Session title : Freedom of Information Legislation and Litigation Update
Moderator/Panelists :
David S. Goodis, Director of Legal Services and General Counsel, Office of the Information & Privacy Commissioner, Ontario
Paula S. Pearlman, Staff Attorney, Connecticut Freedom of Information Commission
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Rapporteur : Alexandre Duval

Session summary

Access to information is undergoing pressure from all sides in American and Canadian jurisdictions: the right to privacy, the public interest, the right to information, and security issues collide such that access to information finds itself front and centre among legitimate yet sometimes contradictory visions. The most tangible proof of the tensions regarding access to information is clearly reflected in the impressive number of cases concerning which Canadian and American lawmakers and courts have been forced to adjudicate over the last year.

In the United States, in particular the state of Connecticut, contentious public records cases raising access to information questions have proliferated in many forms. Whether concerning recorded emergency 9-1-1 phone calls, “mug shots” of criminal suspects [in a criminal matter], images of homicide victims, or information related to the carrying of weapons, access to information is an issue that affects a vast array of potentially sensitive data. On the one hand, the public is claiming the right to know. On the other, we find the victims themselves, their families and witnesses, claiming that disclosure of certain information would be an invasion of their personal privacy and a safety risk. Courts across the nation have not always rendered similar decisions in access to information cases over the past year, and neither have lawmakers, although generally speaking the tendency has been to restrict the public right to obtain information linked to records maintained by law enforcement agencies. In addition, over the last year, other tensions arose with respect to the right to access information held by public institutions of higher learning and their affiliated entities; and governmental decision-making.

Canada was also concerned by these questions over the last year. From one end of the country to the other, provincial access to information commissioners have had ample food for thought and have confronted a great many matters about which to issue recommendations, including lawyers’ professional secrets, tripartite contracts, and the archiving and conservation of personal information and documents. For example, in an Ontario case concerning the cancellation of government contracts with gas-fired power plants, for which information regarding the decision-making process was missing, the Ontario Information and Privacy Commissioner proposed that certain amendments be made to the Freedom of Information and Protection of Privacy Act, especially regarding provisions for government decisions to be documented and archived internally. In another case, the Commissioner deemed legitimate a journalist’s request for basic information for purposes of disclosing the number of sex offenders in the Ontario registry and located in a specific region of the province.

In the final analysis, access to information remains a major concern in both the United States and Canada. The sought-after balancing of the various opposing forces that stakeholders face is difficult to achieve, as the court rulings and the direction taken by legislation adopted over the past year clearly demonstrate.

Federal Freedom of Information Act Cases for 2013

(*Case Summaries by Harry Hammitt, Editor, Access Reports*)

- In ***McBurney v. Young***, 133 S.Ct. 1709 (2013), the Supreme Court resolved an apparent Circuit split over the constitutionality of such limitations. A unanimous Court held that citizens-only provisions violated neither Article IV's Privileges and Immunities Clause nor dormant Commerce Clause principles. In passing, the Court seemed to go out of its way to denigrate the importance the right of access to government information.

- In ***ACLU v. CIA***, 710 F.3d 422 (D.C. Cir. 2013), a D.C. Circuit panel found that the CIA could not invoke a *Glomar* response, neither confirming nor denying the existence of records, in response to the ACLU's request asking for information pertaining to the CIA's intelligence interest in targeted drone strikes because both the President and two CIA directors had publicly confirmed that the U.S. had an intelligence interest in targeted drone strikes.

- ***Judicial Watch, Inc. v. U.S. Department of Defense***, 715 F.3d 937 (D.C. Cir. 2013). D.C. Circuit affirmed the decision of the district court regarding release of photos taken during the raid that killed Osama bin Laden. The D.C. Circuit agreed that the CIA was in sole possession and control of the records and that Exemption 1 (national security) permitted the agency to withhold the photos, largely on the grounds cited by the district court.

- In ***Cause of Action v. National Archives and Records Administration***, WL 765336 (D.D.C. 2013), a D.C. District Judge grappled with the question of whether records of legislative commissions transferred to the National Archives and Records Administration ("NARA") could be considered "agency records" subject to FOIA. The court found that Congress had not relinquished control of the records and that NARA was acting merely as a repository and had no legal ability to disseminate or use the records independently.

- In ***Charles v. Office of the Armed Forces Medical Examiner***, WL 1224890 (D.D.C. 2013), the district court ruled that autopsy records of troops whose deaths in Iraq or Afghanistan might have involved body armor failure were not protected when redacted by the privacy exemption. However, the court found that, while the final autopsy was not privileged, preliminary autopsies constituted draft decisions and were therefore protected.

- ***Center for International Environmental Law v. Office of the United States Trade Representative***, 718 F.3d 899, (D.C. Cir. 2013) (*CIEL*): The D.C. Circuit ruled that judges were not in a position to question any plausible reason provided by an agency for classifying a document. The district court had held twice that the Trade Representative had failed to explain the harm to national security if a white paper setting forth her position on the meaning of the draft treaty's "under like circumstances" clause during failed treaty negotiations was disclosed. However, the D.C. Circuit found that as long as the Trade Representative's claims were logical the court should not second-guess its decision.

- In ***CREW v. FEC***, 711 F.3d 180 (D.C. Cir. 2013), D.C. Circuit decided what agency response was sufficient to trigger a requester's obligation to exhaust administrative remedies

before seeking judicial relief. The Court held that a statement that the agency would begin to produce responsive records and ultimately claim exemptions was not sufficient to trigger the exhaustion obligation. To trigger that obligation the agency would, within the statutorily-mandated time-frame have to set out the scope of documents in would produce and the scope of the exemptions it would claim.

