Chapter 1

Portals to Government: What Is a Public Record?

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> *A fundamental premise of American democratic theory is that government exists to serve the people. . . . Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance.*[1]

While a common law right of access to government records has long been recognized in many U.S. jurisdictions,[2] those rights were often limited and subject to judicial discretion. As stated by the Tennessee Supreme Court, "So while the right [of access to public documents] is, in theory, absolute, yet it is in practice so limited by the remedy necessary for its enforcement [mandamus] as that it can be denominated only a 'qualified right.'"[3] In addition, common law rights of access were sometimes recognized only when the requester could show some particular interest in the material sought[4] or some public benefit that overrode any government interest in refusing access.[5] The limitations and uncertainly surrounding the common law right of access left many—if not most—government records beyond the reach of the public. While a common law right of access may still exist in at least in some jurisdictions, that right is generally restricted to documents relating to litigation.[6]

Broad rights of public access to government records became available only upon the enactment of public records statutes. Wisconsin adopted what was likely the first state public records law in 1849.[7] Between that date and 1940, eleven other states followed suit.[8] All fifty states and the District of Columbia now have

codified a public right of access to government information,[9] with six states also guaranteeing that right through constitutional provisions.[10]

Those state legislatures that have included specific intent provisions describe the purposes for their public records statutes in markedly similar ways. California's and Arkansas's statutes are representative, including declarations that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"[11] and "[i]t is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy."[12] Moreover, many state public records statutes include a policy statement that public records are to be accessible to the public,[13] with some also expressing the intent that any doubt as to access should be resolved in favor of openness.[14]

Despite these similar statements of intent and purpose seemingly favoring public access, state public records statutes and the constructions given them by state courts vary significantly. This chapter examines differing treatments of two of the most fundamental issues addressed in public records statutes: (1) Which government entities are subject to the statute? and (2) What are public records? Each state's approach to these basic considerations, as well as the number and extent of exemptions superimposed by either specific statute or common law, determines how wide a portal to government the public records law provides.[15]

Which Government Entities Are Subject to the Public Records Statute?

Every state public records statute includes a description of the government entities whose records are subject to the law. In every instance, the statutes comprehensively capture the records of local government entities, with some states including a specific definition of "local government" for purposes of defining

the records subject to the law. Pennsylvania, for example, defines "local agency" as:

> (1) Any political subdivision, intermediate unit, charter school, cyber charter school, or vocational school.
>
> (2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission, or similar governmental entity.[16]

Other states encompass local agency records by defining "public body" or "public agency" to include various iterations of local government, such as South Carolina's inclusion of "any . . . subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts,"[17] or simply by adding the all-encompassing phrase "any political subdivision of the State."[18]

While the treatment of local government entities is fairly uniform, the treatment of state-level entities is not. For example, in Utah, the records of all three branches of state government are considered public records subject to that state's statute,[19] while in Texas, executive and legislative materials are public records, but judicial materials are not.[20] Tennessee includes executive and judicial records but not legislative records.[21] The Pennsylvania and New York public records statutes apply only to the executive branch.[22]

Some state statutes include carve-outs that exclude particular offices or functions from the reach of the statute. Delaware, for example, includes records of the legislature itself but excludes the records of legislative caucuses.[23] Connecticut includes records relating to the administrative functions of its judicial branch but excludes all other records of the judicial branch,[24] while Kansas includes the records of judicial staff but excludes those of judges themselves.[25] Michigan excludes the records of the governor and lieutenant governor while including other executive branch records.[26] Mississippi includes all three branches of state government but specifically excludes the records of individual government officials and employees.[27]

Even in those states where the statutory language explicitly states that a branch of government is included, courts have sometimes ruled otherwise. For example, Kentucky's statute defines "public agency" to include "[e]very state or local court or judicial agency. . . ."[28] The state supreme court acknowledged this provision but declined to apply it, stating that "with respect to records that belong to the courts and are a part of their ongoing work, the only conclusion consistent with the constitutional right of control over their own records is that the public policy must be articulated by the courts themselves."[29] Nebraska's supreme court took a somewhat different approach, recognizing that separation of powers demands that one branch of government may not "significantly impair the ability of any other in its performance of its essential functions," but determining that excluding all judicial records from the reach of that state's public records statute was inappropriate.[30]

Indiana's supreme court also relied upon the separation of powers doctrine, holding that that state's courts are without authority to enforce that state's public records statute with respect to legislative records.[31] Thus, while legislative records may technically be subject to the public records statute, there may be no means of effectuating access to those records. Kentucky's supreme court reached the opposite result, finding that "[i]nterpretation of a statute detailing review of a legislative records request is in no way an encroachment on the legislative function, it is a quintessentially judicial function."[32] Florida's supreme court agreed with Kentucky in its separation of powers analysis but nonetheless ruled that Florida's public records law does not apply to the legislature. Even though the term "agency" is defined to include a seemingly exhaustive list of government entities culminating with "any . . . other separate unit of government created or established by law . . . ,"[33] the court concluded that "[i]n common usage, 'agency' is not understood to include a basic legislative branch of government."

