

Current Challenges & Trending Topics in Public Information Acts

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Government Perspective

Government lawyers searching for and preparing records for disclosure to people (citizens) requesting them.

The Adequate Search

- *Tanner v. Idaho State Police*, No. 49580, 2023 WL 4195817, at *6 (Idaho Ct. App. 2023)(unpublished).
  - "Tanner's assertion that it is 'absurd that no records exist whatsoever' of the personnel complaint is not evidence that the records existed at the time of the request.'"
  - "once records are received, there is no entitlement to additional discovery just because the plaintiff wants to determine facts to undermine the state affidavit of all records were produced"
- *Cnty. of San Benito v. Superior Ct.*, 314 Cal. Rptr. 3d 269, 284–85 (Cal. App. 2023).
- *Nandendla v. Wakemed*, No. COA23-940, 2024 WL 3269348, at *5 (N.C. Ct. App. 2024)(unpublished).

The Adequate Search

- *Chicago Recycling Coal. v. City of Chicago Dep't of Streets & Sanitation*, 2023 IL App (1st) 220154, *5 (Ill. App. Ct. 2023).
  - "an adequate search was performed when the Department searched its records for the third-party private hauler reports and turned over every such report in its possession. FOIA does not impose an obligation on the Department to make a demand on a third-party private hauler who is delinquent or otherwise noncompliant with its obligation to submit its report to the Department"
- *New York C.L. Union v. New York State Off. of Ct. Admin.*, 205 N.Y.S.3d 17, 19 (N.Y. App. Div. 2024).
  - "seeking records respondent created during a period of more than 10 years that summarized, interpreted, explained, analyzed, or applied any state or federal court decisions, statutes, or regulations" was overbroad, required sifting through attorney files

The Adequate Search

- *Pak v. NYS Dep't of Motor Vehicles*, 210 N.Y.S.3d 302, 304 (N.Y. App. Div. 2024).
  - "petitioner failed to articulate a demonstrable factual basis that the requested documents did exist and, instead, relied on speculation and conjecture, which does not suffice to warrant a hearing"
- *Gray v. Philadelphia Dist. Attorney's Off.*, 311 A.3d 1230, 1241 (Pa. Commw. Ct. 2024) (no requirement to swear that a record does not exist).
- *Bruce v. Bay City Pub. Sch. Bd. of Trustees*, No. 365065, 2023 WL 8868056, at *1 (Mich. Ct. App. 2023)(unpublished).

The (In) Adequate Search

- *Contreraz v. City of Tacoma*, No. 3:22-CV-05106, 2024 WL 1138902, at *9 (W.D. Wash. 2024).
  - "Tacoma's argument that it had no duty to look for records in South Sound 911's possession rests on its contention that it did not 'prepare,' 'own,' or 'retain' the CAD logs in question. But the record before the Court shows that it certainly 'used' them" and thus "the Court finds that TPD used the CAD logs stored in South Sound 911's system because they clearly play a role in TPD's business as records themselves."
- *New York C.L. Union v. New York State Police*, No. CV–23–0999, 2024 WL 3056267, at *4 (N.Y. App. Div. 2024).
  - "Considering these prospective enhancements to respondent's review and disclosure processes which, as Brundige recognized, will ease some of the challenges of production moving forward, we do not find that respondent has established that complying with the disclosure ordered by Supreme Court would impose an undue burden. In that vein, we fail to discern any compelling reason to indefinitely halt or delay production until those resources and processes are fully implemented, as there is no indication that production could not occur on a parallel track."

Only Citizens of This State

- *McBurney v. Young*, 569 U.S. 224, 225 (2013) (interpreting VA. CODE ANN. § 2.2-3704).
  - "Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records"
- *Marzen, A Constitutional Right to Public Information*, 29 B.U. Pub. Int. L.J. 223, 226–27 (2020).
  - *Rodriguez v. Dougherty*, No. 3:23-CV-1542, 2024 WL 896752 at *8 (D. Conn. 2024); *Arnold on behalf of Arnold v. City of Hampton*, No. 1:21-CV-4970-SEG, 2023 WL 3243913, at *29 (N.D. Ga. 2023); *Book v. Lauretti*, No. 3:20-cv-1381 (JCH), 2022 WL 4944399, at *7, n.8 (D. Conn. 2022); *Pastore v. Bd. of Cnty. Commissioners for Cnty. of Catron*, 572 F. Supp. 3d 1100, 1115 (D.N.M. 2021); *Begay v. Nat'l Archives & Recs. Admin.*, No. CV 21-782 (TJK), 2021 WL 4589085, at *2 (D.D.C. 2021)(unreported).