- In ***Florida Medical Association v. Department Of Health, Education, & Welfare***, 2013 WL 2382270 (M.D.Fla. May 31, 2013), a district court judge vacated a more than 30-year-old injunction barring the Department of Health and Human Services from releasing information regarding reimbursement of individual doctors under Medicare. The court found the injunction's reliance on the Privacy Act had been superseded by subsequent appellate decisions. The existence of the injunction played a key role in two recent cases involving access to Medicare payment information, *Alley v. Dept of Health and Human Services,* 590 F. 3d 1195 (11th Cir. 2009), and *Consumers' Checkbook v. Dept of Health and Human Services*, 554 F.3d 1046 (D.C. Cir. 2009) and continued to serve as an obstacle to disclosure of such information until officially dissolved by the district court in which it was originally decided.

- ***New York Times v. Department of Homeland Security*** 2013 WL 2952012 (S.D.N.Y.) Granting plaintiff's motion for summary judgment re FOIA request for list of convicted aliens released by Immigration and Customs Enforcement (ICE), but not deported, since January 1, 2008, due to the 2001 Supreme Court decision Zadvydas v. Davis over an Exemption 7(C) defense.

- In ***Cameranesi v. Dept. of Defense***, 2013 WL 1741715 (N.D. Cal.), the District Court ruled that names and military units of foreign students and instructors who taught at the Western Hemisphere Institute for Security Cooperation were not protected by Exemption 6. The judge also found that § 1083 of the National Defense Authorization Act, which protects names and duty stations of active U.S. military personnel in deployable units, did not qualify as a prohibiting statute under Exemption 3 (other statutes).

- In ***Acosta v. FBI***, 2013 WL 1633068 (D.D.C.), the District Court concluded that, based on the D.C. Circuit's ruling in *CREW v. FEC* on when a requester had constructively exhausted administrative remedies permitting him to file suit, even though the FBI responded to Samuel Acosta's request before he filed suit, its failure to respond within the statutory deadline constituted a constructive exhaustion of his administrative remedies.

- In ***Coleman v. DEA***, 714 F. 3d 816 (4th Cir. 2013), the 4th Circuit ruled that FOIA's constructive exhaustion provisions, which permit a requester to file suit after an agency misses its statutory deadline for responding to a request or responding to an administrative appeal, applied to DEA's duty to respond to the requester after the Office of Information Policy remanded John Coleman's administrative appeal pertaining to his fee category back to the agency.

- In ***Judicial Watch v. Dept of Transportation***, 2013 WL 3168738 (D.D.C.), the District Court ruled that discussions between the Department of Transportation and the California High Speed Rail Authority, a state agency, qualified under the "inter- or intra-agency" threshold of Exemption 5 (privileges). The court indicated that the Supreme Court's decision in *Klamath*

Water Users Association v. Dept. of Interior, holding that a third party did not qualify as a consultant to the government when the third party had an interest adverse to other similarly situated third parties, applied only when such an adverse interest existed. The court then found that advice provided by third parties was protected in the D.C. Circuit when it aided the government's deliberative process and presented no adverse interest to other similar third parties.

- In ***EFF v. Dept of Commerce***, 2013 WL 3730096 (N.D. Cal.), the District Court ruled that the lapsed Export Administration Act no longer qualified under Exemption 3. Although the EAA had long been considered an Exemption 3 statute, the court agreed with EFF that its statutory authority lapsed in 2001 and was never renewed by Congress. The court found that the current basis for claiming that export licenses were exempt from disclosure relied on an Executive Order issued to implement a provision of the International Emergency Economic Powers Act, the combination of which did not provide the statutory basis for claiming that information was protected from disclosure under Exemption 3 (other statutes).

- In ***Judicial Watch v. Secret Service***, 726 F.3d 208 (D.C. Cir. 2013), the D.C. Circuit ruled that White House visitors' records were not subject to FOIA even though they were used by the Secret Service in clearing and admitting visitors because the agency could not use and dispose of the records as it wished nor had it integrated the records into its filing system. Further, the court found serious potential separation-of-powers questions militated against making the records subject to FOIA. Instead, the court found the records were presidential records under the Presidential Records Act.

- In ***ACLU of Michigan v. FBI***, 2013 WL 4436533 (C.A. 6), the Sixth Circuit ruled that racial and ethnic demographic data analyzed by the FBI for purposes of assessing vulnerabilities and terrorism threats in ethnic communities was protected by Exemption 7(A). Although much of the information came from public source material, the court found that its disclosure would reveal the way the FBI used the data for intelligence purposes. Concerned that the agency might have excluded some information under (c)(3), which allows the FBI to exclude classified information pertaining to international terrorism, the ACLU asked the court to allow the parties to litigate whether or not the data fell within the exclusion. The court rejected the suggestion and indicated instead that the *in camera* procedures used when information was excluded provided a better way to resolve exclusion claims.

- In ***Maracich v. Spears***, 133 S.Ct. 2191 (2013), the Supreme Court held that the Driver Privacy Protection Act exemption permitting release of information in connection with judicial and administrative proceedings, including investigation in anticipation of litigation, does not cover attorney solicitation of clients, even though the solicitation occurred in the process of identifying the certified class in a class action suit.

Freedom of Information
Litigation and Legislation Update

2013 COGEL Conference
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Prepared by
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Freedom of Information
Litigation and Legislation Update

❖ Public Disclosure of Records Maintained by Law Enforcement Agencies

In recent years, there has been a growing movement to shield records maintained by law enforcement agencies from public disclosure. In the wake of the alarming and growing number of mass shootings around the country, such as the terrible tragedy in Newtown, Connecticut in December of 2012, lawmakers in many states, citing the need to protect the privacy of victims and their families, have introduced legislation to further restrict public access to incident information. In addition, law enforcement records are being withheld from disclosure based on the belief that disclosures would subject witnesses to threats and intimidation; be prejudicial to law enforcement actions and proceedings; reveal investigatory techniques; and infringe on rights granted under copyright law. Despite the presumption that law enforcement records are public in most states, subject to some exemptions and exclusions, many of the newly enacted laws and related court rulings seek to limit public disclosure of records that were heretofore routinely public such as police booking and "blotter" records to mug shots and 9-1-1 recordings. As illustrated in the following section, this movement aimed at increasing restrictions on access to law enforcement records further frustrates the sometimes difficult, but well-established guarantees of many states of public access to law enforcement records.

