RIGHT TO KNOW ADVISORY COMMITTEE

Tuesday, October 2, 2018
9:00 a.m.
State House Room 438

Meeting Agenda

1. Introductions

2. Discussion on enforcement and penalties
   A. Alternative dispute resolution options
   B. Fines
      (1) Payable by agency or individual
      (2) Tiered
      (3) Payable to
          General Fund
          Aggrieved Party
          Special fund
   C. Additional remedies – standards?
      (1) Attorney’s fees
      (2) Court costs
      (3) Damages – actual or minimum amount
   D. Criminal sanctions

3. Additional topics for Advisory Committee to discuss

4. Subcommittee to review existing public records exceptions: Plans

5. Establish future meeting dates?

6. Adjourn
Dispute resolution before resorting to court action

Questions
Who oversees, arranges the dispute resolution
Costs
Enforcement
Timing

Examples of states that provide an avenue in addition to court action for compliance
(This information comes from the 2015 report by the Colorado Freedom of Information Coalition’s report Freedom of Information: State-by-State Evaluation of Alternative Dispute Resolution Processes; Ohio and Colorado information is new.)

Arizona
Arizona Ombudsman-Citizens’ Aide Office is a neutral resource for both citizens and government officials. Part of the legislative branch and has the authority to investigate any governmental bodies (other than the judiciary and state universities). Engages in coaching, informal assistance (including mediation) and investigation, but it does not have the power to write legally binding opinions.

Arkansas
Attorney General is statutorily required to review custodians’ decisions concerning the release of “personnel records” or “employee evaluation or job performance records” that a records custodian has identified as responsive to a request. The records cannot be disclosed until the AG has issued an opinion. Otherwise, the AG issues legal opinions that are not binding but may possess persuasive power.

Colorado (new in 2017)
At least 14 days before filing in district court, person who has been denied the right to inspect record files written notice with custodian that has denied inspection. During the 14-day period, the custodian is required to meet in person to communicate over the telephone to determine if the dispute may be resolved without filing with the district court. Any method of dispute resolution agreeable to both parties. Common expenses shared among the parties unless parties agree to something different. If person who has been denied access states in the written notice to the custodian that the person needs to pursue access on an expedited basis, the notice includes statement of factual basis for the expedited access, and the notice is provided at least three days before the person files with the district court, no meeting to determine if dispute resolution may resolve the dispute is required.

Connecticut
Connecticut Freedom of Information Commission provides an appeals process outside of the courts, and its decisions have the force of law. If parties
don’t resolve disputes with the assistance of a CFOIC staff attorney, the Commission conducts hearings and issues decisions, which have the force of law. (But consolidation of government activities and budget cuts have reduced effectiveness.)

Florida
Office of the Attorney General administers a formal mediation program: Open Government Mediation Program. Voluntary and both parties must consent. Not mandatory, so unresolved cases result when the government agency refuses mediation, forcing the requester to go through the court system.

Georgia
Attorney general has the authority to help citizens and government agencies mediate public records and open meetings disputes, usually resolved through education. But if a local government refuses to comply, the AG can bring both civil and criminal actions to enforce compliance; because of limited budget, the AG usually does not file in court but advises the complainant to hire independent counsel.

Hawaii
The Office of Information Practices (within the lieutenant governor’s office): to provide an informal dispute resolution process as an alternative to court actions. Also offers “attorney-of-the-day” service which advises members of the public and government agencies. The Office has the power to order agency compliance, and the law requires courts to defer to decisions requiring disclosure unless the factual and legal determinations are found to be “palpably erroneous.” No cost to participants, but timeliness has deteriorated because of decreased resources and budget cuts.

Illinois
Public Access Counselor leads the Public Access and Opinions Division of the Office of the Attorney General. After a non-commercial records request has been denied, the requester can ask that the case be reviewed. If the agency does not cooperate, the AG can issue a subpoena to gather additional information. The AG has authority to make findings of fact and conclusions of law and issue binding opinions, subject to administrative review. The AG can also opt for mediation, and can issue advisory opinions.

Indiana
The Office of the Indiana Public Access Counselor can respond to informal requests from the public and public agencies. Public bodies must cooperate with the Public Access Counselor, which can issue advisory opinions, but a complainant must go to court to appeal a denial. Must file a complaint with the Public Access Counselor first to collect attorney’s fees.
Iowa

The Office of Citizen’s Aide/Ombudsman is an independent state agency to which citizens can bring complaints about government. The position of Citizens’ Aide is appointed by the Legislative Counsel. The office can investigate and make recommendations but has no formal enforcement powers.

The Iowa Public Information Board was created to provide a free, efficient way for Iowans to receive information and resolve public records disputes. Once the Board accepts a complaint, it has the power to stay any court actions. Board attorneys try to negotiate compromises to satisfy both parties. A decision made by the Board is a final decision, and the Board is empowered to enforce its decisions with legal action and civil penalties. Parties can opt to use an administrative law judge. A final Board order is subject to judicial review.

Kentucky

The attorney general serves as an impartial tribunal, issuing legally binding decisions in disputes related to the open records and open meetings laws. Both parties can appeal the AG’s decision in court; appeal must be filed within 30 days or the AG decision will have the force and effect of law and can be enforced in court.

Maryland

The Maryland Open Meetings Compliance Board (OMCB) and the State Public Information Compliance Board (PICB) can resolve disputes over public meetings and unreasonable fees, respectively. In addition, the Public Access Ombudsman may review any dispute “relating to requests for public records.” OMBC opinions are advisory.

Massachusetts

The Supervisor of Public Records is responsible for maintaining the commonwealth’s public records and handling administrative appeals in disputes relating to the Public Records Law. The Supervisor can order the custodian to comply, and ask the attorney general for assistance. Judicial remedies are available directly.

Minnesota

The Information Policy Analysis Division of the Department of Administration provides an alternative appeal mechanism for FOI request denials. Commissioner of Administration may issue written advisory opinions; opinions are not binding but must be given deference by a court. Complainant must bring a court action to compel compliance.

Nebraska

A person denied access under either the open meetings or public records law can request the attorney general to review. The attorney general also issues decisions interpreting the laws. The attorney general can order the public agency
to comply, but if the agency refuses, the requester can bring suit or demand in writing that the attorney general bring suit.

New Jersey

The Government Records Council (GRC) created to establish an informal mediation program for facilitating the resolution of records disputes, hear complaints concerning denials of access to records, issue advisory opinions and prepare information for requesters and custodians.

After a requester files a formal complaint of denial of access, the GRC offers an opportunity to resolve the dispute through mediation with an impartial third-party attorney with knowledge of the law serving as mediator. Mediation is voluntary and at no cost to either party. If no mediation or mediation not successful, GRC can initiate a more formal investigation. Does not apply to the legislature or judiciary.

New York

Committee on Open Government provides advice, issues written advisory opinions and provides the public with resources to file requests or appeal denials of requests. Advisory opinions do not have the force of law, so requester must bring court action to enforce.

North Dakota

Any interested party may ask the attorney general for an opinion regarding an alleged violation of records or meetings laws. The AG issues opinions free of charge. If the AG finds the public entity violated the law, the entity has seven days to address and correct the issue; failing to comply can result in potential personal liability for the person or persons responsible, although the AG does not have the authority to change, void or overrule a decision of or action taken by the public entity. At any time, the aggrieved party can bring a civil action.

Ohio (new in 2016)

Requesters can file a complaint with the Ohio Court of Claims ($25 filing fee), and require the public office to work with the requester and a mediator to try to resolve any issues. If mediation is not successful, the question is referred to a “Special Master” who will decide whether the public office must turn over the records.

The alternative (existing law) is for the requester to file a mandamus action – which allows the requester to collect court costs if wins, plus attorney’s fees if records withheld in bad faith.

Addresses “vexatious litigator” who repeatedly brings baseless complaints for the purpose of harassing a defendant: can be prevented from bringing further complaints without prior permission from the courts.

Pennsylvania

Office of Open Records is authorized to hear and decide appeals from requesters who have been denied access to records by state and local agencies.
Informal mediation program to resolve disputes without undergoing a formal administrative review process and appellate litigation. An administrative appeal process is required before any court action. Mediation is voluntary. If mediation does not resolve the issues, the Office will issue a final determination within 30 days. If the parties do not opt for mediation, the Office has 30 days to issue a final determination, with or without a hearing. The final determination is binding on the agency and the requester, but the requester must seek court help to enforce, as the Office does not have enforcement powers.

Rhode Island

The attorney general investigates complaints on both public records and open meetings. The chief administrative office for the agency responsible for the records handles administrative appeals after a denial. If the chief administrator officer does not release the record, the requester can file a formal complaint with the AG. The AG may file suit in superior court. If the AG decides not to take legal action, citizens can file suit in superior court.

South Dakota

The Open Meetings Commission (five attorneys appointed by the Attorney General) handles disputes related to the open meetings law; the Office of Hearing Examiners handles disputes over public records. Citizens can take complaints about open meetings to the state’s attorney or the AG; the AG decides whether to prosecute, or can send the complaint to the Open Meetings Commission for further action. The Commission evaluates the complaint and issues a written determination, which is final, reprimanding the offending official or government entity rather than imposing criminal charges or a fine. Citizens with public records access disputes can file notice of review with the Office of Hearing Examiners, which will make written findings of fact and conclusions of law, which could be after a hearing. State’s attorneys and the AG do not prosecute any decisions.

Tennessee

Office of Open Records Counsel (in the Comptroller of the Treasury) was created to deal with local government open records issues. The office issues informal advisory opinions, informally mediates disputes with local governmental entities (not state) and works with the Advisory Committee on Open Government on open meetings and open records issues. Opinions are advisory and citizens seeking enforcement of public records or open meetings laws must go to court.

Texas

Requesters and governmental bodies are required to consult with the attorney general before claiming exemptions or proceeding to litigation. If a governmental body wishes to withhold records from a requester, and there has not been a previous AG’s determination on the disclosure of those records, it must ask the AG for a decision within 10 business days of receiving the request. The AG must issue a written opinion within 60 working days after the request. If the AG
determines that the information is public, the governmental body must file a cause of action seeking relief from compliance in order to avoid criminal violation of the act. The AG can pursue civil actions in open-government cases but cannot prosecute those complaints in criminal court. The AG does not have jurisdiction over Texas Open Meetings Act violations (district courts and county and district attorneys do). Citizen has to bring an action for refusal to request an AG’s decision or for refusal to supply public information or information that the AG determined is a public record.