What Is a Public Record?

Once the government entities subject to a state's public records law are identified, the question then becomes: What information

and materials associated with those entities are considered a public record? The phrase "public record," while not used in every jurisdiction, is the most common label assigned to that government information or material subject to state public records laws. For that reason, it is the term that will be used here unless referring to a specific state's law.

Each state statute includes myriad exceptions—sometimes couched in terms of specific carve-outs from the defined term[34] and, in other instances, still categorized as public records but excepted from the requirement that they be made publicly accessible,[35] and those exclusions and exemptions may ultimately result in a lack of access. However, the first question entertained in virtually all public records disputes is whether the materials requested fall within the specific definition set out in a state's statute. The criteria used to define public records usually fall within three general categories: (1) the content of, or purpose for, the records; (2) the connection between the records and government; and (3) the possible physical forms of the records, either as they currently exist or as they may be customized. Most state statutes incorporate some version of all three of these elements. However, as discussed in the next section, their reach varies significantly due to differences in both the statutes and judicial construction.

Public Records Defined by Content or Purpose

Most state statutes defining public records limit the scope of the term to materials or information that either relates to government business or reflects some public function. The phrases used to describe this limitation vary from Arkansas's "a record of the performance or lack of performance of official functions that are or should be carried out [by government] . . ."[36] to Connecticut's reference to "data or information relating to the conduct of the public's business . . . ."[37] Louisiana couples this government business factor with the government entity's legal authority, defining public records as materials used, received, or maintained in connection with government business conducted "under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any

money received or paid by or under the authority of the constitution or laws of this state. . . .[38] In contrast, New Mexico's statute expressly states that "whether or not the records are required by law to be created or maintained" is irrelevant to a determination of whether materials are public records.[39] Delaware expansively includes "information of any kind . . . relating in any way to public business, or in any way of public interest, or in any way related to public purposes. . . ."[40]

The issue of whether material relates to government business or was made or received pursuant to law—and is therefore public record—has confronted courts in virtually all states that include such factors in their public records definition. In most instances, particularly where the statutory definition uses general phrases such as "relates to government business," state courts have taken a broad view. As expressed in *Dunn v. New Mexico Department of Game and Fish*, "[g]iving the words their ordinary meaning, we conclude that the IPRA's [New Mexico's Inspection of Public Records Act] definition of 'relat[ing] to public business' means simply that the requested records are connected to government affairs or official actions by or on behalf of public bodies."[41]

A different result was reached in *State ex rel. Community Press v. City of Blue Ash*, where an Ohio court had under review a city's refusal to provide copies of assessments prepared by a consultant hired to provide professional coaching to certain city employees. Each employee—and no one else with the city—received a copy of his or her own assessment. The court concluded that the assessments were not public records because:

> [t]hey do not document: 1) the organization of the city; 2) the functions of the city; 3) the policies of the city; 4) the decisions of the city; 5) the procedures of the city; 6) the operations of the city; or 7) other activities of the city. And they are not something "a government unit utilizes to carry out its duties and responsibilities."[42]

The court recognized that the assessment might be used by the city employees to improve their job performance but deemed

that an insufficient connection to city government's functions to make the assessments public records.