➢ *Litigation:*

- **Jack Gillum and the Associated Press v. Chief, Police Department, Town of Newtown; Police Department, Town of Newtown; and State's Attorney, State of Connecticut, Division of Criminal Justice** (Docket # FIC 2013-031) (September 25, 2013):

  The FOI Commission concluded that the Town of Newtown and the State's Attorney violated the FOI Act by failing to provide the requester with copies of the 9-1-1 calls made by members of the public originating from Sandy Hook Elementary School on December 14, 2012. The State's Attorney contended that the 9-1-1 calls were exempt from disclosure because they are records of child abuse as well as law enforcement records consisting of signed witness statements, identities of witnesses that may be subject to threat or intimidation, and information the disclosure of which would be prejudicial to a prospective law enforcement action. The Commission found that the respondents failed to prove that the records were exempt and ordered disclosure. The final decision was appealed to the Superior Court by the State's Attorney. Subsequently, in a ruling on a motion to stay the Commission's order, the Court rejected the State's Attorney's arguments and ordered the near immediate release of the 9-1-1 calls. See Stephen J. Sedensky III, State's Attorney for the Judicial District of Danbury v. Freedom of Information Commission, et. al., Docket No. HHB-CV-13-6022849-S, Judicial District of New Britain) (November 26, 2013).

- **Maine Today Media Inc. v. State of Maine**
  (2013 ME 100, Maine Supreme Court) (November 14, 2013):

  The Maine Supreme Judicial Court ruled unanimously in favor of releasing the 9-1-1 transcripts (with the names and addresses of the callers redacted) regarding a landlord-tenant altercation that resulted in two teenagers being fatally shot. The Court concluded that the State failed to meet its burden of establishing the reasonable possibility that disclosure of the 9-1-1 transcripts would interfere with law enforcement proceedings as asserted by the State. The 9-1-1 transcripts were found to be public records subject to disclosure pursuant to the Freedom of Access Act.

- **State of Ohio ex. Rel. Cincinnati Enquirer v. Hon. Michael J. Sage**
  (Case No. CA2012-06-122, Court of Appeals of Ohio, Twelfth Appellate District, Butler County 2013-Ohio-2270; 992 N.E.2d 1178) (June 3, 2013):

  The Ohio Court of Appeals ruled that a follow-up call made by a 9-1-1 operator to a residence after the initial 9-1-1 call was disconnected, resulting in the suspect confessing to murder, remained part of the original 9-1-1 call and cannot be withheld under the investigatory records or trial preparation exemptions. The Court looked to an Ohio Supreme Court ruling where the Court held that 9-1-1 recordings do not qualify as trial preparation records or confidential law enforcement investigatory techniques. The court also observed that "the Outbound Call, while placed by [the 9-1-1 operator], constituted a continuation of the First Call so that [the 9-1-1 operator] could obtain additional information to provide an emergency response that was both effective and safe. When the [9-1-1 operator] placed the Outbound Call, she had no idea that a crime had been committed, and had no investigatory intent beyond what was necessary to provide an effective emergency response."

- **Decision of Salt Lake County Council concerning a GRAMA Appeal of Kyle Prall**
  (April 9, 2013)(Utah):

  The Council unanimously voted to uphold a denial by the Salt Lake County Sheriff's Office of a request for approximately 1,400 mug shots taken in January 2013. The request was made under the Utah Government Records Access and Management Act (GRAMA) by an owner of a website that posts booking photos from around the country. The sheriff asserted that because the office owns a copyright in the booking photographs it can deny access to such records. The case has been appealed to the Third District Court.

- ***Legislation:***

  - **Senate Bill 131; Act No. 145,** ***An Act to protect the privacy of owners of, and applicants for, concealed handgun carry licenses; to exempt the name and corresponding zip code of an applicant, licensee, or past licensee from disclosure under the Freedom of Information Act of 1967; to declare an emergency; and for other purposes***. (Arkansas):

The bill exempts from public disclosure the names and zip codes of gun owners with permits to carry concealed weapons and applicants for gun permits. The bill also includes an "emergency clause" stating that the release of such information is an "unwarranted invasion of privacy and threatens the safety and property of the persons identified; and that this act is immediately necessary to prevent harm to citizens and safeguard their property…." The bill was signed into law by the state's lieutenant governor while the governor was out of state. Although the governor had previously stated that he opposed the bill, he decided to let the bill become law without his signature.

- **Senate Bill 1149; Public Act 13-311,** ***An Act limiting the disclosure of certain records of law enforcement agencies and establishing a task force concerning victim privacy under the Freedom of Information Act.*** (Connecticut):

  The Connecticut General Assembly passed, without a public hearing, Senate Bill 1149 in response to the Sandy Hook Elementary School shootings in December 2012. The bill was signed by the Governor on June 5, 2013 and was effective immediately.

  Public Act 13-311 exempts, from disclosure under the CT FOI Act, a photograph, film, video, digital, or other visual image created by a law enforcement agency depicting a homicide victim, to the extent that the record could reasonably be expected to constitute an unwarranted invasion of the victim's or surviving family members' personal privacy. The law also exempts from disclosure under FOIA, (1) law enforcement records, compiled in connection with the detection or investigation of a crime that would disclose the identity of minor witnesses and (2) that portion of an audio tape or other recording where the individual speaking on the recording describes a homicide victim's condition. The audio recording exemption (1) does not extend to 9-1-1 or other calls for assistance made by a member of the public to a law enforcement agency and (2) applies to requests for audio tapes or other recordings made on or before May 7, 2014, only.

