Public Records and Open Meetings

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In the practice of local government attorneys, few subjects are more ubiquitous than transparency laws—often called "Sunshine" laws. Public records and open meeting laws vary from state to state, but it is critical that municipal lawyers understand when and where communications and actions by governmental officials are subject to scrutiny by the public, not only to afford constituents with the transparency they deserve but also to ensure that local officials do not violate the law. The following materials were developed for use in the annual Institute for Local Government Lawyers (ILGL), an IMLA program designed for new local government attorneys, law students, and seasoned attorneys who need a "refresher" in various general topics of local government law.

Public Records Overview

The federal "Freedom of Information Act" (FOIA – 5 U.S.C. § 552) does not apply to state or local government. *Rimmer v. Holder*, 700 F.3d 246 (6th Cir. 2012); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369 (9th Cir. 1981). Public access to state and local government records is mostly governed by state law, usually as a matter of state legislation rather than common law, but in some cases, a mixture of the two.

A majority of states have a basic public records statute, which contains a broad definition of "public record," describes the right of access, and identifies remedies for denial of access. Exceptions typically are included in the main statute but also may exist in other provisions of law throughout the codified statutes. In most such states, a record held by government is presumed to be open to the public, and if the custodial government wishes to deny access it must find a statute granting an exception to the general rule of open access. In these states, courts are interpreting their own state statutes, which tend to be specific about the types of records exempt from public access. Courts in these states look much more to decisions from other states than they do to federal decisions. (In a few states, courts feel entitled to create their own exceptions grounds of public policy.)

A minority of states have adopted public records statutes modeled after the federal Freedom of Information Act (FOIA). These statutes attempt to be comprehensive treatments of access to records held by state and local governments, putting all the law in a single statute. The federal model leaves a good bit of discretion to courts in determining whether particular records are open or closed, and in these states, the courts rely very much on federal decisions interpreting the federal FOIA. Some of these states have created state-level Freedom of Information Commissions, which have the power to review agency actions regarding record requests.

Elements of Public Records Laws

An attorney who represents state or local government agencies must become familiar with the statutory provisions that define the scope of access to public records. The definition of what constitutes a public record is important, as well as the list of exceptions, which may or may not exist all in one place.

Examples of common exceptions include:

Personnel records. (Some personnel records, such as salaries, are usually open to public access.)

Law enforcement records. (Some police records, such as incident reports and arrest records, are usually open to public access; in some states, police investigation records become open once a trial is held or an investigation is closed. Juvenile records normally receive greater protection.)

Medical records associated with specific patients. Hospital credentialing and peer review information is also often closed to access. Furthermore, with increased competition among hospitals, more and more states exempt information that might be important to a hospital's competitive position. Some states also explicitly exempt emergency medical system records. Federal law (HIPAA) affects access to certain types of protected individual health information.

Student records. Federal law (FERPA) requires that these records be confidential as a condition of federal education aid.

Trade secrets submitted to governments by private companies.

Income and sales information found in tax records. (Property tax records are usually open.)

Matters within the attorney-client privilege. (This is not universal, and in some states

attorney work product is also open to the public.)

Minutes of closed sessions of public bodies, at least for a time.

Records of economic development agencies regarding client contacts. Records about social services clients, because of federal requirements.

Records involving public security, including drawings and plans for public buildings and for infrastructure.

Individual financial or other identifying information, such as bank or credit card account numbers. Federal law limits the use of Social Security numbers (*See* 5 U.S.C. 552a (note); *Ingerman v. Delaware River Port Authority,* 630 F. Supp. 2d 426 (D.N.J. 2009)).

Consideration of Privacy Interests in Releasing Records

Public records laws significantly abrogate common law rights of privacy, but some statutes (including federal FOIA) include provisions exempting or allowing redaction of records in order to prevent unwarranted invasion of privacy.