The requirement that materials must be connected to government business has been narrowly construed in some instances. For example, in *Farrimond v. State ex rel. Fisher*, the Oklahoma Supreme Court was faced with the issue of whether certain insurance company records in the state insurance commissioner's possession were public records when the commissioner had custody only as a result of a court order in receivership. Oklahoma defines public records to encompasses materials that come into government custody "in connection with the transaction of public business, the expenditure of public funds, or the administering of public property."[43] The court concluded that, as a receiver, the insurance commissioner functioned as a representative of the court rather than as the head of a state agency. As a consequence, the court concluded that the record did not fall under the state's definition of a government record.[44]

A similarly narrow approach was taken in *Coronado Police Officers Association v. Carroll*. A police officers' association requested access to a database maintained by the public defender's office. While acknowledging the intent stated in California's law to include every conceivable record, the *Coronado Police Officers* court concluded that the representation of indigents in criminal proceedings was essentially a private function. Because the core function of the database related to such representation, the database was not related to conducting public business and consequently was not a public record.[45]

The requirement that, to be considered public records, materials must relate to public business applies to digital records in the same manner as it does to traditional hard copies. Courts in those states where the definition of public record requires some connection to government business have applied that criterion to distinguish between electronic communications and social media posts that are considered public records and those that are not. In most instances, it makes no difference whether the information is lodged on a government-owned server or on a personal device.

For example, in *Service Employees International Union Local v. University of Washington*, the Washington Supreme Court took under consideration a public records request for the e-mail of several university faculty members. The e-mail in question was stored on university-owned servers, and, therefore, there was no question that the material was retained by a government entity. Reversing a lower court summary judgment enjoining the release of the e-mail, the court concluded that "[f]or an email 'to contain[ ] information relating to the conduct of government or the performance of any government or proprietary function,' . . . it need not have been sent or received within the 'scope of employment,' as that phrase is defined in *Nissen*, . . ."[46] Thus, those faculty e-mails that related to university business would be public record, regardless of whether the faculty members were acting within the scope of their employment when the e-mail was sent or received.

This same axiom was expressed by a Florida court in *Times Publishing Company v. City of Clearwater*. There, the court had before it a petition from a newspaper seeking the release of all e-mail between two city employees using city-owned computers. The city allowed the two employees to sort through their e-mail, separating personal e-mails from those the employees felt related to their government employment. The e-mails identified as city related were provided to the newspaper—the other e-mails were not. The court rejected the newspaper's arguments that all e-mail on government-owned computers should be considered public, holding instead that "'private' or 'personal' email falls outside the current definition of public records . . . [because it] is not 'made or received pursuant to law or ordinance' . . . [or] 'in connection with the official business' of the City. . . ."[47]

Public Records Defined by Government Involvement

The second criterion included in most state definitions of public records is the requirement that government or government actors have some involvement with the records, whether it be creation, receipt, use, or possession. In some instances, the laundry list of qualifying types of government involvement is extensive. For

example, Delaware defines public records as those materials that are "owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected or received"[48] by a government entity. In contrast, Hawaii references only a single touchpoint with government—that the covered information be maintained by an agency[49]—and Iowa defines public records as information "of or belonging to" a government body.[50] In other states, materials are public record if they are made for or used by government[51] or if government received or is entitled to receive a copy.[52]

The variation in types of government involvement is critical to the determination of whether a document is subject to a state's public records law. For example, as stated above, Hawaii's definition focuses on whether a government entity maintains the materials at issue. In *Nuuanu Valley Association v. City and County of Honolulu*, Hawaii's supreme court construed this provision as limited to those materials a government entity is required to maintain, not simply all materials that may temporarily come into its possession. Thus, since there was no requirement that a local government maintain draft engineering reports submitted by a real estate developer, the reports were not public records that had to be disclosed.[53] In the same vein, a Colorado appellate court construed that state's definition of public records as materials "made, maintained, or kept" by government, to exclude the e-mails of a private consultant working for a governmental entity, concluding that "[w]hile the purpose of CORA [Colorado's public records statute] is to provide open government through disclosure of public records, its purpose is not to disclose information beyond that kept by government. . . ."[54]

In contrast, Nebraska's supreme court construed the language in that state's statute—which defines public record as materials "of or belonging to" government—to include the reports of a private investigator hired by a city, even though the city never took physical possession of the reports. "The public's right of access," the court concluded, "should not depend on where the requested records are physically located." A similar conclusion was reached in Idaho, where public records are

defined as material "prepared, owned, *used* or retained"[55] by a government agency. That state's supreme court ruled that a state agency's review of feedlot nutrition plans constituted use, and therefore, the plans were public records, even though the plans were eventually returned to feedlot owners.[56]

Florida's statute identifies only two types of government involvement that categorize material as public record: that the material is "made or received"[57] by a government agency or its representative. While the term "used" is not included in Florida's public records statute, an appellate court in that state essentially conflated "use" with "receipt," at least with respect to materials posted on a third-party website. Ruling that records accessible only on computers owned by the NCAA were public records, even though neither a state university nor attorneys acting on the university's behalf were permitted to make copies or otherwise obtain possession, the court stated:

> The term "received" in section 119.011(12) refers not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agency examines a document residing on a remote computer. If that were not the case, a party could easily circumvent the public records laws. . . . [The University's appeal to the NCAA] is not transformed into a private matter merely because the documents the University lawyers used to prepare the appeal reside on a computer owned by a private organization. . . . [T]he definition of a public record does not turn on the sender's method of transmission.[58]

NCAA v. Associated Press appears to be one of the few—if not the only—appellate decisions relating to the reliance of government officials and employees of information posted on a third party's network without the information ever being in the physical possession of either government or government having some right to obtain physical custody.