  Public Act 13-311 also creates a task force to make recommendations regarding the balance between victim privacy under the FOIA and the public right's right to know. The task force must submit a report on its findings and recommendations to the General Assembly by January 1, 2014.

- **Senate Bill 1160; Public Act 13-3,** ***An Act concerning gun violence prevention and children's safety.*** (Connecticut):

  The bill makes numerous changes in the laws governing (1) firearms, (2) mental health insurance coverage and service provisions, and (3) security for K-12 public schools and institutions of higher education.

  With respect to access to public records, the bill also mandates that the Department of Emergency Services and Public Protection establish and maintain a deadly weapon offender registry of everyone (1) convicted of an offense committed with a deadly weapon or (2) found not guilty by reason of mental disease or defect for such an offense, notwithstanding any pending appeal. The registry must include name, identifying information (physical

description, fingerprints, photograph), home and email addresses, criminal history record (description of offense, date of conviction, date released from incarceration). The registry information, however, will not be a public record for purposes of the FOI Act. The registry information can be disclosed, however, to law enforcement.

- **Chapter 54; H.P. 250-LD 345,** ***An Act to ensure the confidentiality of concealed handgun permit holder personal information*****.** (Maine):

  The bill makes all proceedings relating to the issuance, refusal, suspension or revocation of a permit to carry concealed handguns confidential. In addition, information contained in the permit itself is confidential, except for the municipality of residence; the date the permit was issued; and the date the permit expires. The bill was emergency signed by the Governor.

- **Senate Bill 281; Chapter 427,** ***Firearm Safety Act of 2013*****.** (Maryland):

  The bill, which was signed by the governor, provides, in part, that registration data provided on a firearm application, including, but not limited to the name, address, social security number, place and date of birth, height, weight, race, eye and hair color, signature, driver's license and occupation, is not open to public inspection.

- **House Bill 4011,** ***A Bill to amend 1976 PA 442, entitled "Freedom of Information act," by amending section 13 (MCL 15.243), as amended by 2006 PA 482*****.** (Michigan):

  The bill proposes to exempt from disclosure an audio recording of an emergency telephone call made to a 9-1-1 system unless the public interest in disclosure outweighs the public interest in nondisclosure in a particular instance. The exemption would not apply to written records, transcripts, or other written reports relating to the emergency telephone call. In addition, this exemption would not apply to audio recordings when: (1) the caller whose voice is on the audio recording requested a copy of the recording (or, if the caller was deceased or incapacitated, the caller's legal representative). Such a request would have to be accompanied by a signed affidavit attesting to the identity of the caller (or legal representative) and attesting that the recording was relevant to an investigation of a legal matter arising from the circumstances leading up to the emergency telephone call; (2) the request for disclosure was from a law enforcement agency conducting an investigation related to the emergency telephone call; and (3) a court orders the release of the audio recording.

  There has been no action on the bill since January 2013 when it was printed and provided to House members.

- **House Bill 149,** ***An Act to create section 25-61-11.1, Mississippi Code of 1972, to exempt information regarding persons with a weapon permit from the Mississippi Public Records Act of 1983; and for related purposes.*** (Mississippi):

The bill exempts from public disclosure the name, home address, and any telephone number or other private information of any person who possesses a weapon permit. The bill died in committee.

- **LB 293*, An Act relating to firearms; to prohibit disclosure of any applicant or permit holder information regarding firearms registration, possession, sale, or use as prescribed.*** (Nebraska):

  The bill, as introduced, provides that "[a]ny information obtained by the Nebraska State Patrol, the Department of Motor Vehicles, or any other state or federal department or agency regarding firearm registration, sale, or use, whether obtained for purposes of application or issued as a permit or license, is confidential and shall not be considered a public record…."

  No action has been taken on the bill since March 19, 2013.

- **Assembly No. 4083*, An Act requiring the public release of photographs of arrestees and amending P.L. 1963, c. 73.*** (New Jersey):

  The proposal requires the public release of photographs of individuals taken into custody under the State's open public records law. The bill is currently in the Assembly Law and Public Safety Committee.

- ***NY Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013 (*Senate Bill 2230-2013)** (New York):

  The act allows, in relevant part, gun owners to opt out of having their personal information disclosed under the state's Freedom of Information Law (FOIL) based on the following grounds: (1) the applicant's life or safety may be endangered by disclosure (*e.g.*, he or she is an active or retired police officer, peace officer, probation officer, parole officer or correction officer; is a protected person under a currently valid order of protection; is or was a witness in a criminal proceeding involving a criminal charge; is participating or previously participated as a juror in a criminal proceeding, or is or was a member of a grand jury; or is a spouse, domestic partner or household member of the applicants identified herein); (2) the applicant has reason to believe his or her life or safety may be endangered by disclosure due to reasons stated by the applicant; (3) the applicant has reason to believe he or she may be subject to unwarranted harassment upon disclosure of such information.

  It also creates centralized government databases that record permit holder information, all gun and ammunition sales and a list of mentally ill gun owners who have made threats of harming others. Under this bill, the newly created databases are exempt from disclosure under FOIL.

- **Senate Bill 60*, To amend section 2923.129 of the Revised Code to eliminate the journalist access exception from the general prohibition on the release of confidential records relative to the issuance, renewal, suspension, or revocation of a concealed handgun license.*** (Ohio):

The bill repeals the "journalist access exception" to the general prohibition on the release of confidential records relative to the issuance, renewal, suspension, or revocation of a concealed handgun license.

The "journalist access exception" in existing law specifies that a "journalist" (statutorily defined) may submit to a sheriff a signed, written request to view the name, county of residence, and date of birth of each person to whom the sheriff issued, renewed or issued a replacement for a license, or for whom the sheriff has suspended or revoked a license. The request must include the journalist's name and title, include the name and address of the journalist's employer, and state that disclosure of the information sought would be in the public interest. If the request is granted and access provided, the journalist may not copy the name, county of residence or date of birth of each person to or for whom the sheriff has issued, suspended, or revoked a license.