Courts balance privacy interests against the strong policy of public access and also consider federal and state constitutional privacy protections. *See, e.g., Oklahoma Pub. Employees Ass'n v. State ex rel. Oklahoma Office of Pers. Mgmt.*, 267 P.3d 838 (Okla. 2011) (state employees' privacy interest in their birthdates and employee identification numbers outweighed interest in public access); *Déjà vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County,* 274 F.3d 377 (6th Cir. 2001) (privacy of personal information about owners or employees of sexually-oriented businesses outweighs interest in public access); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press*, 4 So.3d 807 (La. Ct. App. 2008) (public interest in release of internal affairs investigation outweighs constitutional privacy interest); *Herald Co. Inc. v. Kent County Sheriff's Dep't*, 680 N.W.2d 529 (Mich. Ct. App. 2004) (internal affairs report public, but personal information redacted); *Kentucky Bd. of Examiners v. The Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992) (client complaints included in report about psychologist sexual misconduct exempt); *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987) (FERPA did not shield public school teacher's college transcript from disclosure because she had not attended any school within the school district and was therefore not a "student" under the FERPA definition; public's interest in qualifications of schoolteachers outweighed teacher's privacy interest in transcript).

Other Statutory Provisions Governing Access

Governments may adopt regulations governing access to public records, as long as those do not significantly deter the public's right of access.

Statutory provisions typically include: *Custody/retention requirements:* Defining who has custody and to whom requests must be made. Delineating requirements for retention and preservation of records, and authorizing their destruction.

Allowable costs: Charges imposed on requesters of public records are usually nominal, covering only the marginal cost of making the copy. Sometimes statutes permit higher charges for specific types of records or for extensive requests.

Required format of copies: If a record is maintained in electronic form, in most states the requester is entitled to a copy in that form.

Time for production: Records usually must be produced within a reasonable time, and what is reasonable depends on many variables: size of request, number of requests, location of record, etc. A custodian may not, however, automatically put the records request at the bottom of the list of things to do. In some states the statute sets a specific number of days within which a records request must be responded to.

Identity of requester/intended use: The purpose for which someone seeks a record is irrelevant to that person's right of access. Some statutes have incorporated restrictions on commercial use of individual information and lists.

Records, not information: Access extends to specific records, not information, so an agency is generally not required to compile information from records or create new records upon request. But note that courts may require production of information contained in electronic databases.

Personal/Private/Constituent Records

Records relating to personal or private matters that do not involve the transaction of public business generally are not considered public records. *See Denver Post v. Ritter*, 255 P.3d 1083 (Colo. 2011) (cell phone bills for Governor's privately owned phone are not public records); *Associated Press v. Canterbury*, 688 S.E.2d 317 (W. Va. 2009) (emails written by a justice of the state Supreme Court of Appeals were not public records because they did not relate to public business or official duties); *Denver Pub. Co. v. Board of County Commissioners of County of Arapahoe*, 121 P.3d 190 (Colo. 2005) (romantic emails between county clerk/recorder and a subordinate are not public record because don't involve public business.); *Office of the Governor v. Washington Post Co.,* 759 A.2d 249 (Md. 2000) (records of telephone calls made at governor's residence, paid for by the state, are not public records); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Department,* 693 N.E.2d 789 (Ohio 1998) (racist email on departmental computer not public record). *But see Capital Newspapers v. Whalen*, 505 N.E.2d 932 (N.Y. 1987) (personal papers found in mayor's office after his death are public record because in possession of a public agency).

This analysis of personal or private records may also extend to records of elected officials that relate to political or constituent communications and that do not specifically relate to local government activities.

Access to Email and Other Electronic Records

Generally, email and other electronic records are subject to public records laws. Requests for copies of email can be extraordinarily onerous, but the costs of isolating email in response to a request may have to be met by the government.

Content, not location, usually governs the status of the record: Private email on a public email system may not be a public record; public email on private systems may be a public record. *See City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017) (holding that when a city employee uses a personal account to communicate about the conduct of

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public business the writings may be subject to disclosure under the public records law); *Schill v. Wisconsin Rapids School Dist.*, 786 N.W.2d 177 (Wis. 2010) (personal emails created on public system are not public records); *Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007) (private emails created on government email system not public records); *State v. City of Clearwater*, 863 So.2d 149 (Fla. 2003) (private email on government- owned computer not public record). *Compare Ohio ex rel. Bowman v. Jackson City School Dist.*, 2011 WL1770890 (Ohio Ct. App. 2011) (unpublished) (private emails used as basis for suspension are public records).