Utah

Requesters can appeal a records denial by appealing to the head of the state agency, or they can appeal to the State Records Committee. If unsuccessful, they can appeal to district court. The State Records Committee serves as an appeals board from agency denials, including local agencies.

Government Records Ombudsman provides information.

Virginia

Freedom of Information Advisory Council (FOIAC), within the legislative branch, renders advisory opinions that clarify the law and provide guidance to government agencies. FOIAC cannot compel production of documents or issue orders, does not have authority to mediate, but can be called upon as a resource to issue advisory opinions that have persuasive value. FOIAC issues formal written opinions as well as informal opinions. Opinions are merely advisory and not binding; appeals and remedies are still funneled through the courts systems.

Washington

Open Government Ombudsman, also called the Assistant Attorney General for Open Government, to help public agencies and citizens comply with laws. A citizen or public agency can call or email the ombudsman, who may provide an informal written analysis and follow up with the agency and ask it to reconsider its position where appropriate. The opinions of the ombudsman are nonbinding, but they may be persuasive to the agency or to a court considering a public access dispute.
<table>
<thead>
<tr>
<th>Type of penalty or remedy</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal sanctions (fine and/or imprisonment)</td>
<td>Arkansas, DC, Florida, Georgia, Hawaii, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, Texas, Utah, West Virginia</td>
</tr>
<tr>
<td>Public employee personally liable for civil penalty DAMAGES</td>
<td>Iowa (damages for violation, higher if &quot;knowingly&quot; violated); New Hampshire (if acted in bad faith)</td>
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<tr>
<td>No criminal or civil penalty</td>
<td>Alabama, Alaska, Arizona, California, Delaware, Maryland, Massachusetts, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, Vermont</td>
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<tr>
<td>Attorney fees available to plaintiff (usually if prevails or substantially prevails; standard varies)</td>
<td>Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin</td>
</tr>
<tr>
<td>Attorney fees available to defendant agency (usually if request or appeal is deemed frivolous)</td>
<td>California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, Texas, Vermont</td>
</tr>
<tr>
<td>Damages available to plaintiff</td>
<td>Arizona, Iowa (paid by person who violated), Kentucky, Michigan (statutory damages, paid by agency), New Mexico, North Dakota, Ohio, Washington, Wisconsin</td>
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<tr>
<td>Injunctive, declaratory, or equitable relief available</td>
<td>Alaska, Arkansas, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Utah, West Virginia</td>
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</tbody>
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# State Fines, Penalties and Attorneys' Fees
## For Open Records Violations
**Updated April 2018**

<table>
<thead>
<tr>
<th>State</th>
<th>Entity</th>
<th>Standard</th>
<th>Civil or criminal</th>
<th>Fines/penalties/Attorneys fees (Other relief available)</th>
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<tbody>
<tr>
<td>ALABAMA</td>
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<td>-No provision for fines for wrongful failure to disclose</td>
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<td>-Public Records Law does not reference sanctions for noncompliance, but attorneys' fees have been awarded (2001 case)</td>
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<td>ALASKA</td>
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<td>-No sanctions for noncompliance</td>
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<td>-Full attorneys' fees have traditionally been available to the prevailing plaintiff in a public interest suit</td>
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<td>-(Court may issue order to enjoin future violations)</td>
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<tr>
<td>ARIZONA</td>
<td>Officer or the public body</td>
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<td>-If wrongfully denied access to public records, has a cause of action for damages</td>
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<td>-If custodian acted in bad faith or in an arbitrary and capricious manner, superior court may award to petitioner legal costs, including reasonable attorneys' fees</td>
</tr>
<tr>
<td>ARKANSAS</td>
<td>A person</td>
<td>Negligent violation</td>
<td>Misdemeanor</td>
<td>-Fine of up to $500, imprisonment for up to 30 days or both; alternatively, the defendant may be sentenced to “appropriate public service, education or both”</td>
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<td>-FOIA permits civil suits to enforce</td>
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<td>-Attorneys' fees maybe awarded to a substantially prevailing plaintiff unless the court finds the position of the defendant was substantially justified or that other circumstances make award unjust</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>Public agency</td>
<td></td>
<td>Civil</td>
<td>-Court will award costs and reasonable attorneys’ fees to prevailing plaintiff</td>
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<td>-Agency can recover attorneys’ fees if agency prevails and court finds lawsuit was clearly frivolous</td>
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<td>- If an agency fails to obey a court order requiring disclosure of public records, contempt sanctions may be imposed after a hearing</td>
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</tbody>
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Right to Know Advisory Committee: Legislative Subcommittee
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| COLORADO      | Custodian                      | Arbitrary or capricious         |                   | - No criminal penalty or fine  
- Violation had been a misdemeanor carrying a fine or up to $100 and jail for 90 days; repealed in 2009                                                                                                           |
|               |                               |                                 |                   | - If criminal justice agency arbitrarily or capriciously withheld a criminal justice record, court may impose a penalty of up to $25 per day  
- Unless denial was proper, court shall order court costs and reasonable attorneys' fees to prevailing applicant  
- If denial was proper, court will award court costs and reasonable attorneys' fees to the custodian if the action was "frivolous, vexatious or groundless" |
| CONNECTICUT   | Custodian or other official    | "without reasonable grounds"    | Civil             | - Freedom of Information Commission can assess civil penalty of not less than $20 and not more than $1,000 for denial of a right under FOIA "without reasonable grounds."  
- Destroying, mutilating, or otherwise disposing of any public record without approval is a Class A misdemeanor  
- Failing to comply with an order of the Freedom of Information Commission is Class B misdemeanor |
|               | Any person                     | "willfully, knowingly, and with intent" | Class A misdemeanor |                                                                                                                                             |
|               | Any member of any public agency|                                 | Class B misdemeanor |                                                                                                                                             |
| DELAWARE      |                               |                                 |                   | - Court may award attorneys' fees and costs to a successful defendant if the action was frivolous or was brought solely for the purpose of harassment                                                                                           |
| DISTRICT OF COLUMBIA | Any person              | Arbitrary and capricious violation | Misdemeanor       | - Fine of up to $100                                                                                                                                                                                                                                                   |
| FLORIDA       | Public officer                 | Willing and knowing violation   | First degree      | - Fine of up to $1,000, imprisonment of up to one year or both  
- If court finds agency unlawfully refused. Court will assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorneys' fees |
|               | Agency                         |                                 | Misdemeanor       |                                                                                                                                             |
|               |                               |                                 | Civil             |                                                                                                                                             |
## State Fines, Penalties and Attorneys’ Fees

**For Open Records Violations**  
Updated April 2018

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<tr>
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</table>
| GEORGIA   | Any person or entity          | Knowing and willfully                         | Misdemeanor       | - Fine for criminal or civil penalty of up to $1,000 for first violation; up to $2,500 for additional violation within 12 mos  
- Court may award prevailing party reasonable attorneys' fees where it determines that either party acted without substantial justification either in complying with the chapter or in instituting the litigation |
|           |                               | Negligently                                    | Civil penalty     |                                                        |
| HAWAII    | Officer or employee of an agency | Intentionally                       | Misdemeanor       | - Fine of up to $2,000                                 |
| IDAHO     | Public official               | Deliberately and in bad faith                | Civil penalty     | - Up to $1,000  
- Court shall award reasonable costs and attorneys’ fees to the prevailing party or parties if it finds that the request or refusal to provide records was frivolously pursued |
| ILLINOIS  | Public body                   | Willfully and intentionally, or otherwise in bad faith | Civil penalty     | - Fine of $2,500 to $5,000; court may impose additional penalty of up to $1,000 for each day the violation continues under certain circumstances  
- Prevailing party entitled to reasonable attorney's fees and costs |
| INDIANA   | Individual or public agency   |                                               | Civil penalty     | - Up to $100 for first violation; up to $500 for each additional  
- The court will award attorneys’ fees, court costs and other reasonable expenses of litigation to the prevailing plaintiff  
- An award of attorneys’ fees to a prevailing defendant is discretionary if the court finds the action was frivolous or vexatious. |
| IOWA      |                               |                                               | Civil             | - Court may assess the persons who participated in violation damages of not more than $500 nor less than $100  
- The court will order the payment of all costs and reasonable attorneys fees, including appellate attorneys’ fees, to any plaintiff successfully establishing a violation of the Open Records Act. |
| KANSAS    | Agency                        | Knowingly                                      | Civil penalty     | - Fine up to $500 for each violation  
- Attorneys’ fees are allowable to either party, if the denial or the request was not in good faith and without reasonable basis in fact or law. |