As of November 15, 2013, the bill was still in committee.

- **House Bill 1109*, An Act to provide that criminal booking photos and police logs are open records.*** (South Dakota):

  House Bill 1109 would have made mug shots and police logs public records. On January 23, 2013, the bill was tabled.

- **Assembly No. 4083*, An Act requiring the public release of photographs of arrestees and amending P.L.1963, c.73***. (New Jersey):

  The proposal clarifies that all booking photographs taken after an arrest are to be available to the public under the State's open public records law. The last recorded action was on May 6, 2013, when it was referred to the Assembly Law and Public Safety Committee.

- **House Bill 408*, Criminal Suspect Photographs*** (Utah):

  The bill enacts a provision relating to photographs of criminal suspects. Specifically, it prohibits county sheriffs from providing a copy of a booking photograph in any format to a person *if* the photograph will be placed in a publication or posted on a website that requires a payment in order to remove the photograph; requires a person requesting a copy of a booking photograph to sign a statement affirming that the photograph will not be placed in a publication or posted on a website that requires payment in order to remove the photograph; and provides a criminal penalty for a false statement. The bill was signed by the Governor on April 1, 2013.

❖ Public Disclosure by University & Affiliated Entities

The extent to which information held by public institutions of higher learning and their affiliated entities can be shielded from disclosure under public records laws continues to be a hotly contested issue before many tribunals and legislative bodies around the country. In most cases, there is no dispute as to whether the records at issue are public. In recent years, however, public institutions have become the subject of heightened levels of public scrutiny due, in part, to commercial endeavors and economic successes that are sometimes carried out by private entities on behalf of public universities. Efforts to manage the issue of transparency in public institutions and their affiliated entities are illustrated below:

- ***Litigation:***

  - **Ryan Bagwell v. Pennsylvania Department of Education**
    (The Commonwealth Court of Pennsylvania, No. 739 C.D. 2011, 76 A.3d 81; 2013 Pa. Commw. LEXIS 267) (July 19, 2013):

    The Pennsylvania Commonwealth Court reversed a decision by the Office of Open Records dismissing an appeal where the requester sought access to records relating to correspondence received by the Secretary of Education concerning Pennsylvania State University (PSU). The Office of Open Records reasoned that it lacked jurisdiction over the appeal because the requester sought records of PSU, which is not a defined agency under the Right-to-Know Law. The Court concluded, however, that the Penn State-related correspondence were public records because the Secretary of Education served as an *ex officio* member on the Penn State Board of Trustees in his official capacity. "Pursuant to a statutory requirement, the Secretary serves on behalf of the Department when serving on the PSU Board. Thus, the records the Secretary receives as a Board member are received by the Department pursuant to its statutory function as supporter and influencer of education at state-related institutions. Because the records are received by a Commonwealth agency to enable it to perform its statutory governmental function, they qualify as 'records' under the RTKL."

    The case was remanded back to the Office of Open Records to address whether the records are exempt from disclosure for reasons other than Penn State's non-agency status.

- ***Legislation:***

  - **Senate Bill 204; *An Act requiring marketing contracts involving public institutions of higher education to be subject to disclosure under the Freedom of Information Act.***
    (Connecticut):

    Senate Bill 204 would increase the transparency of marketing contracts made on behalf of public institutions of higher learning. The CT FOI Commission argued that the bill would

close an unfortunate loophole that now shields from public scrutiny some deals that are struck between private organizations and agents of Connecticut public universities. Senate Bill 204 never made it out of committee.

- **House Bill 6605*, An Act concerning transparency of expenses.*** (Connecticut):
  House Bill 6605 would increase transparency in public institutions of higher education by prohibiting unvouchered expenses. Specifically, the proposal required each constituent unit of the state system of public higher education to document every expenditure made by such constituent unit at the time the expenditure is made. The proposal also required that documentation of such expenditures be made available for public inspection upon request in accordance with the FOI Act. The bill made it out of committee with unanimous support, but died on the House calendar.

- **Ch. SL 2013-97; House Bill 142*, An Act to provide public access to certain information maintained by campus police agencies affiliated with private, nonprofit institutions of higher education.*** (North Carolina):
  The bill allows public access to the following information, with exceptions, maintained by campus police agencies affiliated with private, nonprofit institutions of higher education: contents of an arrest and incident report; circumstances surrounding an arrest; contents of emergency calls to campus police agencies; communications between employees of campus police agencies pertaining to arrests and investigations that are broadcast over public airways;
  identity of complaining witnesses; and the daily log of crimes reported to campus policy agencies that are required to be made available under the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

  The bill was signed into law on June 12, 2013.

  Notably, the bill was approved months after the North Carolina Supreme Court issued a divided 3-3 opinion affirming a state Court of Appeals decision addressing whether the state open records laws apply to campus police departments at private universities. The lower court ruled that campus police departments at private universities are not subject to the North Carolina Public Records Act, and dismissed an appeal alleging that the campus police department at Elon University, a private university, improperly denied complete access to a 2010 incident report surrounding a student's arrest. See Nick Ochsner v. Elon University and North Carolina Attorney General Roy Cooper, 2013 N.C. LEXIS 266, 737 S.E.2d 737 (No. 299PA12, Supreme Court of North Carolina, March 2013), affirming Nick Ochsner v. Elon University and North Carolina Attorney General Roy Cooper, 2012 N.C. App. Lexis 721, 725 S.E.2d 914 (2012).