Only Citizens of This State

- ARK. CODE ANN. § 25-19-105(a)(1)(A) (2019).
- 2024 La. Sess. Law Serv. Act 638 (H.B. 767) (June 11, 2024)
  - "only a person who resides in the state of Louisiana and who otherwise meets the qualifications required by this Chapter may inspect, copy, reproduce, or obtain a copy or reproduction of a public record or seek to enforce the provisions of this Chapter"
- 2023 Nebraska Legislative Bill No. 43, Nebraska One Hundred Eighth Legislature - Second Regular Session
  - allows requests from all residents of Nebraska, including people of tribal nations, to receive records at lower cost than out-of-state requestors
- N.J. STAT. ANN. § 47:1A-1 (2019).
- Stephen Gidiere, *Is Change on the Way for Alabama's Open Records Law?*, 68 Ala. Law. 203, 205 (2007).

Requestor's Purpose is Not Important

- *Michaud v. Town of Campton Police Dep't.*, No. 2022-0328, 2024 WL 1665246, at *2 (N.H. 2024).
  - "The plaintiff asserts that the Town violated the Right-to-Know Law when it initially categorically denied his request based on its position that he was attempting to circumvent discovery in the other matter. He asserts that his motive in seeking the records is irrelevant and that New Hampshire law prohibits the use of the Right-to-Know Law to circumvent discovery only in the limited sense that the law cannot be used 'to obtain information that would be privileged or prohibited from disclosure by a court's discovery rules.'"
- *State ex rel. Cincinnati Enquirer v. Wilson*, No. 2022-0425, 2024 WL 235398 (Ohio 2024).

Private Records and Private Devices

- *Town of Avon v. Sastre*, 312 A.3d 40, 51, *cert. denied*, 312 A.3d 1058 (Conn. App. Ct. 2024).
- *Davis v. Augusta Press*, 889 S.E.2d 110, 113 (Ga. 2023).
  - "improperly conflated Davis, the individual and candidate, with Davis, the Mayor, throughout this litigation. This distinction is significant: when a private person or entity is sued under the Open Records Act, the court must determine whether the records in question – even if prepared or maintained by a private party – were prepared or maintained 'in the course of the operation of a public office.'"
- *Kentucky Open Gov't Coal., Inc. v. Kentucky Dep't of Fish & Wildlife Res. Comm'n*, No. 2022-CA-0170-MR, 2023 WL 7095744, at *10 (Ky. Ct. App. 2023)(unpublished), *review granted* (June 5, 2024).
  - "we reject the Commission's argument that official documents of the Commission may only be generated by a quorum of members"

Private Records and Private Devices

- *Michalski v. Dep't of Corr.*, 315 A.3d 903, 907 (Pa. Commw. Ct. 2024).
  - data available on Netflix's website identifying the movies DOC ordered from Netflix for use in its SCIs "documents a transaction or activity of [DOC]" and "is created, received[,] or retained ... in connection with a transaction, business[,] or activity of [DOC]." Absent a valid exemption or privilege claim, such histories are public records. The fact that they are in Netflix's possession or are "difficult to print off directly from the Netflix [web]site', does not change the conclusion that they are public records that DOC must disclose."
- *Baracco v. Cnty. of Beaufort*, No. 2021-000321, 2024 WL 112282, at *1 (S.C. Ct. App. 2024)(unpublished).
  - "County's public use of private email accounts is neither a violation of FOIA nor does it eliminate the attorney-client privilege"
- *Flaxman v. Ferguson*, No. C23-1581-KKE, 2024 WL 623754, at *4 (W.D. Wash. Feb. 14, 2024).
  - "Plaintiffs' emails are public records because they are public employees, and they do not have a First Amendment privacy interest in them that is violated by disclosure to the Executive Ethics Board"