Even the seemingly clear issue of whether material was made or prepared by government can give rise to controversy when

the materials at issue were created or received by individuals—either government officials or government employees—rather than by a government body or office. In most instances, courts have concluded that government entities act through their officials and employees. Thus, material prepared by a government employee acting within the scope of their employment is generally deemed to be prepared by government agency itself.[59]

The California Supreme Court tackled this issue in *City of San Jose v. Superior Court* in its consideration of a public records request for e-mail and text messages on the private devices of the mayor and city council members. That state's statute defines public records as materials "prepared, owned, used, or retained by any state or local agency. . . ."[60] Recognizing that "[a] disembodied governmental agency cannot prepare, own, use, or retain any records[,] [o]nly human beings who serve in agencies can do these things,"[61] the court concluded that electronic communications on the private devices were subject to disclosure as public records if those communications related to public business.

A similar test has been applied by Florida courts. As expressed in *O'Boyle v. Town of Gulf Stream*, text messages in the control of an elected official are considered public records if the following test is met:

> [A]n official or employee must have prepared, owned, used or retained it within the scope of his or her employment or agency [and] [a]n official or employee's communication falls "within the scope of employment or agency" only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests.[62]

Vermont's supreme court took the same approach. That state's statute combines the content and government involvement requirements into a single factor, defining public records as materials "produced or acquired in the course of public agency business."[63] In *Toensing v. Attorney General*, the Vermont court was presented with the issue of whether the state attorney general was required to query its employees regarding content on

their personal e-mail accounts, including all communications to or from any of four different e-mail domains. Concluding that such an inquiry was required only with respect to that e-mail created or received during the course of agency business, the court emphasized "[o]ur holding that records located in private accounts may be public records does not mean that the PRA [Vermont's Public Records Act] purports to reach anything other than *public records*—those 'produced or acquired in the course of public agency business'—that are located in private accounts."[64]

This same precept was applied to social media in *West v. City Puyallup*, where a Washington court considered whether Facebook posts made by a city official on his personal page were public records. That state defines public records to include information "relating to the conduct of government or the performance of any governmental or proprietary function. . . ."[65] Relying upon earlier decisions relating to government employees' text messages and e-mails, the court stated:

> [P]osts on social media sites like Facebook potentially can constitute public records, just like any other written communication. . . . [T]he PRA [Public Records Act] must apply when public employees "use cell phones to conduct public business by creating and exchanging public records—text messages, emails or anything else." . . . The same rule necessarily applies to public official using Facebook to "conduct public business." Therefore a Facebook post can constitute a public record—but only if the statutory requirements are satisfied.[66]

The *West* court identified a three-pronged test for resolving the issue of whether social media posts are public records: (1) whether the city council member prepared the posts as part of his or her official duties, (2) whether he or she was directed by the city to prepare the posts, or (3) whether the posts furthered the city's interests.[67] Even though the Facebook posts in question included content that related to the conduct of government, none of the three prongs were present and, therefore, the posts were not public records.

Illinois' courts have wrestled with a related issue, albeit focused on when an individual official could be considered a "public body" that prepared used, received, or had custody of materials.[68] In both *City of Champaign v. Madigan* and *Better Government Association v. City of Chicago*, appellate courts considered whether e-mail received on the personal devices of city officials were public records. In both instances, there was no dispute that the information contained in the messages related to government business. At issue was whether the e-mail and text messages were received by a public body. In *City of Champaign*, the court concluded that messages of individual city council members were not public records,[69] while the *Better Government Association* court held that messages received by a city mayor and certain other city officials were. The latter court explained the distinction as follows:

> [T]he court [in *City of Champaign*] concluded that the city council was capable of conducting public business only when a quorum of council members was involved. By contrast, . . . the officials in question here are not limited by a quorum requirement. Rather, defendants—through their individual officials such as those names in the requests at issue—can function as public bodies without any official meeting having been convened.[70]

