas		X	X	X	X	X	X			
Kentucky	X	X			X		X			
Louisiana		X	X		X	X	X			X
Maine		X	X		X		X			
Maryland		X	X		X					
Massachusetts		X			X		X		X	
Michigan		X	X	X		X	X			
Minnesota		X			X		X	X		
Mississippi		X	X		X		X		X	X ⁱⁱⁱ
Missouri		X	X		X		X	X		X ⁱⁱⁱ

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State	Fees				Enforcement and Sanctions				State committee or commission on open records	Constitutional right to open records
	Higher for commercial purposes	Includes personnel costs	Discretionary waivers	Mandatory waivers	Attorneys' fees for prevailing plaintiff	Attorneys' fees awarded to custodian	Civil fines	Criminal sanctions		
Montana		X			X ⁱ					X
Nebraska		X		X	X			X		
Nevada		X	X		X			X		
New Hampshire			X		X	X		X	X	X
New Jersey		X			X		X		X	
New Mexico			X	X	X		X			
New York					X				X	
North Carolina		X	X		X	X				
North Dakota		X	X		X		X			X
Ohio	X				X		X			
Oklahoma	X	X		X	X	X		X		
Oregon		X	X		X		X	X		X ⁱⁱⁱ
Pennsylvania			X	X	X	X	X		X	
South Carolina		X	X	X	X			X		
South Dakota		X	X					X		
Tennessee	X				X				X	
Texas		X	X	X	X	X		X	X	
Utah		X	X		X		X	X	X	
Vermont		X			X		X	X		
Virginia		X			X		X		X	
Washington		X			X		X		X	
West Virginia			X		X			X		X ⁱⁱⁱ
Wisconsin		X	X		X		X			
Wyoming			X					X		

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