The distinction between records and information is blurred with electronic records. Although courts have held that a local government need not create records or reprogram a computer in order to respond to a public records request, the law may require retrieval of information in a database. *See Data Tree, LLC v. Romaine*, 880 N.E.2d 10 (N.Y. 2007) (question of fact as to whether the request requires reprogramming or retrieval).

Questions arise as to whether metadata associated with an electronic record is sufficiently part of the record to be available as a public record. *See O'Neill v. City of Shoreline*, 240 P.3d 1149 (Wash. 2010) (city must search council member's personal hard drive to provide access to specific requested email containing addressee "metadata" information); *Fagel v. Dep't of Transp.*, 991 N.E.2d 365 (Ill. App. Ct. 2013) (provision of "locked" version of excel spread sheet requested in electronic form was not acceptable as response to FOIA request), *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 905 F. Supp. 2d 161 (D.D.C. 2012) (petitioner's argument that it was entitled to metadata failed as a matter of law where providing metadata would require creation of new records rather than production of those which already existed). For an explanation of metadata and recent cases, *see,* Kara Millonzi, School of Government, UNC Chapel Hill, North Carolina Coates' Canons Local Government Law Blog: Is Metadata a Public Record? Case Law Update https://canons.sog.unc.edu/is-metadata-a-public-record-case-law-update/.

Federal law places limitations on access to electronic records such as email, text, and voice mail messages stored on private systems. *See* Stored Communications Act, 18 U.S.C. § 2701.

Relationship to Discovery/Attorney-Client Privilege

Public records laws do not necessarily coincide with or recognize rules of discovery or privileges that exist under other laws. A majority of courts have held that a public records request can be used in litigation as an alternative to, and notwithstanding some of the limitations of, the discovery rules. *See Scott v. Smith,* 728 S.W.2d 515 (Ark. 1987) (attorney work-product available under public records law); *Chief of Police, Hartford Police Dep't v. Freedom of Info. Comm'n*, 746 A.2d 1264 (Conn. 2000) (use of public records law allowed); *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860 (Ky. Ct. App. 2001) (use of public records law allowed); *McCormick v. Hanson Aggregates Southeast, Inc.,* 596 S.E.2d 431 (N.C. Ct. App. 2004) (attorney work-product available through public records law). *But see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (report prepared for litigation exempt under "other laws" exception to public records act).

Regarding the attorney-client privilege, compare *Suffolk Const. Co., Inc. v. Division of Capital Asset Management,* 870 N.E.2d 33 (Mass. 2007) (public records law does not abrogate attorney-client privilege), and *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990, 997 (Ohio 2005) (indicating that "in Ohio, the attorney-client privilege extends to government agencies consulting with in-house counsel for legal advice or assistance"), with *News and Observer Pub. Co., Inc. v. Poole,* 412 S.E.2d 7 (N.C. 1992) (matters within attorney-client privilege available under public records law), and *City of N. Miami v. Miami Herald Pub. Co.*, 468 So.2d 218 (Fla. 1985) (communications between lawyer and public-entity clients only shielded from disclosure during pendency of litigation pursuant to limited statutory exemption).

Open Meetings Overview

Each state has its own open meetings law, and there are significant differences among their provisions. Therefore, the decisions of other courts are often not helpful in interpreting your jurisdiction's statute. A new attorney needs to read his or her state's statute, any cases and attorney general's opinions interpreting it, and any publications explaining the statute.

The new attorney should seek answers to the following questions:

What bodies are covered?

Elected governing boards are universally subject to open meetings laws. Sometimes boards with advisory powers only are not covered. Sometimes committees of larger boards are not covered.

Sometimes boards of private organizations are covered, if these organizations are subject to effective government control, carry out governmental functions, or are acting as agents for government. This kind of coverage is usually the result of case law rather than explicit statutory provision.

What meetings are covered?

In some states only meetings at which action is taken are subject to the law. In some states only formal meetings are subject to the law. Informal gatherings of a board's members are not covered.

In many states, any gathering at which board members deliberate about board business is subject to the law.

What about email and other electronic communications?