- **House Bill 61*, An Act providing for access to public information, for a designated open-records officer in each Commonwealth agency, local agency, judicial agency and legislative agency, for procedure, for appeal of agency determination, for judicial review and for the Office of Open Records; imposing penalties; providing for reporting by State-related institutions; requiring the posting of certain State contract information on the***

Internet; and making related repeals," in preliminary provisions, further providing for definitions; and repealing provisions relating to State-related institutions. (Pennsylvania):

As proposed, the bill amends the Right to Know Law to apply the access requirements currently imposed on state-owned universities to state-related institutions. Under the bill, the records of state-related institutions (*i.e.*, Pennsylvania State University, University of Pittsburgh, Temple University and Lincoln University), which receive much of their funding from the state, will be presumed to be public records and treated in a manner similar to the records of many other state and local agencies. The bill was approved by the House Committee on State Government in April 2013, but was tabled in June 2013.

- **Chapter 2; House Bill 223,** ***An Act relating to public records; authorizing denial of inspection of records of applications for president of institutions of higher education and associated records as specified; specifying applicability; and providing for an effective date.*** (Wyoming):

  House Bill 223 authorizes the University of Wyoming and the state's community colleges to deny the right of inspection to records relating to the search and selection of presidents of the institutions, if the records could be used to identify a candidate. The bill also specifies that the proposal is applicable to any search being conducted at the time the bill became effective, regardless of whether the records were submitted prior to the effective date of the bill. Notably, the bill was introduced a day after a district court ruled that the University of Wyoming must disclose the names of finalists in its search for a new University president. See Cheyenne Newspapers, Inc., et. al. v. The University of Wyoming and its Board of Trustees, et, al., Docket # 32631 (January 2013).

  The bill became law without the Governor's signature.

❖ Privileges & Immunities to Public Disclosure Laws

While the spirit and letter of most freedom of information laws presumes that the public is entitled to the fullest practicable information regarding the decision-making processes of government, claims of privilege and immunity from open records laws by public bodies and officials continue to frustrate the public's ability to exercise oversight and control over government actions. The policy objective of the "executive" privilege, which is commonly invoked by public officials as justification for refusing to produce public documents, recognizes the importance of protecting the integrity of agency decision-making processes by encouraging candid discussions of policy and communication among public officials during deliberative processes. There is a fine balance between upholding the right to access public information and protecting the "deliberative process" involved in governmental decision-making. The tension between the disclosure requirements of freedom of information laws and the importance of protecting the integrity of agency decision-making processes is further illustrated in the cases and legislative acts, below:

- ***Litigation:***

  - **Office of the Governor v. Mark Scolforo**
    (The Pennsylvania Commonwealth Court, 65 A.3d 1095; 2013 Pa. Commw. LEXIS 120) (April 23, 2013)

    A court of appeals ruled that, although the Office of Open Records erred in finding that calendar entries consisting of descriptions of meetings between the Governor and others did not qualify for the deliberative process privilege, the Governor's Office failed to prove that the calendar entries at issue are exempt from disclosure and therefore must be disclosed to the requester.

  - **Letter from James E. Schliessmann, Senior Assistant Attorney General, Commonwealth of Virginia** (May 15, 2013):

    In a written response to a request for records relating to the Virginia Attorney General Ken Cuccinelli's involvement with a company that allegedly provided stock to Cuccinelli, the Attorney General's office declined to respond to the request asserting that since it is an independent constitutional office, it is not subject to the state's freedom of information laws. The Attorney General stated that "the Attorney General is an executive constitutional officer who is separate and apart from the executive constitutional office of the Governor" and that "[g]iven the constitutional structure and the statutory definitions, the premise of [the] request is inapplicable to this Office."

  - **Freedom Foundation, a Washington nonprofit corporation v. Christine O. Gregoire, in her official capacity as governor of the state of Washington**
    (Supreme Court of Washington, No. 86384-9, 2013 Wash. LEXIS 858) (October 17, 2013):

The Supreme Court of Washington ruled that the governor's office may invoke a gubernatorial communications privilege in response to a Public Records request and may withhold records absent a sufficient showing by the requester. Upholding a trial court decision, the Supreme Court found that the gubernatorial communications privilege applied to the records sought because they contained communications concerning policy matters and were authored or solicited and received by the governor or senior advisors who had broad discretion over policy matters. It further found that the requester failed to show that the requester's need for the materials outweighed the public interests served by protecting the chief executive's access to candid advice for purposes of formulating policy.

- **Center for Media & Democracy v. Leah Vukmir**
  (Case No. 13-CV-1875, Wisconsin Circuit Court, Branch 11, Dane County):

  In June 2013, the Center for Media and Democracy filed suit against Senator Leah Vukmir for her failure to release records relating to her involvement with the American Legislative Exchange Council. ALEC is an organization through which state legislators meet with corporate representatives to adopt "model" legislation, and ALEC advocates for the introduction and passage of that model legislation in Wisconsin and throughout the country. The Senator, with the assistance of the state Attorney General, is claiming legislative immunity and asserting that a state legislator cannot be held accountable for refusing to disclose public records while the Legislature is in session and that the session extends for a legislator's entire term.

  A state constitutional provision gives legislators limited immunity from arrest or civil process "during the session of the legislature." Today, the legislature remains in session continuously, even during recess, for a full two years. Arguably, the Senator's position would close off any possibility of enforcing any civil action against a state legislator.

- ***Legislation:***

  - **House Bill 19*, An Act relative to public records; to provide for the application of the laws relative to public records to the records of the governor and the office of the governor; to provide for the transfer of the records to state archives; to provide certain exceptions; and to provide for related matters.*** (Louisiana):

    The bill proposed to repeal the "deliberative process" exemption that shields records created and maintained by the governor's office. Under the proposal, all records of the governor's office would be subject to public records laws, except for certain records relating to intraoffice communications between the governor and his staff; the schedule of the governor and his family that contains security details; and records concerning a meeting or event that the governor attends and transportation related thereto. The privilege from disclosure for intraoffice communications would lapse ten years after the creation of the record to which the privilege is applicable. Records relating to the governor's schedule, meetings and events would be confidential for no longer than seven days after the scheduled meeting or event.

The bill was denied and never made it out of committee.