Right to Know Advisory Committee: Legislative Subcommittee
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</thead>
<tbody>
<tr>
<td>KENTUCKY</td>
<td></td>
<td>Civil</td>
<td></td>
<td>-Any person prevailing against an agency may be awarded costs and reasonable attorney’s fees. -Court may also award up to $25 for each day the person was denied access to the record.</td>
</tr>
<tr>
<td>LOUISIANA</td>
<td>Any person having custody or control of a public record</td>
<td>Violation of any provision</td>
<td>Criminal</td>
<td>-1st offense: fine of not less than $100 and not more than $1,000, imprisonment for not less than one month and not more than six months -Subsequent offense: fine of not less than $250 and not more than $2,000, imprisonment for not less than two months and not more than six months or both -If a person seeking the right to inspect or to receive a copy of a public record prevails in such a suit, the person will be awarded reasonable attorneys’ fees and other costs of litigation. If such person prevails in part, the court may award that person reasonable attorneys’ fees or an appropriate portion.</td>
</tr>
<tr>
<td>MAINE</td>
<td>State government agency or local government entity</td>
<td>Willful</td>
<td>Civil violation</td>
<td>-Forfeiture of up to $500 -The court may award reasonable attorney’s fees and litigation expenses to the substantially prevailing plaintiff if the court determines that the refusal or illegal action was committed in bad faith. Attorney’s fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.</td>
</tr>
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<td>MARYLAND</td>
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<td>-Penalty had been fine of up to $1,000 plus damages; repealed in 2014 -Court may award actual damages and attorneys’ fees to complainant if court finds by clear and convincing evidence that the complainant substantially prevailed</td>
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<td>MASSACHUSETTS</td>
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<td>-No sanctions for noncompliance -Court may award attorney’s fees and costs</td>
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<tr>
<td>MICHIGAN</td>
<td>Public body</td>
<td>Arbitrary and capricious</td>
<td>Civil</td>
<td>-Reasonable attorneys’ fees, costs, and disbursements will be awarded to any person who prevails in an action to compel disclosure. -$1,000 civil fine paid to the state general fund; $1,000 damages to person seeking public record</td>
</tr>
</tbody>
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<tbody>
<tr>
<td>MINNESOTA</td>
<td>Any person</td>
<td>Civil</td>
<td></td>
<td>-$1,000 civil penalty; injunctive relief also available</td>
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<tr>
<td>MISSISSIPPI</td>
<td>Any person</td>
<td>Civil</td>
<td></td>
<td>-$100 per violation</td>
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<tr>
<td>MISSOURI</td>
<td>Any official</td>
<td>Criminal</td>
<td></td>
<td>-Misdemeanor and punishment of up $100 and/or up to 90 days in jail</td>
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<tr>
<td>MONTANA</td>
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<td>-A plaintiff, who prevails in an action brought in district court to enforce their rights under the Open Records Act, may be awarded costs and reasonable attorneys’ fees.</td>
</tr>
<tr>
<td>NEBRASKA</td>
<td>Any official</td>
<td>Violation</td>
<td>Criminal-Civil</td>
<td>-Class III misdemeanor - Fine of up to $500, imprisonment of up to three months or both</td>
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<td></td>
<td>-Equitable relief available; reasonable attorneys’ fees and other litigation costs reasonably incurred by the complainant.</td>
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<tr>
<td>NEVADA</td>
<td>Public officer or employee</td>
<td>Acts in good faith</td>
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<td>-Immune</td>
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<td>-Requestor may appeal denial to district court; if requestor prevails, the requestor is entitled to recover costs and reasonable attorney’s fees in the proceeding from the agency whose officer has custody of the book or record.</td>
</tr>
<tr>
<td>NEW HAMPSHIRE</td>
<td>Public body</td>
<td>Knew or should have known in violation</td>
<td>Civil</td>
<td>-Injunctive relief available by filing in superior court</td>
</tr>
<tr>
<td></td>
<td>Public official or employee of public body</td>
<td>Bad faith</td>
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<td>-Reasonable attorneys’ fees if the court finds that a public body knew or should have known that it violated statute</td>
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<td>-Fees may be awarded personally against a public official or employee of a public body who acted in bad faith</td>
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<td>-Court may impose civil penalty of between $250 and $2,000 if official or body acted in bad faith</td>
</tr>
<tr>
<td>NEW JERSEY</td>
<td>Custodian</td>
<td>Willfully</td>
<td>Civil-Civil penalty</td>
<td>-Requestor may appeal denial in court; entitled to fees upon prevailing</td>
</tr>
<tr>
<td></td>
<td>Public official, officer, employee, or custodian</td>
<td></td>
<td></td>
<td>-$1,000 for first violation; $2,500 for second within 10 years; $5,000 for third within 10 years</td>
</tr>
<tr>
<td>NEW MEXICO</td>
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<td>-Injunctive relief or writ of mandamus may be issued to enforce public records act</td>
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<td>-Damages, costs, and reasonable attorneys' fees to person whose written request has been denied and is successful in court.</td>
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<td>State</td>
<td>Entity</td>
<td>Standard</td>
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</tr>
<tr>
<td>NEW YORK</td>
<td></td>
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<td></td>
<td>-Court may award reasonable attorneys' fees and other litigation costs reasonably incurred in any case in which the requestor has substantially prevailed, provided, however, that the court finds that: (1) the record involved was, in fact, of clearly significant interest to the general public; and (2) the agency lacked a reasonable basis in law for withholding the record.</td>
</tr>
<tr>
<td>NORTH CAROLINA</td>
<td></td>
<td></td>
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<td>-Requester who prevails may seek attorneys' fees, which is discretionary with the judge</td>
</tr>
<tr>
<td>NORTH DAKOTA</td>
<td>Public entity</td>
<td>Intentional or knowing</td>
<td>Civil</td>
<td>-Declaratory relief, an injunction, or writ of mandamus may be issued</td>
</tr>
<tr>
<td></td>
<td>Public servant</td>
<td>Knowingly</td>
<td></td>
<td>-Court may award costs, fees</td>
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<td>-Court may award damages of $1,000 or actual damages, whichever is greater</td>
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<td>-Class A misdemeanor</td>
</tr>
<tr>
<td>OHIO</td>
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<td>-Court has discretion to award attorneys’ fees when the person bringing suit obtains a writ of mandamus.</td>
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<td>-Statutory damages of $100 per day up to $1,000 may be assessed; to be construed as compensation and not penalty.</td>
</tr>
<tr>
<td>OKLAHOMA</td>
<td>A public official</td>
<td>Willful violation</td>
<td>Criminal</td>
<td>-Fine of up to $500 and/or imprisonment of up to one year</td>
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<td>-May sue for declarative or injunctive relief</td>
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<td></td>
<td>Civil</td>
<td>-Reasonable attorney fees if requestor prevails</td>
</tr>
<tr>
<td>OREGON</td>
<td></td>
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<td></td>
<td>-Upon denial, requestor may petition the Attorney General; may be entitled to fees if requestor prevails</td>
</tr>
<tr>
<td>PENNSYLVANIA</td>
<td></td>
<td></td>
<td>Civil</td>
<td>-If the court finds that the requestor or the agency has acted in bad faith in pursuing an appeal or refusing access to records, it can award reasonable attorneys’ fees to the prevailing party.</td>
</tr>
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<td>-Court may impose $1,500 civil penalty if agency acted in bad faith; may assess additional penalty of $500 per day for failure to comply with court order to produce records.</td>
</tr>
<tr>
<td>State</td>
<td>Entity</td>
<td>Standard</td>
<td>Civil or criminal</td>
<td>Fines/penalties/Attorneys fees (Other relief available)</td>
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<td>------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| RHODE ISLAND       | Public body or official       | Knowing and willful     | Civil             | -Fine of not more than $5,000  
                     |                               |                         | -Attorney General may investigate and file for injunctive or declaratory relief on behalf of requestor; fees available for requestor |
| SOUTH CAROLINA     | Public body                   | Arbitrary and capricious | Civil             | -Civil fine of $500 (formerly criminal misdemeanor)  
                     |                               |                         | -Equitable relief available  
                     |                               |                         | -Court may award a successful plaintiff reasonable attorneys' fees and other costs of litigation. |
| SOUTH DAKOTA       | Public entity                 | Bad faith               | Civil             | -Court may award costs, disbursements, and a civil penalty of up to $50 for each day the records were delayed  
                     |                               |                         |                                                   | -Attorneys’ fees may be awarded if the refusal to disclose was willful |
| TENNESSEE          |                               |                         |                   |                                                                                                                 |
| TEXAS              | An officer for public information | With criminal negligence | Misdemeanor       | -Fine of up to $1,000, imprisonment of up to six months or both  
                     |                               |                         | -The court shall assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. When determining whether or not to award attorneys' fees, the court considers whether the conduct of the officer for public information of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith. |
| UTAH               | Public employee               | Intentionally           | Class B misdemeanor | -Fine of not more than $1,000, imprisonment of up to six months or both  
                     |                               |                         |                                                   | -Injunctive relief available  
                     |                               |                         | -Court may assess against governmental entity reasonable attorneys' fees and other litigation costs reasonably incurred if requestor substantially prevails - but subject to Governmental Immunity Act |
| VERMONT            |                               | Civil                   |                   | -Court may award reasonable attorneys' fees and litigation costs to a substantially prevailing complainant |

Right to Know Advisory Committee: Legislative Subcommittee
<table>
<thead>
<tr>
<th>State</th>
<th>Entity</th>
<th>Standard</th>
<th>Civil or criminal</th>
<th>Fines/penalties/Attorneys fees (Other relief available)</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIRGINIA</td>
<td>Individual member of public body</td>
<td>Willfully and knowingly</td>
<td>Civil penalty</td>
<td>-First offense: fine of not less than $500 and not more than $2,000</td>
</tr>
<tr>
<td></td>
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<td>-Subsequent offense: fine of not less than $2,000 and not more than $5,000</td>
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<td>-Costs and attorneys' fees will be awarded where the petitioner substantially prevails and where there are no</td>
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<td>special circumstances making the award unjust</td>
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<tr>
<td>WASHINGTON</td>
<td></td>
<td></td>
<td>Civil</td>
<td>-Court may award up to $100 per day to requestor for each day records were withheld</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>-A requesting party who prevails against the agency is entitled to its costs and attorneys' fees</td>
</tr>
<tr>
<td>WEST VIRGINIA</td>
<td>Custodian</td>
<td>Willful</td>
<td>Misdemeanor</td>
<td>-Fines between $200 and $1,000 and/or up to 20 days in jail</td>
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<tr>
<td></td>
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<td></td>
<td>Civil</td>
<td>-Injunctive or declaratory relief available; custodian may be punished as being in contempt of court</td>
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<td></td>
<td>-If requestor prevails, attorney fees and court costs awarded</td>
</tr>
<tr>
<td>WISCONSIN</td>
<td>An authority or legal custodian</td>
<td>Arbitrarily and capriciously</td>
<td>Civil</td>
<td>-Forfeiture of up to $1,000</td>
</tr>
<tr>
<td></td>
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<td>-If the requester prevails in whole or in substantial part, the court will award reasonable attorneys' fees, costs,</td>
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<td>damages of not less than $100</td>
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<td></td>
<td>-Court may award punitive damages to requestor</td>
</tr>
<tr>
<td>WYOMING</td>
<td>Any person</td>
<td>Knowingly or intentionally</td>
<td>Civil penalty</td>
<td>-Fine of up to $750 (formerly misdemeanor)</td>
</tr>
</tbody>
</table>

G:\Studies - 2010\Right to Know Advisory Committee\penalties chart 2010.doc (9/7/2018 2:32:00 PM)
# Legal Standard for Attorneys’ Fees for Plaintiffs
## For Open Records Violations – By State
### April 26, 2018