Thus, while the Chicago officials in *Better Government* were considered public bodies, such that materials they received became subject to the Illinois public records statute, Champaign's individual council members were not. This distinction between records made, received, or used by an individual member of a collegial body, who is without authority to act alone, is codified in New Hampshire statute, which expressly defines the term to include materials created, maintained, or received by a public body itself, "or a quorum or majority thereof. . . ."[71]

Public Records Defined by Form

All state public records definitions provide that public records are not limited to any particular format. Instead, public records typically are defined as including materials regardless of format

or characteristics,[72] in any medium or recorded by any method,[73] writings,[74] or documentary materials.[75]

Government information is frequently replicated in multiple formats or media. There is a divide among the states with respect to whether each such format in which a record exists is a distinct public record—or, instead, whether it is the information contained within that is a public record. As characterized by one court, the issue "turns on whether the basic purpose of the . . . [state public records act] is one of public accessibility to the *informational content* of public records or is, instead, one of access to the *public records* in the form in which they are normally kept."[76] In those states that define records by their format, each such physical manifestation of recorded government information is considered a distinct public record. Thus, for example, in *AFSCME, AFL-CIO v. County of Cook*, the Illinois Supreme Court considered a labor union request for copies of computer tapes in the custody of a county. The county offered printouts of the information on the tapes rather than computer tape copies. The court rejected the argument that a government agency could provide copies of public records in the format of its choice if reasonable access to the information contained in the record was provided, concluding, instead, that "[c]omputer tapes are public records and must, therefore, be made available to the public."[77]

In contrast, some states place the focus on the information contained within a record, rather than the record's format. A Colorado court explained that position as follows: "[T]he basic purpose of the Open Records Act [Colorado's public records statute] is to insure [sic] the public's access to *information* which is a matter of public record, in a form which is reasonably accessible, and which does not alter the contents of the information."[78] Thus, an agency regulation limiting the form in which electronically stored information could be obtained to oral communication of the information, microfiche copies, or computer printouts was found to provide reasonable access to public records. In reaching this conclusion, the Colorado court expressly rejected Illinois' approach and, instead, adopted the federal view that content—rather than format—is the critical factor.[79]

A Michigan court reached a similar conclusion, relying on the absence of any statutory provision requiring that records be provided in any particular format. Holding that a county register of deeds had the discretion to provide paper copies of records, rather than the microfilm format in which the records were maintained, the court reasoned that a microfilm copy, while printed on a different medium, contains the identical information as that on a paper copy.[80]

Prior to 1991, Connecticut's public records statute mandated that agencies provide a printout of computer data, rather than an electronic copy.[81] Applying that provision strictly, the court in *Chapin v. Freedom of Information Commission* held that "[t]o dictate the format is to go beyond the essence of the act, which is to provide for inspection of public records."[82] Subsequent to the *Chapin* decision, this mandate was removed and replaced with language requiring that nonexempt records stored on computers have to be made available "on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made."[83] Thus, unless converting a record to a requested format would require an unreasonable effort, a government entity is required to provide a copy of public records in whatever medium a requester specifies.

Even where the format selected by the government agency for disclosure is not an exact duplicate of that held by government, some courts have balanced the interests of government against the public's right of access to allow the government's preferred format to be disclosed. For example, in *WIREdata, Inc. v. Village of Sussex*, Wisconsin's supreme court concluded that providing copies of electronically stored property records in a PDF format—rather than in the manipulatable format in which they were maintained—satisfied the state's public records statute.[84]

Even in jurisdictions that treat content rather than form as the deciding factor, however, the distinct medium in which a record is created or stored can determine whether that medium defines

the public record. This issue frequently arises in connection with electronic or digital information. In *Lueders v. Krug*, for example, a Wisconsin court upheld a lower court order requiring a state representative to disclose electronic copies of e-mail relating to proposed changes in certain state laws, as opposed to paper copies of the e-mail. The court considered the electronic copies separate and distinct records because "the electronic copies and the emails themselves, as received and stored on Krug's computer, contain 'metadata,' which information was not on the paper printouts from the e-mails."[85] The *Lueders* court relied, in part, on an earlier Wisconsin decision, holding that analog recordings of 911 calls could not be substituted for the digital format in which such calls were maintained by a police department. As with the electronic copies of e-mail, the digital recordings included certain information and allowed more detailed review than would analog recordings. Thus, the digital format defined the public record, but only because the information contained within that record differed from what would have been available in the analog format.[86]