Tricky Tech

- *Castanares v. Superior Ct.*, 316 Cal. Rptr. 3d 422, 434–35 (Cal. Ct. App. 2023), *review denied* (2024).
  - "The drone video footage should not be treated as a monolith, but rather, it can be divided into separate parts corresponding to each specific call. Then each distinct video can be evaluated under the CPRA in relation to the call triggering the drone dispatch. Further, as an initial determination, the City is well equipped to categorize the drone video footage in this manner. However, we do not propose to instruct the City regarding what process it must use to evaluate the drone video footage or suggest that a City designee must watch the footage to make the necessary determinations"
- *Chicago Recycling Coal. v. City of Chicago Dep't of Streets & Sanitation*, No. 1-22-0154, *5, 2023 WL 5159842 (Ill. App. Ct. 2023).
  - "deleting information from a record does not create a new record, even if all but one or two items of information have been deleted. Similarly, scrambling a record does not lead to the creation of a new record. No new content is created; the existing document is simply altered to remove exempt information"
  - "IT department averred that the Sheriff's Office 'does not have the ability to scramble or disguise audio recordings so as to protect the identity of a speaker.' Therefore, the 911 recordings in their only available form are exempt from disclosure"

Tricky Tech

- *Edgar Cnty. Watchdogs v. Will Cnty. Sheriff's Off.*, 234 N.E.3d 145, 152, *appeal denied*, 221 N.E.3d 394 (Ill. App. Ct. 2023).
  - file layouts exempt from disclosure to prevent cyberattacks
- *Ortolano v. City of Nashua*, 308 A.3d 733, 737 (N. H. 2023).
  - "where the record demonstrates that the requested emails are 'readily accessible' to the City through the services of the IT Department, the trial court did not err in determining that the requested emails located on the back-up tapes are 'readily accessible' to the City"

This can NOT be redacted; or can it?

- *Tax Analysts v. D.C.*, 298 A.3d 334, 341 (D.C. Ct. App. 2023).
  - D.C. tried to argue that the existence of the ruling itself was shielded tax information, but Court held "legal discussions are not, for example, financial or tax-related data submitted by a taxpayer seeking a private letter ruling, and in themselves they do not (or may not) disclose such particular data or the identity of the taxpayer"
- *Conrad v. Reno Police Dep't*, 530 P.3d 851, 856 (Nev. 2023)
  - remanded to redact the faces from police body camera because affidavit of harm if unredacted footage was released was insufficient to explain why a redacted record
- *Union Leader Corp. v. New Hampshire Dept. of Safety*, No. 2023-0208, 2024 WL 3281613, at *4 (N.H. 2024).
  - "a distinction between 'factual information about incidents impacting public safety and welfare' and those 'aspects of a juvenile criminal investigation' for which confidentiality plays a 'central role ... in a juvenile's rehabilitation'"



Exemptions to Disclosure

Statutory and common law exemptions to disclosure under state and federal public information laws.

Deliberative Process Exemption:
Idealism vs. Practicality

- Yamamoto & Kelly, *Abdicating Judicial Independence: Expanding the State Secrets and Deliberate Process Privileges to Bury National Security Abuses of Civil Liberties*, 4 N.C.C.R.L. Rev. 343, 400–02 (2024).
  - "From the outset, legal scholars doubted the legitimacy of the privilege. Nevertheless, maneuvering officials and acquiescent courts entrenched the privilege"
- Ryan W. Miller, *Ending Exemption 5 Expansion: Toward A Narrower Interpretation of FOIA's Exemption for Inter- and Intra-Agency Memorandums*, 92 Fordham L. Rev. 1613, 1657 (2024).
  - "honor both FOIA's text and its purpose, not judge-made doctrines that enable government secrecy"

Deliberative Process Exemption:
Idealism vs. Practicality

- *Simpson v. Harmer*, 23CA0622, 2024 WL 1316694, *6 (Colo. App. 2024).
  - draft audit report from City Council to State Auditor not deliberative even though a draft because it does not reflect decisions
- *Town of Greenwich v. Freedom of Info. Comm'n*, 226 Conn. App. 40, 43–44 (Conn. App. Ct. 2024).
  - Greenwich argued running commands in software to produce record of changes was a new record, but appellate court held that in this novel fact pattern FOIA Commission's conclusion that Greenwich did not meet burden of showing records exempt from disclosure

Deliberative Process Exemption:
Idealism vs. Practicality

- *Fam. & Soc. Servs. Admin. v. Saint*, No. 23A-MI-2742, 2024 WL 2984410, at *1 (Ind. Ct. App. 2024).
  - "exception does not apply because the White Paper was communicated by a private healthcare provider to a state agency"
- *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Army*, No. 21-CV-2482, 2023 WL 3995639, at *3 (D.D.C. June 14, 2023).
  - "the necessity of the National Guard and the State working together does not make their communications intra-agency. Certainly, exempting their conversations from disclosure might make sense as a policy matter—but policy concerns cannot trump the plain language of the Freedom of Information Act or the underlying policy of the FOIA favoring public disclosure."