<table>
<thead>
<tr>
<th>State</th>
<th>Standard (in statute and/or case law)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALABAMA</td>
<td>Not in statute. An award of reasonable attorney’s fees “may be proper where the case results in a benefit to the general public even though there was no bad faith involved” <em>Tuscaloosa News v. Garrison</em>, CV-99-408 (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001).</td>
</tr>
<tr>
<td>ALASKA</td>
<td>Not in Open Records statute or case law. There is a “loser pays” provision in Alaska Rules of Civil Procedure for most civil litigation. (Rule 82).</td>
</tr>
<tr>
<td>ARIZONA</td>
<td>By statute, a court may award attorney fees that are reasonably incurred if person seeking public records has “substantially prevailed.” Ariz. Rev. Stat. § 39-121-02(B). In case law, for plaintiff to prevail, denial must have been “wrongful.” For government to defend a denial, must show that “considerations of confidentiality, privacy, or the best interests of the state” outweigh the presumption of public disclosure. See <em>Lake v. City of Phoenix</em>, 207 P.3d 725.</td>
</tr>
<tr>
<td>ARKANSAS</td>
<td>By statute, attorneys’ fees may be awarded to a substantially prevailing plaintiff unless the court finds the position of the defendant was substantially justified or that other circumstances make award unjust. § 25-19-107. In case law, “court need not make a fee award in every FOIA case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith.” <em>Hamilton v. Simpson</em>, 993 S.W.2d 501, 502 (Ark. Ct. of App. 1999).</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>By statute, attorney fees shall be awarded to the plaintiff upon prevailing. (Ca. Govt. Code § 6259). No clarification in case law.</td>
</tr>
<tr>
<td>COLORADO</td>
<td>By statute, attorney fees shall be awarded if plaintiff prevails and custodian acted arbitrarily and capriciously. § 24-72-204. No clarification in case law.</td>
</tr>
<tr>
<td>FLORIDA</td>
<td>By statute, attorney fees shall be awarded if court determines that an agency “unlawfully refused” access to a public record. § 119.12. In case law, entitlement to attorney fees for unlawful refusal to permit inspection or copying of a public record is based upon whether the public entity had a “reasonable” or “good faith” belief in the soundness of its position in refusing production. <em>Knight Ridder, Inc. v. Dade Aviation Consultants</em>, App. 3 Dist., 808 So.2d 1268 (2002).</td>
</tr>
<tr>
<td>GEORGIA</td>
<td>By statute, unless special circumstances exist, the prevailing plaintiff shall be awarded fees if the agency acted “without substantial justification.” § 50-18-73. In case law, there is a two-prong test for attorney’s fees. Plaintiff (appellants) must show that agency violated the access law, and if there was a violation, plaintiff must who that agency lacked substantial justification. <em>Jaraysi v. City of Marietta</em>, 2008, 294 Ga.App. 6, 668 S.E.2d 446.</td>
</tr>
<tr>
<td>State</td>
<td>Standard (in statute and/or case law)</td>
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<tr>
<td>IDAHO</td>
<td>By statute, court shall award reasonable fees to prevailing party if refusal to provide records was frivolously pursued. § 74-116. No clarification in case law.</td>
</tr>
<tr>
<td>ILLINOIS</td>
<td>By statute, court shall award prevailing plaintiff reasonable atty fees. § 140/11. In case law, a court may only deny fees if “special circumstances would render such an award unjust.” Callinan v. Prisoner Review Bd., 862 N.E.2d 1165. Record must be “of clearly significant interest to the general public, and the public body lacked any reasonable basis in law for withholding the record.” Lieber v. Board of Trustees of Southern Illinois University, 736 N.E.2d 213.</td>
</tr>
<tr>
<td>INDIANA</td>
<td>By statute, court shall award substantially prevailing plaintiff reasonable atty fees. § 5-14-3-9. In case law, atty fees are more discretionary, considering factors including whether the plaintiff substantially prevailed and the defendant’s violation was knowing or intentional. See City of Elkhart v. Agenda: Open Government, Inc., App.1997, 683 N.E.2d 622; Indiana Civil Liberties Union v. Indiana General Assembly, App. 4 Dist.1987, 512 N.E.2d 432.</td>
</tr>
<tr>
<td>IOWA</td>
<td>By statute, court shall award atty fees to any plaintiff successfully establishing a violation. § 22.10. In case law, good faith or reasonable delay appears to be sufficient for agency to defend. City of Riverdale v. Dierks, 2011, 806 N.W.2d 643.</td>
</tr>
<tr>
<td>KANSAS</td>
<td>By statute, court shall award atty fees if the denial was not in good faith and without reasonable basis in fact or law. § 45-222. No meaningful clarification in case law.</td>
</tr>
<tr>
<td>KENTUCKY</td>
<td>By statute, court may award reasonable atty fees to prevailing plaintiff if court finds that records were “willfully withheld.” § 61.882. No meaningful clarification in case law.</td>
</tr>
<tr>
<td>LOUISIANA</td>
<td>By statute, court shall award reasonable atty fees if plaintiff prevails. § 35. In case law, plaintiff must show that custodian acted arbitrarily and capriciously. Bacino v. City of Kenner, 131 So.3d 283, (La.App. 5 Cir. 12/12/13).</td>
</tr>
<tr>
<td>MAINE</td>
<td>By statute, court may award reasonable attorney’s fees and litigation expenses to the substantially prevailing plaintiff if the court determines that the refusal or illegal action was committed in bad faith. § 409.</td>
</tr>
<tr>
<td>MASSACHUSETTS</td>
<td>By statute, court may award reasonable atty fees to prevailing plaintiff. § 10A. No clarification in case law.</td>
</tr>
<tr>
<td>MICHIGAN</td>
<td>By statute, court shall award reasonable atty fees to prevailing plaintiff. § 15.240. In case law, court may not limit prevailing party’s access to atty fees; statute provides without qualification that court must award fees to prevailing plaintiff. Meredith Corp. v. City of Flint (2003) 671 N.W.2d 101,</td>
</tr>
<tr>
<td>State</td>
<td>Standard (in statute and/or case law)</td>
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<tr>
<td>MONTANA</td>
<td>By statute, court may award costs to plaintiff who prevails in action brought under Right to Know provision in MT constitution. § 2-3-221. In case law, award of fees is discretionary, but outright denial without rationale is an abuse of discretion. Yellowstone County v. Billings Gazette, 143 P.3d 135, 333 Mont. 390 (2006). Attorneys fees may be awarded even if agency acted in good faith. (This was a public meeting case but reasoning should apply.) Associated Press v. Board of Public Educ., 1991, 246 Mont. 386, 804 P.2d 376.</td>
</tr>
<tr>
<td>NEBRASKA</td>
<td>By statute, court may award reasonable attorney fees if requestor substantially prevails. § 84-712.07. No clarification in case law.</td>
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<tr>
<td>NEVADA</td>
<td>By statute, requester is entitled to recover reasonable attorney fees upon prevailing. § 239.011. No clarification in case law.</td>
</tr>
<tr>
<td>NEW HAMPSHIRE</td>
<td>By statute, court shall award reasonable attorney fees if agency knew or should have known it was in violation and if the lawsuit was necessary in order to make the information available. § 91-A:8. No clarification in case law.</td>
</tr>
<tr>
<td>NEW JERSEY</td>
<td>By statute, a prevailing requestor shall be entitled to reasonable attorney fees. § 47:1A-6. No clarification in case law.</td>
</tr>
<tr>
<td>NEW MEXICO</td>
<td>By statute, court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act. § 14-2-12. No clarification in case law.</td>
</tr>
<tr>
<td>NEW YORK</td>
<td>By statute, court may award reasonable attorney fees if requestor substantially prevails and there is a showing that the record was of public interest and that the agency had no reasonable basis for denying access. § 89. No further clarification in case law.</td>
</tr>
<tr>
<td>NORTH CAROLINA</td>
<td>By statute, court shall allow a prevailing requestor to recover reasonable attorney fees unless agency acted in reasonable reliance on a court order or judgment or on an opinion of the Attorney General. § 132-9. In case law, bad faith is not standard to be used in determining whether withholding of public records was without substantial justification. North Carolina Press Ass'n, Inc. v. Spangler, 1989, 381 S.E.2d 187.</td>
</tr>
<tr>
<td>NORTH DAKOTA</td>
<td>By statute, court may award reasonable attorney fees in a civil action based on any violation. (Damages for intentional or knowing violation.) § 44-04-21.2. No clarification in case law.</td>
</tr>
<tr>
<td>State</td>
<td>Standard (in statute and/or case law)</td>
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<tr>
<td>OHIO</td>
<td>By statute, court may award reasonable atty fees. Fees shall be construed as remedial and not punitive. § 149.43. In case law, award of fees is not mandatory. State ex re. Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181. Reasonableness and good faith by the agency refusing to disclose may be considered. State ex re. Cincinnati Enquirer v. Dinkelacker, 761 N.E.2d 656.</td>
</tr>
<tr>
<td>OKLAHOMA</td>
<td>By statute, prevailing requestor shall be entitled to reasonable atty fees. § 24a.17. No clarification in case law.</td>
</tr>
<tr>
<td>OREGON</td>
<td>By statute, prevailing requestor shall be awarded reasonable atty fees. § 192.490. No clarification in case law.</td>
</tr>
<tr>
<td>PENNSYLVANIA</td>
<td>By statute, court may award reasonable atty fees if the court finds that agency refused access “willfully or with wanton disregard” or “otherwise acted in bad faith” or if the agency defended its refusal using an unreasonable interpretation of law. § 67.1304. Case law echoes these factors.</td>
</tr>
<tr>
<td>RHODE ISLAND</td>
<td>By statute, court shall award reasonable atty fees to prevailing requestor when imposing civil fine for knowing and willful or for reckless violation. § 38-2-9. No clarification in case law.</td>
</tr>
<tr>
<td>SOUTH CAROLINA</td>
<td>By statute, court may award reasonable atty fees to prevailing requestor. § 30-4-100. In case law, the only prerequisite for an award of fees is prevailing. Campbell v. Marion County Hosp. Dist. 580 S.E.2d 163. There is no good faith exception for an award of fees. New York Times Co. v. Spartanburg County School Dist. No. 7, 649 S.E.2d 28.</td>
</tr>
<tr>
<td>TENNESSEE</td>
<td>By statute, court has discretion to award reasonable atty fees to prevailing requestor if the court finds that the agency knowingly and willfully refused access. § 10-7-505. In case law, there is a good faith exception for agencies. See, e.g., Friedmann v. Corrections Corp. of America, 310 S.W.3d 366.</td>
</tr>
<tr>
<td>TEXAS</td>
<td>By statute, court shall assess reasonable atty fees for substantially prevailing plaintiff unless agency acted in reasonable reliance on a court judgment or order or on a decision of the AG. § 552.323. Case law emphasizes that agencies are protected if they act in good faith (Texas Comptroller of Public Accounts v. Atty General, 244 S.W.3d 629) and suggest that courts have more discretion than the statute seems to say (Adkisson v. Paxton, 459 S.W.3d 761).</td>
</tr>
<tr>
<td>UTAH</td>
<td>By statute, court may assess reasonable atty fees if requestor substantially prevails. Factors for award include “the public benefit derived from the case, the nature of the requestor’s interest in the records, and whether the [agency] had a reasonable basis.” § 63G-2-802. No case law.</td>
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<tr>
<td>State</td>
<td>Standard (in statute and/or case law)</td>
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<tr>
<td>VERMONT</td>
<td>By statute, court has discretion to award reasonable atty fees if requestor substantially prevails if agency concedes that the records are public and provides them to requestor within the time allowed for service of an answer under VT Rules of Civil Procedure. § 319. Case law echoes statute.</td>
</tr>
<tr>
<td>VIRGINIA</td>
<td>By statute, court shall award reasonable atty fees if requestor substantially prevails unless special circumstances would make an award unjust. § 2.2-3713. Case law echoes statute.</td>
</tr>
<tr>
<td>WASHINGTON</td>
<td>By statute, court shall award reasonable atty fees if requestor prevails. § 42.56.550. In case law, a showing of bad faith is not required. Spokane Research &amp; Defense Fund v. City of Spokane, 117 P.3d 1117.</td>
</tr>
<tr>
<td>WEST VIRGINIA</td>
<td>By statute, court shall award atty fees to prevailing plaintiff. § 29B-1-7. No clarification in case law.</td>
</tr>
<tr>
<td>WISCONSIN</td>
<td>By statute, court shall award reasonable atty fees if requestor prevails in whole or in substantial part. § 19.37. In case law, must be a causal connection between civil action and release of information. WTMJ, Inc. v. Sullivan, 555 N.W.2d 140.</td>
</tr>
</tbody>
</table>
January 16, 2018