One consequence of defining a public record by its format is that access is generally limited to the format in which government keeps the record, regardless of whether government has the capability of providing the record in a format preferred by the requester. Pennsylvania's statute makes this limitation explicit, stating that an agency cannot be required to format a public record in a way the record is not currently formatted.[87] In other jurisdictions, the limitation has been established by caselaw. A Florida court concluded that requiring copies to be provided in a format other than that in which it was maintained would unduly burden government and be "ludicrous."[88]

The distinction between a new record and one that already exists becomes less clear when applied to information stored in electronic databases, however. The issue frequently presented is whether a public records request merely elicits existing electronic records or, instead, requires the creation of a new record. The majority position was stated in *Attorney General v. District Attorney for the Plymouth District*:

> [A] member of the public may not, through a public records request, require an agency or municipality to create new documents that do not already exist. . . . But, where public records are in electronic form, as they increasingly are and will be, a public records request that requires a government entity to search its electronic database to extract requested data does not mean that the extracted data constitute the creation of a new record under the public records law.[89]

A database has been characterized as comparable to a filing cabinet from which various file folders can be removed[90] or a giant Excel spreadsheet.[91] Consequently, a public records request may require an agency to query a database, just as a request for paper records may require a search of file cabinets.

The distinction between a search of data already compiled and the creation of a new record is not always clear, however. Thus, a request for e-mail that included certain search terms was found not to be a valid public records request,[92] nor was a request that would have required a state agency to collate data into categories different from those already embedded in the database.[93] However, the zip codes of students in certain classes[94] or the number of certain cancers occurring in each parish[95] was raw data already compiled in a database and, therefore, a search for that information was a valid request for a public record, even if a new code or a new program was required to conduct the search.

Conclusion

Even the broadest of public records definitions satisfies the goal of providing a portal to the operations of government only to the extent the state statute—or in some jurisdictions, common law—does not unduly narrow the width of the opening though exclusions and exceptions. Social media and an increasingly digital government bring with them increased concerns about a loss of privacy and government security. These concerns, along with other objectives, often lead to a proliferation of new exclusions and exemptions that run counter to government transparency.

In addition, continued advances in technology will require both state courts and state legislatures to revisit their public records statutes to accommodate situations not previously contemplated. The advent of new Internet-based video conferencing platforms and methods of electronically creating, sharing, using, and maintaining information by both government and those who interact with government requires both a careful reading of the public record definition and attention to the purposes for which public records statutes were enacted. For example, when a government employee participates in a meeting held via some virtual platform such as Zoom, are materials screen shared by a nongovernment host public record? Is the automatically created list of participants in the virtual meeting a public record, regardless of whether the meeting is hosted by government and regardless of whether such list is used or subsequently maintained by government? If the meeting is hosted by a private individual or entity and is recorded, is the recording a public record? These, and a host of other issues, will undoubtedly give rise to future disputes.

Endnotes

1. Kish v. Akron, 846 N.E.2d 811, 816 (Ohio 2006).
2. *E.g.*, *In re* Caswell, 29 A. 259 (R.I. 1893); State *ex rel.* Colscott v. King, 57 N.E. 535 (Ind. 1900); State *ex rel.* Wellford v. Williams, 75 S.W. 948 (Tenn. 1903); Clement v. Graham, 63 A. 146 (Vt. 1906); Excise Com'n v. State *ex rel.* Skinner, 60 So. 812 (Ala. 1912); Barrickman v. Lyman, 157 S.W. 924 (Ky. 1913); Palacios v. Corbett, 172 S.W. 777 (Tex. 1915); Nowack v. Fuller, 219 N.W. 749 (Mich. 1928).
3. *State ex rel. Wellford*, 75 S.W. at 958.
4. *E.g.*, Brewer v. Watson, 71 Ala. 299, 1882 WL 1234 (Ala. 1882) (stating that "any citizen with a legitimate interest" may inspect books kept by the state auditor); *see also Nowack*, 219 N.W. at 751–52 (finding that a newspaper publisher's interest in publishing information about government business was a sufficient special interest to allow him access to government records).
5. *State ex rel. Wellford*, 75 S.W. at 958 (recognizing a taxpayer's right to access a city's books "when the public good shall seem, on sound reasons, to demand it . . ."); *Clement*, 63 A. at 155 (petitioner seeking access to government records to "procure the enforcement of a public duty" not required to show any special interest).