Courts are grappling with the question of whether email and other electronic communications among board members constitute meetings under open- meetings legislation. *See Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.,* 359 P.3d 753, 763 (Wash. 2015) concluding that an "'e- mail/telephone' exchange did not constitute a 'meeting' of the [County Council]" in part because there was "no indication that the participants had the requisite collective intention to meet"; explicitly not reaching the issue of whether such an exchange of communications could ever constitute a meeting under state law); *Allen v. Lake-*

side Neighborhood Planning Comm., 308 P.3d 956, 963 (Mont. 2013) (affirming lower court's ruling that an electronic meeting did not occur in this case, but declining to adopt the position that a meeting "could never by convened by way of a Yahoo email group"); *Johnston v. Metro. Gov't of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 312 (Tenn. Ct. App. 2009) (certain email exchanges involving "reciprocal attempts at persuasion" among members of local legislative body fell within scope of state open meeting law); *District Attorney for Northern District v. School Comm. of Wayland*, 918 N.E.2d 796 (Mass. 2009). *But see Lambert v. McPherson*, 98 So. 3d 30, 35 (Ala. Civ. App. 2012) (school board member's email to other board members was not a meeting under state law because it "was a unilateral expression of [the sending member's] ideas or opinions" rather than an "exchange of information or ideas among a quorum of board members" (internal quotation marks omitted)); *Hill v.* Fairfax Cnty. Sch. Bd., 727 S.E.2d 75 (Va. 2012) (a series of emails among council members was not a meeting); *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010) (one-on-one briefings and email exchanges may be violation, but cured by genuine deliberation in open session).

What notice is required of meetings?
In a few states the statute contains no notice requirement.
In some states the statute requires "reasonable" notice, or a comparable formulation, and the courts will determine whether the notice given was in fact reasonable.
In some states the statute sets out very specific requirements for notice.

What can be discussed (or acted upon) in closed or executive session?

Common topics include:
- Personnel matters.
- Litigation, administrative proceedings, and discussions of other claims.
- Attorney-client discussions.
- Property acquisition and/or disposition.
- Deliberations in quasi-judicial matters.
- Deliberations on economic development projects.
- Matters involving patients or physicians in public hospitals and other health facilities.
- Discussions on matters confidential under other statutes.

What remedies are available when the statute has been violated?
Most commonly, litigants can seek declaratory or injunctive relief.
In many states, litigants can seek to invalidate actions taken after statutory violations.
In a few states, violations expose board members to civil penalties or criminal prosecution, or to personal liability for plaintiffs' attorney fees.

Application of Public Records and Open Meetings Laws to Private Entities
A private entity does not become subject to sunshine laws simply by contracting with or receiving funds from a public entity. On the other hand, government cannot avoid sunshine laws by delegating its responsibility to a private entity. Courts have analyzed this issue by applying different tests and sets of factors including: whether the private agency is performing governmental functions or serves as the "functional equivalent" of a government body; the extent of oversight and control the public agency has over the private agency, with respect to specific records; whether the public agency owns or has a right of access to the record. *See SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012) (private entity was subject to state public records law where stadium contract for operation of a minor league ball park was found to be a "delegation of some non-ancillary undertaking of government"); *Evertson v. City of Kimball*, 767 N.W.2d 751 (Neb. 2009) (private investigator report prepared under contract is public); *State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193 (Ohio 2006) (functional equivalent test for determining whether nonprofit organization is subject to law); *News and Observer Publishing Co. v. Wake County Hospital System, Inc.*, 284 S.E.2d 542 (N.C. Ct. App. 1981) (multiple factors evaluating extent of control).

Resources
Public Records
For those states that operate under statutes modeled after the federal Freedom of Information Act, the U.S. Department of Justice maintains a website containing information about FOIA and related open government resources: http://www.justice.gov/oip/foiapost/mainpage.htm
David M. Lawrence, Public Records Law for North Carolina Local Governments, (School of Government, 2d ed., 2009), available at https://www.sog.unc.edu/publications/books/public-records-law-north- carolina-local-governments-second-edition (Although this book focuses on North Carolina, it draws on cases from around the country and therefore might be a useful starting point for investigating the law and finding cases.)

Open Meetings
In most states there will be some state-level source on that state's open meetings law. The most likely publishers are state leagues or associations of cities or counties, the state attorney general's office, or a university-based public service organization.
There is one comprehensive national source on open meetings laws and cases: Ann Taylor Schwing, Open Meetings Laws, (Fathom Pub. Co., Anchorage, 3d ed. 2011), available at http://www.openmeetinglaws.com/. ML



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