Senator Lisa Keim, Chair
Right to Know Advisory Committee
Committee Members

Re: Criminal History Record Information Database – Bulk Information Requests

Dear Right to Know Advisory Committee Members:

During the Second Regular Session of the 128th Legislature, the Judiciary Committee heard and worked LD 1658, An Act To Make Criminal History Record Information Maintained in a Database Confidential. The bill as originally drafted designated as confidential criminal history record information contained in a database maintained by the Department of Public Safety’s State Bureau of Identification (SBI), except to the extent necessary to disclose criminal history record information to persons who are authorized by law to receive the information and who submit a request for that information.

Matthew Ruel, Director of the SBI, explained at the public hearing that LD 1658’s purpose was to protect the state criminal history repository maintained by SBI from bulk data requests, which the SBI anticipates may be made in the future by private companies that wish to create on-line searchable criminal history databases for commercial purposes. These types of requests have been made in other states in the past; similarly, bulk requests for data from the Sex Offender Registry have been made in Maine. Bulk requests will not only create administrative burdens for the SBI—requiring the Bureau to segregate confidential criminal history information from the public data contained in its database—but more importantly will create a risk that inaccurate, incomplete and potentially confidential criminal history information will be publicly available on commercial websites. Although the information requested through a bulk data request may be complete and non-confidential on the date that the information is disseminated by the SBI in response to a bulk request, over time the information will become out-of-date and inaccurate. Moreover, criminal history information that is public on one day may, over time, become confidential; for example, pursuant to 16 M.R.S. §703(2)(F), information that a criminal charge has been filed becomes confidential once a year has elapsed since the day of the filing.

Matthew Ruel nevertheless agreed that both the title and the content of LD 1658 were misleading, and he proffered a proposed amendment to the bill in an attempt to clarify that while the databases maintained by the SBI would be protected under the bill, any public criminal
history information contained within those databases "may be disseminated . . . in response to a request for an individual’s criminal history record information . . . in accordance with Title 25, section 1541, subsection 6." In addition, the proposed amendment would re-title the bill: "An Act To Prohibit the Dissemination of Criminal History Record Information Databases Maintained by or for the State Bureau of Identification."

Judith Meyer, of the Maine Freedom of Information Coalition, strongly opposed LD 1658 at the public hearing because it would make otherwise public criminal history information confidential solely because the information is stored electronically in database form. She explained:

Criminal history record information includes, among other things, summonses, arrests, bail, criminal charges, indictments, dispositions of criminal cases and information on post-trial appeals. That information is undeniably public. What the Department of Public Safety is asking is to classify those non-confidential records as confidential by virtue of their being stored in a database, which is in sharp contrast with the spirit of the Freedom of Access Act. In fact, FOAA was amended in 2011 specifically to note that public records stored electronically must be as accessible as records drafted on paper "or in the medium in which the record is stored, at the requester's option," whether records are requested singly or by entire database. (Emphasis by Ms. Meyer.)

Limiting bulk requests, she explained, would limit the ability of members of the public, the legislature, the media and others from conducting research involving criminal history record information. She noted, by example, that a legislator might not be permitted to access compiled criminal history information from the SBI database in an attempt to study the crime rate or recidivism rates in his or her legislative district under either LD 1658 or the proposed amendment presented to the bill. Ms. Meyer further noted that neither the Right to Know Advisory Committee nor the Criminal Law Advisory Commission has been asked to review the SBI’s concerns regarding bulk data requests for public criminal history record information.

The Judiciary Committee ended up voting Ought Not to Pass on LD 1658, with the understanding that we would ask the Right to Know Advisory Committee to collaborate with the Criminal Law Advisory Commission to examine the issues raised by the bill and make recommendations back to the Judiciary Committee in January next year.

The Judiciary Committee will be happy to share all files and correspondence on this bill. Please feel free to contact us or our committee analyst if you have any questions.

Thank you.

Sincerely,

Senator Lisa Keim
Senator Chair

Representative Matthew W. Moonen
House Chair

Attachments: LD 1658 (original bill)
Department of Public Safety proposed amendment to LD 1658

cc: Matthew Ruel, Director, State Bureau of Identification
Members, Maine Criminal Law Advisory Commission
128th MAINE LEGISLATURE
SECOND REGULAR SESSION-2018

Legislative Document

H.P. 1143

No. 1658

House of Representatives, November 29, 2017

An Act To Make Criminal History Record Information Maintained in a Database Confidential

Submitted by the Department of Public Safety pursuant to Joint Rule 203. Received by the Clerk of the House on November 27, 2017. Referred to the Committee on Judiciary pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

ROBERT B. HUNT
Clerk

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 16 MRSA §711 is enacted to read:

§711. Criminal history record information in database confidential

Notwithstanding any other provision of law to the contrary, criminal history record information contained in a database maintained or caused to be maintained by the Department of Public Safety, State Bureau of Identification is confidential and not a public record for the purposes of Title 1, chapter 13 and may not be disseminated in whole or part, except to the extent necessary to generate and disclose an individual's criminal history record information to persons requesting and authorized by law to receive an individual's criminal history record information from the State Bureau of Identification.

SUMMARY

This bill makes criminal history record information contained in a database maintained or caused to be maintained by the Department of Public Safety, State Bureau of Identification confidential.
TESTIMONY OF MATTHEW RUEL
DIRECTOR, STATE BUREAU OF IDENTIFICATION

In Support of
An Act To Make Criminal History Record Information Maintained in a Database Confidential

Senator and Representative, Members of the Committee:

My name is Matt Ruel, and I am the Director of the State Bureau of Identification at the Maine Department of Public Safety. I present this testimony on behalf of the Administration in support of LD 1658.

The purpose of this bill is simply to protect the state criminal history repository from bulk data requests, or having to provide access to repository data in ways that are not already defined in state statute. Our intent is not to change or prohibit public access that is already provided by state statute. Yearly, we receive roughly half a million public requests for individual criminal history and that process will continue unchanged.

I am looking to ensure that the record remains as accurate, timely, and complete as possible and as the only agency responsible for receiving all segments of the criminal history no other entity can meet that requirement. Supporting this LD will protect consumers and the subjects with criminal history by making it difficult for privately maintained criminal history websites from maintaining and disseminating information that could become inaccurate, or that shouldn’t be disseminated because of state statute.

For these reasons, the Administration is in support of LD 1658, and asks the Committee to report the bill out as “Ought to Pass.”

Thank you. I would be happy to try to answer any questions you might have and be available for the work session.
LD 1568, An Act To Make Criminal History Record Information Maintained in a Database Confidential

*** AGENCY AMENDMENT ***

Sec. 1. Amend the bill title by striking the current title and replacing it with the following title:

'An Act to Prohibit the Dissemination of Criminal History Record Information Databases Maintained by or for the State Bureau of Identification'

Sec. 2. Amend Section 1 of the bill by striking the current text of the proposed bill and replacing it with the following text:

'S 711. Dissemination of Criminal History Record Information Databases Prohibited

'Databases that contain criminal history record information and are maintained by or for the Bureau of State Police, State Bureau of Identification are not public records, either in whole or in part, for the purposes of Title 1, chapter 13.'

'Public criminal history record information may be disseminated by the State Bureau of Identification in response to a request for an individual's criminal history record that includes the individual's name and date of birth, in accordance with Title 25, Section 1541, subsection 6.'

AMENDMENT SUMMARY

The amendment replaces the bill. The amendment –

1. Replaces the bill title to better reflect the intent of the original bill and the proposed bill amendment;
2. Clarifies that the bill prohibits the public dissemination, in whole or part, of criminal history databases maintained by or for the Bureau of State Police, State Bureau of Identification; and

3. Provides a cross-reference to the statutory provision that currently authorizes dissemination of public criminal history record information based on name and date of birth requests.
Hey Craig,

FYI – see below concern from the public. I punted to Brenda, but have copied you in case you thought this was worthy of adding to the running list of RTKAC possible biz.

Thanks!

- Henry

Dear Ms. Anderson,

Thank you for sharing your concern. I've copied the Public Access Ombudsman, Brenda Kielty, who would be a good resource if you care to follow up with this concern any further.

I will also share this with the staff for the Right to Know Advisory Committee, in case the Committee wishes to discuss this or investigate further.

Thank you,

Henry

Henry D. Fouts, Esq.
Legislative Analyst
Office of Policy and Legal Analysis
Maine State Legislature
Office Tel.: (207) 287-1670

From: Mackenzie Andersen [mailto:mackenziana@gmail.com]
Sent: Friday, August 24, 2018 11:00 AM
To: Fouts, Henry
Subject: Right To Know

Dear Mr Fouts,
I am contacting you in regards to a right to know concern.

I sent an FOA request to Dawn Seagroves at the Department of Transportation.