6. *E.g.*, *In re* 2014 Allegheny Cnty. Investigating Grand Jury, 223 A.3d 214 (Pa. 2019) (discussing Pennsylvania's common law right to judicial documents). *But see* Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 66 A.3d 244 (N.J. 2013) (recognizing the continued viability of a broader common law right of access). *See also* Joseph Regalia, *The Common Law Right to Information*, Scholarly Works 1232 (2015), *available at* https://scholars.law.unlv.edu/facpub/1232/ (advocating for the continued efficacy of the common law as an alternative means of gaining access to government records).

7. Wis. Stat. ch. 10, §§ 29, 27, 137 (1949).

8. Mass. Gen. Laws ch. 161, § 4 (1851); Mont. Code § 2-6-102 (1895); Carter's Ann. Alaska Code § 1039, pt. IV (1900); Ariz. Territory Rev. Stat. § 3780 (1901); Fla. Stat. § 490 (1909); Nev. Rev. Stat. § 239.010 (1911); 1912 La. Acts 242; Ala. Code § 2695 (1923); N.C. Gen. Stat. 132 (1935); S.D. Codified Laws § 48.0701 (1939).

9. *See* Reporters Comm. for Freedom of the Press, Open Government Guide, *available at* https://www.rcfp.org/open-government-guide/ (last visited Jan. 13, 2021) (providing a summary of all fifty states public records statutes).

10. Cal. Const. art. I, § 3(7); Fla. Const. art. I, § 24; La. Const. art. XII, § 3; Mont. Const. art. 2, § 9; N.H. Const. pt. 1, art. 8; N.D. Const. art. XI, § 6.

11. Cal. Gov't Code § 6250 (2020).

12. Ark. Code Ann. § 25-19-102 (2020). S*ee also, e.g.*, Del. Code Ann. § 10001 (2020) ("It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic"); Ga. Code Ann. § 50-18-70 (2020) ("open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions"); N.Y. Pub. Off. Law § 84 (2020) ("a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government").

13. *E.g.*, Colo. Rev. Stat. § 24-72-201 (2020) ("It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times"); Fla. Stat. § 119.01 (2020) ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency"); 5 Ill. Comp. Stat. § 160/1.5(iii) (2020) ("that those records are, with very few exemptions, to be available for the use, benefit, and information of the citizens").

14. *E.g.*, Idaho Code Ann. § 74-102(1) (2020) ("there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute"); Ind. Code § 5-14-3-1.A (2020) ("This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record").

15. Chapters 5 and 6 of this volume analyze many of the types of exemptions found in state public records statutes.

16. 65 Penn. Const. Stat. § 102 (2020). *See also* Wash. Rev. Code § 42.56.010(1) (2020) (defining "local agency" to include "every county, city, town, municipal corporation, quasi-municipal corporation, or special district, or any office, department, division, bureau, board, commission, or agency thereof, or other local agency"); Wyo. Stat. Ann. § 16-4-201(a)(iv) (2020) (defining "political subdivision" as "every county, city and county, city, incorporated and unincorporated town, school district and special district within the state").

17. S.C. Code Ann. § 30-4-20(a) (2020). *See also* Va. Code Ann. § 2.2-3701 (2020) ("any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing boards of counties, school boards and planning commissions. . . .").

18. *E.g.*, Vt. Stat. Ann. tit. 1 § 317(a)(2) (2020). *See also* Ohio Rev. Code Ann. § 149.011(G) (2020) (including "political subdivisions" within the list of government entities whose records are subject to the public records statute).

19. Utah Code Ann. § 63G-2-103 (2020). *See also* Idaho Code Ann. § 74-101(15) (2020) (defining "state agency" to include the legislative and judicial branches).

20. Tex. Gov't Code Ann. §§ 552.003(1)(A)(i) & (B)(i) (2019). *See also* Tex. Gov't Code Ann. § 552.0035 (2019) (providing that access to judicial records is governed by supreme court rules). *See also* 5 Ill. Comp. Stat. 140/2 § 2(a) (2020) (defining "public body" to include "legislative executive, administrative, or advisory bodies of the State . . . " but making no mention of judicial bodies).

21. Tenn. Code Ann. § 10-7-301 (2020).

22. 65 Penn. Const. Stat. § 102 (2020); N.Y. Pub. Off. Law § 86.3 (2020). *See also* Okla. Stat. tit. 51 § 24A-3.2 (2020) (excluding the legislative and judicial branches except with respect to records of the receipt and expenditure of public funds).