Privacy

- *Augusta Press, Inc. v. Roundtree*, 888 S.E.2d 267, 270 (Ga. Ct. App. 2023), *cert. denied* (Nov. 16, 2023).
  - "although the Augusta Press contends that an expectation of privacy erodes in a home when law enforcement is called to respond to an incident, the exemption explicitly refutes this assertion"
- *Org. of Police Officers v. City & Cnty. of Honolulu*, 494 P.3d 1225, 1237 (Haw. 2021).
  - "absent a significant privacy interest rooted in statute or the constitution, 'a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy'"
- *Timpone v. Illinois Student Assistance Comm'n*, 147 N.E.3d 873, 887 (Ill. App. Ct. 2019).
  - giving out names of students could be coupled with available income information on state awards program meant information was not deidentified

Privacy

- *Thomas v. Cnty. of Cook*, 229 N.E.3d 864 (Ill. Ct. App. 2023).
- *Russell v. Town of Mount Pleasant*, 227 A.D.3d 1083, 1084–85 (N.Y. App. Div. 2024).
- *Spence v. New York State Dep't of Civ. Serv.*, 203 N.Y.S.3d 433, 436 (N.Y. App. Div. 2024).
- *Ludlow v. Ohio Dep't of Health*, No. 2022-1391, 2024 WL 1643632 (Ohio 2024).
- *Gray Media Grp., Inc. v. W. Virginia Dep't of Health & Hum. Res.*, No. 23-ICA-283, 2024 WL 2349994, at *6 (W. Va. Ct. 2024).
- *Cronwell v. City of Glendale*, 6 N.W.3d 279, *3 (2024)(unpublished).
  - "we consider the public's oversight of this governmental function in reviewing and issuing a license to sell alcohol beverages crucial and, in turn, we consider the public to have a unique interest in knowing the details of the applicants for a license to sell alcohol beverages that would allow the public to ensure that the application meets the requirements"

Attorney-Client Communication and Work Product

- *Energy Pol'y Advocs. v. Att'y Gen.'s Off.*, 308 A.3d 456, 462–63 (Vt. 2023).
  - communications between attorney generals of other states were exempted work product because they were prepared in anticipation of multiple lawsuits to formulate strategy
- *Rokita v. Tully*, No. 23A-PL-705, 235 N.E.3d 189, 201-02 (Ind. Ct. App. 2024).
  - court ordered production of redacted copy of Inspector General's informal advisory opinion, motivated General Assembly to prevent future disclosures
- *Mack v. Dist. Att'y for Bristol Dist.*, 231 N.E.3d 934, 949 (Mass. 2024).
  - "Where sections of the draft report are identical to the corresponding sections in either of the publicly available reports, the district attorney's office has effectively waived the work product privilege with respect to these sections"
- *Att'y Gen. v. Gonzalez*, 683 S.W.3d 861, 865 (Tex. Ct. App. 2024).
  - DA preparation of list of possible grand jurors was not an activity of the judiciary

Confidential Commercial or Financial Information/ Trade Secrets

- *UnitedHealthcare of Mississippi, Inc. v. Amerigroup Mississippi, Inc.*, No. 2022-SA-01216-SCT, 2024 WL 3062477, at *1 (Miss. 2024).
  - list of past government sanctions was not confidential business information
- Michael Fussell, *"Heads Up": Combating Government Secrecy and Corporate Meddling in the Public's Right to Know*, 85 Ohio St. L.J. 81, 111 (2024).
  - "free flow of legitimate public information is impeded under federal and state governments' current legal treatment of the pre-disclosure notification processes"
- Ema Klugman, *Are Trade Secret Protections in Government Contracts Adequate? An Analysis of FOIA Exemption 4 and Data Rights*, 53 Pub. Cont. L.J. 459, 491 (2024).
  - "If the government hopes to reap the benefits of innovation that these kinds of companies tend to create, it must make its trade secret protections stronger. The incentive problems that a lack of trade secret protections create are simple, but their consequences are enormous"

Litigation Strategies

In Camera Inspection

Attorneys' Fees and Damages

Improper Sanctions Against Requestors

Judicial Remedies

In Court

Strategies and outcomes in public records litigation.