The response came back with the following notice attached, which when I objected to it, I was told to disregard it, stating that it does not apply to my FOA request. None the less it was included automatically and I had to ask to be told it does not apply. Since I was asking a public agency for information which should be a matter of public record, the effect of including this message automatically with any email correspondence by DOT, and especially an FOA request has an intimidating effect over freedom of speech. I am increasingly finding these kinds of notices posted on government and media sites and elsewhere which I do not believe would be upheld in a court of law, but none the less has a potential intimidating and silencing effect on a percentage of the population. I am submitting my objection to the automatic use of this notice by the DOT, which despite its public-private agreements, is still a public agency.

This message and any attachments are confidential and may contain information protected by the attorney/client privilege. This message and any attachments are intended only for the individual or entity named above. Any dissemination, use, distribution, copying or disclosure of this communication by any other person or entity is strictly prohibited. If you are not the intended recipient, do not read, copy, use or disclose this communication to others. Also please notify the sender by replying to this message and then deleting it from your system. Thank you.
Hi Craig,

FYI – another suggested RTKAC topic from Ms. Anderson.

Best,

Henry

From: Mackenzie Andersen [mailto:mackerziana@gmail.com]
Sent: Wednesday, August 29, 2018 7:31 AM
To: Fouts, Henry
Subject: Re: Right To Know

Dear Mr. Fouts,

Thank You for the suggestion. I have already brought the notice to Ms. Keilty's attention.

However,

In 2014 I made a suggestion to Ms. Keilty, of a searchable online database. At the time, the Maine Legislature was working on a transparency bill, shortly after having received a negative transparency review from the Center for Public Integrity. The response, I received follows:

1. Information made available on an agency website but not in a searchable database format may not provide the research and investigative tool needed by the public. The Freedom of Access Act does not require that public information be posted online in any particular format, just that public records be made available. While there is a strong argument for increasing the accessibility and usefulness of information, there is no current requirement that the technology in place achieve that objective.

2. The collection of data and reports generated from that data may be public records but the agency is not required under the law to create a new record or report in response to a FOAA request. If the dataset you request does not exist, the agency may choose to produce it for any number of reasons but not because they are legally required to take such an action. I appreciate your comments on this topic and I will continue to bring attention to the need for accessible, useful public data.

Brenda Keilty

The Right To Know Committee can be influential in establishing as the law that public records be made available in a searchable database format, for public benefit. That would solve many problems.
In 2015, after passing a new transparency bill, Maine received another F for transparency from The Center for Public Integrity.

Sincerely,
Mackenzie Andersen
Dear Ms Reinsch,

Thank you for sending notice of the Right To Know committee meeting. I would like to submit this testimony of my own experience of how Freedom Of Access currently works and how the law can help to improve it.

I have observed that the Maine Legislative Library is excellent in providing information in the most usable form which is digital, searchable, and it is possible to copy specific information relevant to one's project. It is also sent in digital format free of charge.

The Maine Department of Corporations provides much information which can be downloaded for a reasonable $3.00 fee.

However, when I request information from other government agencies from the town to the state, I usually receive it in a form in which is impossible to search with database tools, either because it is not in digital form or because it is in a PDF which has blocked searching and copying functions. I believe this is an intentional choice as is reflected in the response I received in 2014 from the Maine Ombudsman, Brenda Kielty.

1. Information made available on an agency website but not in a searchable database format may not provide the research and investigative tool needed by the public. The Freedom of Access Act does not require that public information be posted online in any particular format, just that public records be made available. While there is a strong argument for increasing the accessibility and usefulness of information, there is no current requirement that the technology in place achieve that objective.

2. The collection of data and reports generated from that data may be public records but the agency is not required under the law to create a new record or report in response to a FOAA request. If the dataset you request does not exist, the agency may choose to produce it for any number of reasons but not because they are legally required to take such an action. I appreciate your comments on this topic and I will continue to bring attention to the need for accessible, useful public data.

Brenda Kielty

Transparency is best served by a searchable online database but if that is not an option the public should be granted the right to request the information in digital form, which is searchable with functioning copying capability. It seems that the government will only allow the public to request information in the most usable form if there is a law mandating the government to do so- and so there should be.

To take this even further. Since the seventies, we have a public-private government in Maine in which much of its activity is concealed from public transparency by privacy laws specific to the private sector. The public-private government can use its public identity to access public funds for its own use and use the private side of
the partnership to conceal information from the public. Given that the public-private government is deeply entrenched, the rules of privacy and transparency could be rewritten to better serve public transparency.

Sincerely

Mackenzie Andersen

Preserving the American Political Philosophy

On 9/10/2018 3:01 PM, Reinsch, Margaret wrote:

The Right to Know Advisory Committee will hold its first meeting of 2018 on Thursday, September 13th at 4:00 p.m. (we’re trying to accommodate the House and Senate Sessions that day) in Room 438 of the State House.

We apologize for the short notice. The meeting is open to the public and the audio will be streamed live over the Internet: http://legislature.maine.gov/Audio/#438

The plan is to post the agenda tomorrow: https://www.maine.gov/legis/opla/righttoknow.htm

Please let me know if you have any questions.

Thanks

Peggy

Margaret J. Reinsch, Esq., Legislative Analyst

Joint Standing Committee on Judiciary

Maine State Legislature

Office of Policy and Legal Analysis

Room 245, State Office Building

13 State House Station

Augusta, Maine 04333

(207) 287-1670 (office number)

(207) 287-1673 (direct and voice mail)

(207) 287-1275 (fax)

margaret.reinsch@legislature.maine.gov

-----------------------------------------------------------
About This E-Mail List
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Archives of this list: http://https://lists.legislature.maine.gov/sympa/arc/right.to.know-ip
Good morning and thank you for this information.

I do have another question, unrelated from the previous topic. This email originated from Bruce Smith of Drummond Woodsum.

There is an issue about whether school surveillance video is a public record if it is not considered a student record. The federal FPCO says that the video is a student record if it is used for discipline or other specific purpose with regard to one or more students appearing in the video. If it is not used for that purpose, FERPA would not apply. My concern is that if it not a FERPA record, any member of the public might have the right to inspect and copy school and/or bus surveillance videos. My concern was increased when I read the attached Pennsylvania court decision this morning. The court held that a video showing a teacher roughing up a student is neither a FERPA record nor a personnel record, and is therefore a public record under that state’s right to know law.

This reminded me that I have thought we should consider trying to get the FOAA amended to make school surveillance videos confidential. I think that schools and parents would be quite concerned about the notion that any member of the public could have access to in-school or school bus video footage.

I agree with Bruce’s concerns and believe it’s an appropriate topic for the RTKAC. If you would like the attachment Bruce refers to in his email, please let me know.

Please let me know your thoughts and thank you,

Mary-Anne
2018 WL 3483126
Only the Westlaw citation is currently available.
Commonwealth Court of Pennsylvania.

EASTON AREA SCHOOL DISTRICT,
Appellant
v.
Rudy MILLER and The Express Times

No. 1897 C.D. 2017
Argued June 4, 2018
Decided July 20, 2018

Records
Judicial enforcement in general

Commonwealth Court’s review in a Right-to-Know Law appeal determines whether the trial court committed an error of law and whether its findings of fact are supported by substantial evidence. 65 Pa. Stat. Ann. § 67.101 et seq.

Cases that cite this headnote

Records
Judicial enforcement in general

The statutory construction of the Right-to-Know Law is a question of law subject to Commonwealth Court’s plenary, de novo review. 65 Pa. Stat. Ann. § 67.101 et seq.

Cases that cite this headnote

Records
Exemptions or prohibitions under other laws

School bus surveillance video depicting a school teacher roughly disciplining a student was not an “education record” under the federal Family Educational Rights and Privacy Act, and therefore, video did not qualify under Right-to-Know Law exemption for disclosures that would lead to a loss of federal funding; although video captured images of students who were on the bus, it was not directly relevant to those students, rather, it was directly relevant to the teacher’s performance, who roughly disciplined a child. 20 U.S.C.A. § 1232g(a)(4)(A); 65 Pa. Stat. Ann. § 67.708(b)(1)(i).

Cases that cite this headnote

Holdings: The Commonwealth Court, No. 1897 C.D. 2017, Leavitt, P.J., held that:

[1] school bus surveillance video depicting a school teacher roughly disciplining a student was not an “education record” under the federal Family Educational Rights and Privacy Act;

[2] school district failed to show that school bus surveillance video qualified under Right-to-Know Law disclosure exemption for information on employee discipline; and

[3] school district waived argument that school bus surveillance video was exempt from disclosure as evidence presented at an arbitration proceeding.

Affirmed.

West Headnotes (12)
Evidence and burden of proof

Under the standard of proof placed on agency asserting that a record is exempt from public disclosure, the existence of a contested fact must be more probable than its nonexistence. 65 Pa. Stat. Ann. § 67.708(a)(1).

Records

Matters Subject to Disclosure; Exemptions


Records

Regulations limiting access; offenses

The federal Family Educational Rights and Privacy Act prohibits schools receiving federal financial assistance from disclosing sensitive information about students without parental consent. 20 U.S.C.A. § 1232g.

Administrative Law and Procedure

Plain, literal, or clear meaning; ambiguity
Administrative Law and Procedure

Permissible or reasonable construction

Under the Chevron test used to determine Congressional intent in a statute, first, courts must determine whether Congress has directly spoken to the precise question at issue—if so, courts must give effect to the unambiguously expressed intent of the Congress; if the statute is silent or ambiguous with respect to the specific issue, courts must defer to the agency's interpretation as long as it is based on a permissible construction of the statute.

Records

Regulations limiting access; offenses

Federal Family Educational Rights and Privacy Act does not apply to the disclosure of teacher records. 20 U.S.C.A. § 1232g.

Records

Regulations limiting access; offenses

A video does not become an “educational record” under the federal Family Educational Rights and Privacy Act simply because it captures images of students who are bystanders at an event recorded on video; it is only an educational record with respect to a student in the video for whom the video may have consequences. 20 U.S.C.A. § 1232g.

Administrative Law and Procedure

Personal privacy considerations in general; personnel matters

School district failed to show that school bus surveillance video depicting a school teacher roughly disciplining a student qualified under Right-to-Know Law disclosure exemption for information on discipline, demotion, or discharge of an agency employee; district did not establish that video was contained in teacher’s personnel file, and teacher had not been disciplined, demoted, or discharged at time school district declined requester access to the video recording. 65 Pa. Stat. Ann. § 67.708(b)(7)(viii).
Cases that cite this headnote

**[1]** Records
支撑Judicial enforcement in general

By raising issue for first time on appeal to Commonwealth Court, school district waived argument that school bus surveillance video depicting a teacher roughly disciplining a student was exempt from disclosure under Right-to-Know Law as evidence presented at an arbitration proceeding. 65 Pa. Stat. Ann. § 67.708(b)(8)(ii).