- **House Bill 2846,** ***An Act to improve access to public records.*** (Massachusetts):

  Section 8 of the bill establishes "a special commission to study the availability to the general public of information concerning the legislative operations of the general court…. The commission shall examine the procedures and practices of the Senate and the House of Representatives and their committees with regard to matters including, but not limited to: scheduling and notice of hearings and legislative sessions; management of the agenda, scope and substance of committee hearings, including the number of bills heard at each hearing; publication and availability of records concerning committee proceedings, including public hearing agendas, public testimony, and committee votes; rules and scheduling requirements for committee reports; content of committee reports, such as summary, explanatory, and analytical materials; contemporaneous and permanent online access to open sessions of the house and senate; publication of records concerning house and senate sessions, including but not limited to roll call votes; publication of proposed amendments to legislation and votes thereon; and the practicability of applying the provisions of the public records and open meetings laws to the General Court either by statute or by rule."

  No action has been taken since an October 15, 2013 hearing by the committee on State Administration and Regulatory Oversight.

- **House Bill 3227,** ***A Bill to amend the Code of Laws of South Carolina, 1976, by adding Section 30-4-75 so as to provide that meetings of the governor with his appointed agency or department heads together with any other public officials or invited public employees must be open to the public in the same manner and under the same conditions that meetings of public bodies must be open to the public under the Freedom of Information Act.*** (South Carolina):

  The bill specifically requires that: "Meetings of the Governor with agency or department heads he appoints together with any other public official or employee invited to attend must be open to the public in the same manner and under the same conditions as meetings of public bodies…." No action appears to have been taken on the bill since it was referred to the Committee on Judiciary on January 8, 2013.

- **House Bill 3641,** ***A Bill to amend Section 30-4-40, as amended, Code of Laws of South Carolina, 1976, relating to exemptions for certain work of the members of the general assembly and their staff from the Freedom of Information Act, so as to provide these limitations apply only to work pertaining to the development, drafting, or evaluation of legislation that has not been introduced or an amendment to this legislation that has not been proposed to a legislative committee or legislative body; to clarify that the provision does not limit or restrict public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered public information and not otherwise exempt from disclosure by the act; and to exempt written or electronic correspondence sent to an individual public official by a constituent of that public official.*** (South Carolina):

The bill proposes to exempt from disclosure work pertaining to the development, drafting, or evaluation of legislation that has not been introduced or an amendment to legislation that has not been proposed to a legislative committee or legislative body; to clarify that this provision does not limit or restrict public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered public information and not otherwise exempt from disclosure by the Freedom of Information Act. The proposal also exempts written or electronic correspondence sent to an individual public official by a constituent of that public official.

No action appears to have been taken on the bill since it was referred to the Committee on Judiciary on February 27, 2013.

- **Chapter 199; House Bill 1639,** ***An Act to amend and reenact §2.2-3705.7 of the Code of Virginia, relating to the Virginia Freedom of Information Act; correspondence of legislative assistants exempt.*** (Virginia):

  The bill clarifies that the working papers and correspondence of the legislative aides of members of the General Assembly are not subject to the mandatory disclosure provisions of the FOI Act when the aides are working on behalf of the member.

  The bill was approved by the Governor on March 12, 2013.

❖ Proactive Disclosure

The following section provides legislative actions and notable efforts to increase transparency by making information more readily accessible to the public:

- ***Online Access to Public Information:***

  - **Connecticut Executive Order No. 38:**

    On December 3, 2013, the Governor, State Comptroller and Commissioner of the Department of Economic and Community Development (DECD) signed Executive Order No. 38 to make information regarding certain economic assistance and tax credits used to recruit or retain businesses more accessible to Connecticut residents. Executive Order 38 directs DECD, in collaboration with the Department of Revenue Services (DRS) and the Department of Administrative Services' Bureau of Enterprise Systems and Technology, to establish and maintain a searchable electronic database(s) on DECD's website containing information regarding certain state economic assistance and tax credits used to recruit businesses and encourage job creation. The DRS Commissioner will also be required to provide the DECD Commissioner with a report indicating the aggregate amounts of credits claimed in the previous fiscal year as well as those that are carried forward to offset future tax liabilities. As provided by DRS, DECD will also post additional information concerning the size, type, and location of businesses claiming tax credits. This executive order follows on the heels of the unsuccessful legislative proposal in House bill 6566, described below.

  - **New York Data Transparency Website**:

    In March 2013, the Governor of New York launched "open.ny.gov," a new and comprehensive state data transparency website that provides user-friendly, one-stop access to data from New York State agencies, localities, and the federal government. The website allows users to search for information regarding budgets, crime data, economic development, education, energy and environment, government finance, health, human services, public safety, recreation and transportation.

- ***Legislation:***

  - **House Bill 6566,** ***An Act concerning transparency in economic assistance programs.*** (Connecticut):

    Raised Bill 6566 proposed to increase the public's access to information about our state's economic development efforts, budget and tax structure. The proposal required that the names of those receiving economic assistance from the state, in the form of a tax credit or abatement, be posted on a publicly accessible, searchable online database. Additional information such as the amount of state funds expended, the type of, and statutory authority for, such economic assistance, a description of the specific purpose for the assistance, the number of jobs created or retained, and

analysis of net direct and indirect state economic benefit, would also be available. With this information, a member of the public, or a policy maker, could much more easily evaluate the success (or failure) of a particular economic development program or expenditure.

Subsequent to the public hearing, the proposal was amended to seemingly address some of the concerns by various parties, including the CT Business and Industry Association, about disclosure of "proprietary information." The substitute bill reduced the amount of information required to be proactively disclosed. The bill, as amended, appeared to have had overwhelming support from the public, open government advocates and legislators, and was unanimously adopted by the House. However, it was never raised by the Senate.