Litigation Strategies

- AGREEMENTS: *Kinney v. City of Corona*, 317 Cal. Rptr. 3d 545, 560 (Cal. Ct. App. 2023), *as modified* (Jan. 24, 2024)("City's offer of judgment to plaintiff who requested the name of a crime victim under the California Public Records Act (CPRA), offering to pay plaintiff $2,500 in attorney fees and costs, was sufficiently specific and unambiguous at the time it was made" that the City had to disclose the name even though it argued plaintiff's counsel already had access to it).

- CHALLENGING PREPAYMENT OF FEES: *DuBose v. D.C.*, 301 A.3d 726, 733 (D.C. 2023)(judicial review is available to challenge the prepayment of fees requested before production of records because it is a ruling that fee waiver is not in the public interest).

- PROPER PARTIES: *Benda for Common-sense v. Anderson*, 999 N.W.2d 893, 899 (Minn. Ct. App. 2023), *review granted* (Feb. 28, 2024)("a proper defendant in a civil action… is a 'responsible authority' or 'government entity,' not a 'designee' of a 'responsible authority'").

- WITHIN ANOTHER TYPE OF CASE: *Howard v. State*, 378 So. 3d 684, 685 (Fla. Dist. Ct. App. 2024) (mandamus is appropriate way to challenge lack of record production so it can be a motion at end of criminal trial for acquittal).

In Camera Inspection

- *Potter v. Heredia*, No. 1 CA-CV 23-0345, 2024 WL 1529562, at *4 (Ariz. Ct. App. 2024)(unpublished)("court did not abuse its discretion in finding that [Defendants'] pending motions for summary judgment presented 'strictly legal issues,' and that Potter failed to establish 'specific and adequate grounds' for discovery on these legal issues, including in camera inspection").
- *Fairfield v. Maine State Police*, 288 A.3d 1220, 1225, *as revised* (Me. 2023).
- *Energy Pol'y Advocs. v. Att'y Gen.'s Off.*, 308 A.3d 456, 463–64 (Vt. 2023)(trial court did not abuse discretion in declining to grant request for in camera review because "the policy ramifications of plaintiff's proposed burden of proof would be to require in-camera review every time a privilege is claimed").

Attorneys' Fees and Damages

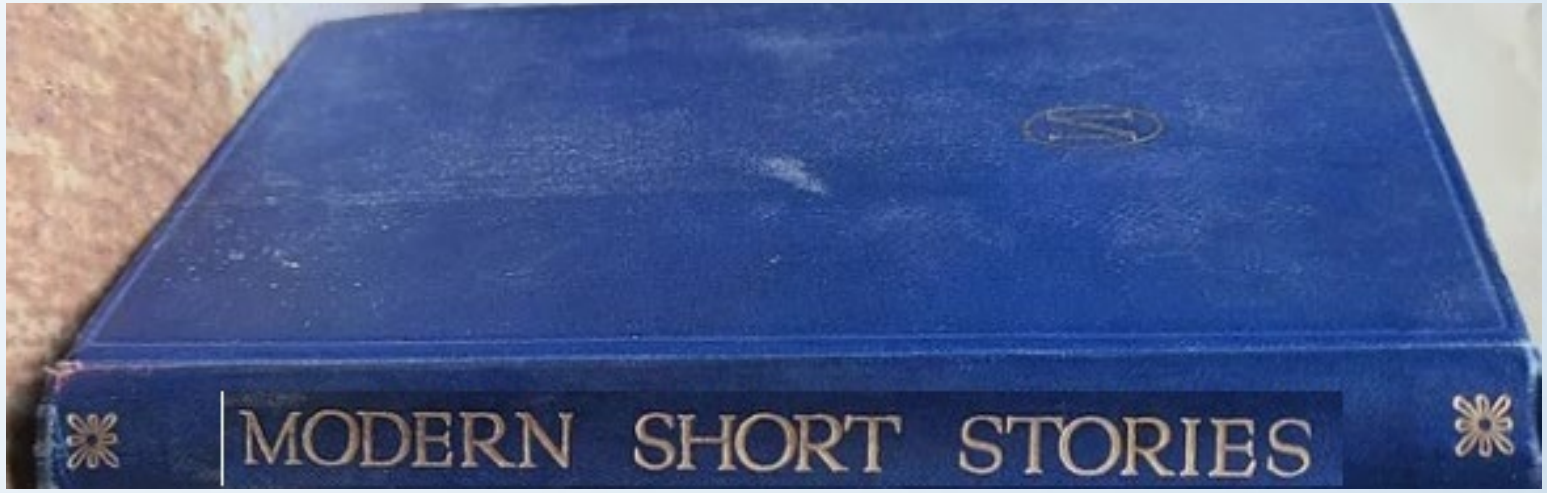
- *Energy Pol'y Advocs. v. Att'y Gen.'s Off.*, 308 A.3d 456, 465 (Vt. 2023)("plaintiff argues that it has substantially prevailed below, yet asks us to reverse almost the entire trial court ruling . . . While plaintiff is entitled to argue alternative case theories, the Court cannot help but take notice of this glaring contradiction. We therefore decline plaintiff's invitation to award its entire costs and fees.").
- *State ex rel. Ware v. Rhodes*, No. 22AP-59, 2024 WL 2036634, *5 (prisoner entitled to monetary damages for state's failure to produce records for 256 days after sending acknowledgment letter).
- *Tooles Contracting Grp., LLC v. Washtenaw Cnty. Rd. Comm'n*, No. 363005, 2024 WL 1472195, *1 (Mich. Ct. App. 2024) (unpublished)("plaintiff primarily argues that the trial court erred by refusing to award it attorney fees for fees that were incurred after defendant's disclosure but incurred as a result of seeking fees relating to that disclosure.").
- *Vaccaro v. Polk Cnty.*, 983 N.W.2d 54, 60 (Iowa 2022).