Cases that cite this headnote

**[2]** Records
支撑Judicial enforcement in general

In asserting that a record is exempt from disclosure under the Right-to-Know Law, an agency must raise all its challenges before the fact-finder closes the record. 65 Pa. Stat. Ann. § 67.708.

Cases that cite this headnote

Appealed from No. C-0048-CV-2017-5558, Common Pleas Court of the County of Northampton, Murray, J.

Attorneys and Law Firms

Rebecca A. Young, Bethlehem, for appellant.

Douglas J. Smillie, Center Valley, for appellees.

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE CHRISTINE FIZZANO CANNON, Judge

Opinion

OPINION BY PRESIDENT JUDGE LEAVITT

*1 Easton Area School District (School District) appeals an order of the Court of Common Pleas of Northampton County (trial court) granting a request under the Right-to-Know Law for a school bus surveillance video. In doing so, the trial court affirmed the determination of the Office of Open Records (OOR) that the recording, which depicts a teacher roughly disciplining a student on the school bus, was disclosable. The School District contends that the video is an exempt public record because its disclosure will lead to a loss of federal funding; provides information on discipline, demotion or discharge of an agency employee; and was admitted as evidence at an arbitration proceeding. For the following reasons, we affirm the trial court.

Background

On February 21, 2017, Rudy Miller, on behalf of The Express Times (Requester), submitted a written request to the School District, which stated in pertinent part:

As per Pennsylvania’s right-to-know law I’m requesting information in connection with an incident on a school bus outside Paxinos Elementary School, which is temporarily located in the rear of Easton Area Middle School in Forks Township. It’s come to my attention that elementary school teacher Aaron Dufour disciplined a child roughly on a school bus in front of the school on the morning of Feb. 8, 2017; Feb. 9, 2017; or Feb. 10, 2017. It’s my understanding he grabbed a child and “slammed” him down in a bus seat. It’s my understanding that Mr. Dufour has either been suspended or terminated as a result of this incident.

***

It’s my understanding that each school bus is outfitted with a security camera. I would like a copy of the surveillance video if any exists that captured this incident involving Mr. Dufour on the school bus in front of Paxinos Elementary School on either Feb. 8, Feb. 9 or Feb. 10, 2017.

Reproduced Record at 9a (R.R. __). The written request also sought information about Dufour’s employment status and his annual salary.

The School District denied the request for the stated
reason that disclosure of the video would imperil federal funding and, thus, it was exempt under Section 708(b)(1)(i) of the Right-to-Know Law, 65 P.S. § 67.708(b)(1)(i). Requester appealed to the OOR. The School District contended that disclosure of the video would violate the Federal Family Educational Rights and Privacy Act (Privacy Act), 20 U.S.C. § 1232g, and, therefore, result in a loss of federal funding. Alternatively, the School District argued that the video recording was exempt under Section 708(b)(7)(viii) of the Right-to-Know Law, 65 P.S. § 67.708(b)(7)(viii), because the video was used “in the pending action to discipline, demote or discharge [ ] Dufour.” R.R. 15a. In support, the School District submitted an affidavit of John Castrovinci, its human resources director and open records officer, which stated that Dufour was the subject of a disciplinary proceeding pending with the School Board and that the video had been admitted into evidence in that proceeding.

OOR’s Final Determination

On May 24, 2017, the OOR issued a final determination partially granting Requester’s appeal. It held that the exemption under Section 708(b)(1)(i) of the Right-to-Know Law was inapplicable because the video was not an “education record” within the meaning of the federal Privacy Act. The OOR did not address whether the exemption under Section 708(b)(7)(viii) of the Right-to-Know Law for information concerning employee discipline applied to the video recording. On the other hand, the OOR held that Requester’s questions about Dufour’s employment status and salary, which were not put in the form of document requests, did not have to be answered by the School District.

The trial court also rejected the School District’s argument that the video recording was exempt from disclosure under Section 708(b)(7)(viii) of the Right-to-Know Law as “‘information regarding’ discipline, demotion or discharge [of Dufour].” Trial Ct. Op. 12/1/2017, at 6 (citing 65 P.S. § 67.708(b)(7)(viii)); R.R. 49a. In so ruling, the trial court found that “no final action resulting in demotion or discharge has occurred.” Id. at 383 (internal citation omitted).

Relying on the Grifasi analysis, the trial court concluded that because the video sought by Requester did not concern any student’s academic performance, it was not an educational record. Accordingly, disclosure of the video would not jeopardize the School District’s federal funding under the Privacy Act, and the School District did not prove an exemption under Section 708(b)(1)(i) of the Right-to-Know Law.

Trial Court Decision

The School District appealed to the trial court, again relying on Sections 708(b)(1)(i) and 708(b)(7)(viii) of the Right-to-Know Law. The trial court affirmed the OOR and held that the video recording was not an “education record” for purposes of the federal Privacy Act. In so holding, the trial court relied upon a New York trial court decision, *Rome City School District Disciplinary Hearing v. Grifasi*, 10 Misc.3d 1034, 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005). In *Grifasi*, a school district video camera captured images of students involved in an altercation along with bystanders. A student who was suspended for the incident subpoenaed the school district for copies of the video recordings. The court rejected the school district’s argument that the videotape was an educational record protected by the Privacy Act, stating:

> [The Privacy Act] is intended to protect records relating to an individual student’s performance. [It] is not meant to apply to records, such as the videotape in question which was recorded to maintain the physical security and safety of the school building and which does not pertain to the educational performance of the students captured on this tape....

Id. at 383 (internal citation omitted).

The School District appealed to this Court. In this appeal, the School District presents three issues for our consideration. The School District first argues that the trial court erred in ruling that the video recording is not exempt from disclosure under Section 708(b)(1)(i) of the Right-to-Know Law (loss of federal funding). Second, the School District argues that the trial court erred in holding...
that Section 708(b)(7)(viii) of the Right-to-Know Law (employee discipline) does not apply to the video. Finally, the School District argues that the video is exempt from disclosure under Section 708(b)(8)(ii) of the Right-to-Know Law (arbitration evidence), 65 P.S. § 67.706(b)(8)(ii). We address these issues seriatim.

I. Loss of Federal Funding Exemption

*3 The School District argues that the trial court erred in holding that the video was not exempt because the Privacy Act prohibits disclosure of a student’s education records without parental consent. The School District contends that because the video depicts students on the school bus during the school day, it is an “education record.” The School District argues that the trial court erred in holding that the Privacy Act protects only those records that relate to a student’s academic performance.

The Right-to-Know Law requires state and local agencies to provide access to public records upon request. Section 302 of the Right-to-Know Law, 65 P.S. § 67.302 (“A local agency shall provide public records in accordance with this act.”). Section 102 of the Right-to-Know Law defines a “public record” as a record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708[, 65 P.S. § 67.708]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.

65 P.S. § 67.102. A “record” is further defined under the Right-to-Know Law as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Id.


Section 708(b)(1)(i) of the Right-to-Know Law exempts from disclosure “[a] record, the disclosure of which would result in the loss of Federal or State funds by an agency or the Commonwealth[,]” 65 P.S. § 67.708(b)(1)(i). Here, the School District argues that the Privacy Act forbids disclosure of the video recording without first obtaining the consent of the parents of all students on the bus that appear in the video. Without this consent, disclosure will cause the School District to lose federal funding.

The Privacy Act prohibits schools receiving federal financial assistance from disclosing “sensitive information about students” without parental consent. Owasso Independent School District No. 1-011 v. Falvo, 534 U.S. 426, 428, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002). Specifically, Section 1232g(b)(1) of the Privacy Act provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein) other than directory information, as defined in paragraph (5) of subsection (a) of students without the written consent of their parents....

Section 1232g(a)(4)(A) of the Privacy Act defines “education records” as “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A).

The School District argues that the school bus video satisfies this definition of “education record” because it contains personally identifiable information about the students on the school bus and is maintained by the School District.

In support, the School District directs the Court to a decision of the Court of Appeals of Utah, Bryner v. Canyons School District, 351 P.3d 852 (Utah Ct. App. 2015), which involved a surveillance video capturing an altercation between students. The school district declined to disclose the video, arguing that it was an educational record under the Privacy Act. The court agreed, holding that the term “education record” was not limited to academic records, and noting that Congress had made no “content-based judgments with regard to its ‘education records’ definition.” Id. at 857 (quoting United States v. Miami University, 294 F.3d 797, 812 (6th Cir. 2002) ). The Bryner court held that the video fell within that definition because the video contained information “identifying the student.” Id. at 858 (quoting United States v. Miami University, 91 F.Supp.2d 1132, 1149 (S.D. Ohio 2000) , aff’d, 294 F.3d 797 (6th Cir. 2002) ). Bryner also cited guidance from the United States Department of Education that videotapes of this type “do not constitute the education records of students who did not participate in the altercation; however, the images of the students involved in the altercation do constitute the education records of those students.” Bryner, 351 P.3d at 858 (quoting Opinion of the Texas Attorney General, OR2006-07701 (July 18, 2006) ).

*5 Requester counters that Congress did not intend the Privacy Act to cover “all records pertaining to a school’s activities”; rather, the Privacy Act has been more narrowly construed by various state and federal courts. Requester Brief at 10 (citing, e.g., Ellis v. Cleveland Municipal School District, 309 F.Supp.2d 1019 (N.D. Ohio 2004) ).

In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the United States Supreme Court outlined a two-step procedure to determine Congressional intent in a statute. First, courts must determine “whether Congress has directly spoken to the precise question at issue.” Id. at 842, 104 S.Ct. 2778. If so, courts “must give effect to the unambiguously expressed intent of the Congress.” Id. at 843, 104 S.Ct. 2778. If the statute is silent or ambiguous with respect to the specific issue, courts must defer to the agency’s interpretation as long as it is “based on a permissible construction of the statute.” Id.

The trial court found that the school bus video was not an “education record” under the Privacy Act simply because it captured a teacher’s misconduct that was irrelevant to the academic performance of any student on the bus. Section 1232g(a)(4)(A) of the Privacy Act defines “education records” as those that “contain information directly related to a student[.]” 20 U.S.C. § 1232g(a)(4)(A). The statute does not require an educational record to be related to a student’s academic performance, but it does require the information to be “directly related to a student.” “Directly” means “in a direct manner.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 327 (10th ed. 2001).