- **Chapter No. 2013-42, Senate Bill 406,** ***An Act relating to economic development*** (short title) (Florida):

  The bill requires, in part, that the Department of Economic Opportunity publish on a website specified information concerning state investment in economic development programs; work with the Office of Economic and Demographic Research to provide a description of specified methodology; and publish certain confidential information pertaining to participant businesses upon expiration of a specified confidentiality period. The information must be provided in a format accessible to the public which enables users to search for and sort specific data and to easily view and retrieve all data at once. The bill was approved by the Governor in May 2013.

- **Chapter No. 2013-54, House Bill 5401,** ***An Act relating to transparency in government spending*** (short title) (Florida):

  The bill requires, in part, that the Executive Office of the Governor (EOG) establish a single website providing access to other websites; requires the EOG to establish a website providing information about fiscal planning for the state; requires the Department of Management Services to maintain a website that provides current information on state employees and officers; and requires the Chief Financial Officer (CFO) to establish and maintain a secure contract tracking system. Notably, even though the bill seeks to provide more access to government spending, it also requires that exempt and confidential information be redacted from contracts and procurement documents posted on the system; and authorizes the CFO to regulate and prohibit posting of certain information that could facilitate identity theft or cause harm.

  The bill was approved by the Governor in May 2013.

- **LB 521,** ***An Act relating to government; to amend section 18-131, Reissue Revised Statutes of Nebraska, and section 84-1411, Revised Statutes Cumulative Supplement, 2012; to require cities and villages to create and maintain web sites and public ordinances on web sites as prescribed; to require public bodies to publish notices and agendas of meetings on web sites as prescribed; and to repeal the original sections.*** (Nebraska):

The bill requires cities and villages and other public bodies that maintain websites to publish all of its ordinances and meeting notices and agendas. No action since January 2013.

❖ Also Noteworthy

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

➢ ***Restrictions on Access to Pending FOI Appeals:***

- **Senate Bill 444,** ***An Act amending the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, further providing for definitions; providing for Pennsylvania Interscholastic Athletic Association; further providing for requests; providing for inmate access; and further providing for access, for requests, for written requests, for production of certain records, for exceptions for public records, for agency response in general, for filing of appeal, for appeals officers, for specified agencies, for fee limitations and for Office of Open Records*** (Pennsylvania):
  The bill requires, in part, that the Office of Open Records "abstain from public comment about a pending proceeding before the office." Under the bill, the Office's executive director would be prohibited from speaking publicly about active cases. It has been reported in the media that this "gag-order provision" is aimed at the current executive director's vigorous advocacy for transparency. No action appears to have been taken since April 26, 2013, when the bill was referred to the Committee on State Government.

➢ ***Optional Compliance with Public Records Act:***

- **Assembly Bill 76,** ***State Government & Supplement to 2013 Budget*** **(**California):

  Under Assembly Bill 76, local public agencies would have discretion to comply with certain delineated provisions. For example, compliance with the following provisions would become optional "best practices": providing a requester with notice of the disclosure determination and the reasons for the determination within 10 days from receipt of a records request; and determining what format of electronic data will be provided in response to a request. Section 118 of the bill appears to set forth the justification for affording such discretion: "The interest being protected is the strong interest of the Legislature in allowing, to the extent possible, local agencies to control the manner in which they perform their public duties, including, but not limited to, the manner in which they comply with the spirit and purpose of the California Public Records Act."

  The bill was vetoed by the Governor, asserting that "[t]his bill is unnecessary as I am signing a similar measure, Senate Bill 71. A Constitutional Amendment [*i.e.*, SCA 3] has also been introduced that will preserve the existing Constitutional and statutory requirements of the California Public Records Act."

- ***Constitutional Right to Access Public Records:***

  - ***Senate Constitutional Amendment No. 3, A resolution to propose to the people of the State of California an amendment to the Constitution of the State, by amending Section 3 of Article I and Section 6 of Article XIII B thereof, relating to public information*** (California):

    On September 10, 2013, the California Legislature passed a constitutional amendment that would preserve the 1968 California Public Records Act in the state's constitution, clarifying that local agencies are required to adhere to the California Public Records Act and Brown Act, and that the state will no longer reimburse the associated costs of compliance. The proposed amendment will appear on the June 2014 ballot. Senator Mark Leno, who co-authored SCA 3, has expressed that "[i]f approved by voters, SCA 3 would permanently uphold and protect a person's right to inspect public records and attend public meetings, which are principles we all respect and treasure."

- ***Non-Citizen Restrictions on Access to Public Records:***

  - **Mark J. McBurney v. Nathaniel Young**
    (U.S. Supreme Court, No. 12-17, 133 S. Ct. 1709 (April 29, 2013):

    The U.S. Supreme Court ruled unanimously that Virginia's public records laws favoring state residents' access to government records is constitutional. The Court rejected the sweeping claim, among others, of two non-residents that the Virginia FOI Act violates the Privileges and Immunities Clause and the dormant Commerce Clause because it denied them the right to access public information on equal terms with Commonwealth citizens. The Court ruled that the state law "did not abridge any constitutionally protected privilege or immunity" because access to public records is not a "fundamental" privilege or immunity of citizenship. In addition, the Court concluded that Virginia's FOI Act "neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides its own citizens copies - which would not otherwise exist - of state records."

- ***Waiver of Exemption:***

  - **Michael Dumke v. City of Chicago**
    (2013 IL App (1st) 121668; 994 N.E.2d 573 (June 28, 2013):

    In an action seeking disclosure of a consultant's report prepared for Chicago's police department, the Appellate Court held that the Mayor of Chicago waived the "deliberative process" exemption from disclosure by publicly citing and identifying the report in a press conference and press release.

- ***Right to Public Comment:***

  - **Chapter No. 2013-227, Senate Bill 50,** ***An Act relating to public meetings*** (short title) (Florida):

    The bill requires, in part, that a member of the public be given a reasonable opportunity to be heard, with certain exceptions, by a board or commission before it takes official action on a proposition. The bill was approved by the Governor.