Improper Sanctions Against Requestors

- *Reguli v. Anderson*, No. M2022-00705-COA-R3-CV, 2024 WL 1708347, *1 (Tenn. Ct. App. 2024) ("The trial court imposed multiple sanctions upon the requester including a $5,000 penalty, a requirement to associate counsel in any future pro se filing within the judicial district, and a dismissal with prejudice of her Petition. We conclude the trial court properly determined the requester violated Rule 11 by including a false statement and deceptive exhibit in her Petition. Given the context of the Public Records Act, we conclude, however, that the trial court erred with regard to its conclusion that the requester made an inadequate inquiry prior to filing her Petition and had an improper purpose in connection with the requester's anticipated use of any documents she obtained.").
- *Gates v. Mem'l Hosp. of Converse Cnty.*, 533 P.3d 493, 503 (Wyo. 2023) (court cannot enter a protective order and limit the use of the records by the requestor).

Judicial Remedies

- DECLARATORY JUDGMENT: *City of Gilroy v. Superior Ct.*, 314 Cal. Rptr. 3d 681, 696 (Cal. Ct. App. 2023), *as modified on denial of reh'g* (Nov. 20, 2023).
- NO INJUNCTION: *Gordon v. Nostrom*, 2024 WL 3191716, 2024 UT 18, *1 (Utah 2024).
- NO SEPARATE CAUSE OF ACTION FOR TIMLINESS: *Tanner v. Idaho State Police*, No. 49580, 2023 WL 4195817, *6 (Idaho Ct. App. 2023)(unpublished).
- NO WRITTEN EXPLAINATION FOR DISCLOSURE: *Org. of Police Officers v. City & Cnty. of Honolulu*, 494 P.3d 1225, 1252 (Haw. 2021).



Of Final Note

A few interesting cases worth mentioning.

Of Final Note

- Academics at State Schools
  - *Iloh v. Regents of Univ. of California*, 87 Cal. App. 5th 513, 527, 303 Cal. Rptr. 3d 709, 720 (2023), reh'g denied (Feb. 6, 2023), *review denied* (Apr. 12, 2023).
  - *Litkouhi v. Rochester Cmty*. Sch. Dist., No. 364409, 2024 WL 748476, *8 (Mich. Ct. App. Feb. 22, 2024).
- But it's about ME!
  - *Hart v. Illinois State Police*, 2023 IL 128275, ¶ 19, 234 N.E.3d 708 (Ill. 2023).
  - *Tibbs v. Gender Dysphoria Grp.*, No. CV 22-11849-FDS, 2024 WL 1765567, *1–2 (D. Mass. Apr. 24, 2024).
- Open Meetings Acts Interacts with Public Information Acts
  - *New Covert Generating Co., LLC v. Covert Township*, No. 364076, 2024 WL 3206592, *3 (Mich. Ct. App. 2024).
- Can Journalists Fall into the Research Exemption?
  - *Silverman v. Arizona Dep't of Econ. Sec.*, No. CV-23-0181-PR, 2024 WL 2809767, *1 (Ariz. 2024).

Questions?

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