The video captured images of the students who were on the bus, but it is not directly relevant to those students. Rather, it is directly relevant to the teacher’s performance, who roughly disciplined a child. Several federal court decisions have held that a video recording that concerns a teacher, not a student, is not an “education record” under the Privacy Act.

In Young v. Pleasant Valley School District (M.D. Pa., No. 3:07-CV-854, filed June 26, 2008), 2008 WL 11336157 (unreported), a school teacher was charged with giving students sexually offensive materials. The parents of one minor student sought emails sent to the school district by other parents with complaints about the teacher. The school district argued, inter alia, that the emails were educational records within the meaning of the Privacy Act and could not be disclosed without consent of all other parents. The United States District Court for the Middle District of Pennsylvania rejected the district’s argument, stating:

The records in question here – e-mails containing complaints about a teacher’s performance – do not appear to be the types of records covered by [the Privacy Act]. Those complaints do not necessarily contain any information directly related to a student. Instead, they are directly related to a teacher and only tangentially related to the student.... As such, we could
probably conclude after examining the e-mails that they are not an educational record and not subject to [the Privacy Act’s] requirement.

*6 Id. at *7 (emphasis added).

Likewise, in Ellis, 309 F. Supp. 2d 1019, the plaintiff sought discovery of “incident reports related to altercations between substitute teachers and students, student and employee witness statements related to these incidents, and information related to subsequent discipline, if any, imposed on the substitute teachers[,]” Id. at 1021. The United States District Court for the Northern District of Ohio ruled that the Privacy Act did not prohibit disclosure of the information sought by the plaintiff:

First, [the Privacy Act] applies to the disclosure of student records, not teacher records. While it is clear that Congress made no content-based judgments with regard to its “education records” definition, ... it is equally clear that Congress did not intend [the Privacy Act] to cover records directly related to teachers and only tangentially related to students.

Id. at 1022 (emphasis added) (internal quotations omitted).

[8] Here, as in Young and in Ellis, the video recording is “directly related” to the teacher disciplining a student and is only “tangentially related” to the students on the bus. Bryner is inapposite because the video contained information directly related to the students committing misconduct. By contrast, here, the video depicts a teacher’s alleged misconduct. The Privacy Act does not apply to the disclosure of teacher records.

[9] This interpretation of the Privacy Act is consistent with guidance from the U.S. Department of Education, which addresses when a photo or video of a student constitutes an “education record” under the Privacy Act:

[The Privacy Act] regulations do not define what it means for a record to be “directly related” to a student. In the context of photos and videos, determining if a visual representation of a student is directly related to a student (rather than just incidentally related to him or her) is often context-specific, and educational agencies and institutions should examine certain types of photos and videos on a case by case basis to determine if they directly relate to any of the students depicted therein.

FAQs on Photos and Videos under FERPA, U.S. DEPARTMENT OF EDUCATION, https://studentprivacy.ed.gov/faq/faq-photos-and-videos-under-ferpa (last visited June 12, 2018) (emphasis in original). Stated otherwise, a video does not become an educational record simply because it captures images of students who are bystanders at an event recorded on video. Bryner, 351 F. 3d at 858. It is only an educational record with respect to a student to whom the video may have consequences.

Because the video recording sought by Requester is not an “education record” for purposes of the Privacy Act, its disclosure will not subject the School District to a loss of federal funding. The trial court did not err in holding that the School District did not prove that the video is exempt from disclosure under Section 708(b)(1)(i) of the Right-to-Know Law.

II. Employee Discipline Exemption

[10] The School District argues, next, that the trial court erred in holding that the video was not exempt under Section 708(b)(7)(viii) of the Right-to-Know Law because the video is “[i]nformation regarding discipline, demotion or discharge contained in [Dufour’s] personnel file.” School District Brief at 13. Requester counters that it is unfair to allow the School District to “indefinitely or permanently deny access to the [v]ideo under the Right-to-Know Law simply by placing the [v]ideo into the employee’s personnel file.” Requester Brief at 17. In any event, Requester maintains that the video is not exempt from disclosure under Section 708(b)(7)(viii) because it does not relate to the discipline, demotion or discharge of Dufour.

*7 Section 708(b)(7)(viii) of the Right-to-Know Law states, in pertinent part, as follows:

(b) Exceptions. — Except as provided in subsections (c)
and (d) [regarding financial records and aggregated data], the following are exempt from access by a requester under this act:

* * *

(7) The following records relating to an agency employee:

* * *

(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

65 P.S. § 67.708(b)(7)(viii) (emphasis added).

Contrary to the School District’s assertion, it has not been established that the video is contained in Dufour’s personnel file. The affidavit of the district’s open records officer, John Castrovincini, states that the video was “admitted into evidence in the pending action to discipline, demote or discharge [ ] Dufour.” Castrovincini Affidavit ¶ 7; R.R. 18a. It further states that “[r]ecords responsive to the first part of [the Requester’s] request are maintained in [ ] Dufour’s personnel file.” Castrovincini Affidavit ¶ 3; R.R. 17a. “The first part of the request,” as Castrovincini cited in his affidavit, concerned Requester’s questions about Dufour’s employment status and annual salary, which is not an issue on appeal. R.R. 17a.

Further, although the video was admitted into evidence in the pending action to discipline, demote or discharge Dufour, the affidavit also states that “no final agency action has been taken with regard to [ ] Dufour’s employment as a result of the incident referred to in this request.” Castrovincini Affidavit ¶¶ 7-8; R.R. 18a. In other words, at the time the School District declined Requester access to the video recording, Dufour had not been disciplined, demoted, or discharged. The video, therefore, is not itself “information regarding discipline, demotion or discharge” of Dufour.

The local agency bears the burden of proving that a record is exempt from public access “by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Because the School District did not satisfy its burden of proving that the video was contained in Dufour’s personnel file and was information regarding discipline, demotion or discharge of Dufour, we hold that the trial court did not err by concluding that Section 708(b)(7)(viii) of the Right-to-Know Law does not apply to the video.

III. Arbitration Evidence

[11] [12] Finally, the School District argues that the video is exempt from disclosure under Section 708(b)(8)(ii) of the Right-to-Know Law because it is evidence presented at an arbitration proceeding. “[A]n agency must raise all its challenges before the fact-finder closes the record.” Levy v. Senate of Pennsylvania, 94 A.3d 436, 441 (Pa. Cmwlth. 2014). Because the School District has raised this issue for the first time on appeal to this Court, the issue is waived.

Conclusion

*8 For the reasons stated above, we conclude that the trial court did not err in ruling that the video recording is not exempt from disclosure under either Section 708(b)(1)(i) or 708(b)(7)(viii) of the Right-to-Know Law. Further, we determine that the School District waived the issue that the video is exempt from disclosure under Section 708(b)(8)(ii) of the Right-to-Know Law. Accordingly, we affirm the trial court’s December 1, 2017, order.

ORDER

AND NOW, this 20th day of July, 2018, the order of the Court of Common Pleas of Northampton County dated December 1, 2017, in the above-captioned matter is AFFIRMED.

All Citations

--- A.3d --, 2018 WL 3483126

Requester did not cross-appeal this part of the DOR's final determination, and it is not before the Court.

Notably, the Privacy Act authorizes the release of educational records without parental consent where required by judicial order or lawfully issued subpoena. 20 U.S.C. § 1232g(b)(2)(B).

This Court's review in a Right-to-Know Law appeal determines "whether the trial court committed an error of law and whether its findings of fact are supported by substantial evidence." Paint Township v. Clark, 109 A.3d 796, 803 n.3 (Pa. Cmwlth. 2015). The statutory construction of the Right-to-Know Law is a question of law subject to this Court's plenary, de novo review. Hearst Television, Inc. v. Norris, 617 Pa. 602, 54 A.3d 23, 29 (2012).

Section 1232g(a)(4)(B) excludes the following from the definition of "education records":

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or
(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to any other person providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.


The School District also directs the Court to an unpublished decision of the Connecticut Superior Court in Goldberg v. Regional School District No. 18 [Conn. Super. Ct., No. KN1-CV-14602020375, filed June 26, 2015], 2015 WL 4571079 (unreported). In a prior ruling, the Connecticut court held that a video recording of students and a school bus driver bullying an autistic child was an educational record protected by the Privacy Act. However, the reasons for that holding are nowhere given in the subsequent decision cited by the School District, which concerned only a bill of costs in a discovery dispute. Thus, Goldberg has no instructive value.

Similarly, Pennsylvania rules of statutory construction provide that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b).

Section 708(b)(17)(ii) of the Right-to-Know Law exempts from disclosure "[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports." 65 P.S. § 67.708(b)(17)(ii); see also California Borough v. Rothey, 185 A.3d 456 (Pa. Cmwlth. 2018). Here, the School District did not assert that the video is exempt as a noncriminal investigative record under Section 708(b)(17)(ii) of the Right-to-Know Law. Accordingly, we do not consider the issue here.
Peggy:

The following is my topic suggestion, and it is inspired by the idea that Sen. Keim had at the last meeting about perhaps having a Legislative panel convened to study the remote participation issue on which the RTKAC has been working for years:

Topic Suggestion:

That the RTKAC consider recommending to the Judiciary Committee that the Maine Legislature establish a joint select committee dedicated primarily to working on government transparency-related and data privacy-related public policy issues.

Creating such a committee – which perhaps might work at times with the RTKAC – would ensure that more Legislators are able to directly work on, more thoroughly discuss, and more fully appreciate the very often complex public policy issues about which the RTKAC frequently deliberates in its work.

Such a Legislative committee would not necessarily need to be one that hears proposed legislation.

Rather, the select committee instead might be responsible for carefully considering government transparency-related and data privacy-related public policy issues that State and local governments frequently encounter, and trying to craft legislation designed to address those issues. Such legislation, in turn, then could be referred by the select committee to the existing joint standing Legislative committees by which – based on the subject matter of the respective bills being referred – it would make the most sense for the legislation to be heard and further worked on.

A few examples of some of the topics on which such a select committee might work are:

- Remote participation in public proceedings/meetings;
- Public access to, and the protection of private/personal information in, administrative professional licensing files;
- Whether to increase fines and penalties for intentional violations of the FOAA;
- Public access to government electronic information systems (such as the new e-records system that is being implemented by the Judicial Branch), and the protection of private/personal information that is included in such systems;
- Creation and implementation of an electronic information system in which to store, and through which the public would be able to access, text messages sent to and from public officials that constitute "public records" (as that term is defined in the FOAA).
Best, C

Chris

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