23. 29 Del. Code Ann. § 10002(c) (2021).

24. Conn. Gen. Stat. § 1-200 (2020). *See also* Tex. Gov't Code Ann. § 552.003(1)(B)(i) (2019) (expressly excluding the judiciary from the definition of "governmental body").

25. Kan. Stat. Ann. § 45-217 (2020).

26. Mich. Comp. Laws § 15.232.2(h)(i) (2020). Michigan's statute also expressly excludes judicial records. Mich. Comp. Laws § 15.232.2(h)(iv) (2020).

27. Miss. Code Ann. § 25-61-3(a) (2020).

28. Ky. Rev. Stat. § 61.870(1)(e) (2020).

29. *Ex parte* Farley, 570 S.W.2d 617, 625 (Ky. 1978). *See also* Ohio Rev. Code Ann. § 149.011(B) (2020) (defining "state agency" to include "any court or agency"); State *ex rel.* Parisi v. Dayton Bar Ass'n Certified Grievance Comm., 150 N.E.3d 43, 47 (Ohio 2019) (stating that Ohio's public records statute "does not govern the courts"). The Ohio Supreme Court rejected the notion that the separation of powers doctrine in any way limits the applicability of that state's public records law to local government entities. State *ex rel.* Plain Dealer Pub. Co. v. City of Cleveland, 661 N.E.2d 187, 192–93 (Ohio 1996).

30. State *ex rel.* Veskrna v. Steel, 894 N.W.2d 788, 800 & 802 (Neb. 2017).

31. State *ex rel.* Masariu v. Marion Sup. Ct. No. 1, 621 N.E.2d 1097, 1098 (Ind. 1993).

32. Harilson v. Shepherd, 585 S.W.3d 748, 759 (Ky. 2019).

33. Fla. Stat. § 119.011(12) (2020).

34. *E.g.*, Colo. Rev. Stat. § 24-72-202(6)(b) (2020); Del. Code Ann. tit. 29 § 10002(l) (2021); Ohio Rev. Code Ann. § 149.43(A)(1) (2020).

35. *E.g.*, Fla. Stat. § 119.071 (2020); Mich. Comp. Laws § 15.243 (2020); N.D. Cent. Code §§ 44-04-18.1 to 44-04-18.21 (2019).

36. Ark. Code Ann. § 25-19-103(7) (2020).

37. Conn. Gen. Stat. § 1-200(5) (2020).

38. La. Rev. Stat. Ann. § 44:1.A(2)(a) (2020).

39. N.M. Stat. Ann. § 14-2-8.G (2020). *See also* Fla. Stat. § 119.011(12) (2020) (defining public records as including materials "made or received pursuant to law or ordinance *or* in connection with the transaction of official business by the [government] agency" (emphasis supplied)); Ariz. Rev. Stat. Ann. § 41-141.18 (2020) (public records are materials made or received by a government entity "in pursuance of law or in connection with the transaction of public business").

40. Del. Code Ann. tit. 29 § 10002(l) (2021).

41. 464 P.3d 129, 132 (N.M. 2020) (finding that e-mail addresses of applicants for hunting licenses, submitted to a state agency as part of the application process, were public records).

42. 116 N.E.3d 755, 758 (Ohio Ct. App. 2018) (quoting State *ex rel*. Mazzaro v. Ferguson, 550 N.E.2d 464, 466 (Ohio 1990)).

43. Okla. Stat. tit. 51 § 24A.3.1 (2020).

44. 8 P.3d 872 (Okla. 2000).

45. 106 Cal. App. 4th 1001 (Cal. Ct. App. 2003).

46. 447 P.3d 534, 542 (Wash. 2019) (citing Wash. Rev. Code § 42.56.010(3) & Nissen v. Pierce Cnty., 357 P.3d. 45 (Wash. 2015)).

47. 830 So. 2d 844, 847 (Fla. Dist. Ct. App. 2002).

48. Del. Code Ann. tit. 29 § 10002(l) (2021).

49. Haw. Rev. Stat. § 92F-3 (2020).

50. Iowa Code § 22.1.3.a (2020).

51. *E.g.*, 5 Ill. Comp. Stat. § 140/2.2(c) (2020).

52. *E.g.*, Mich. Comp. Laws § 15.232.2(i) (2020).

53. 194 P.3d 531, 538–39 (Hawaii 2008).

54. Mountain-Plains Investment Corp. v. Parker Jordan Metro. Dist., 312 P.3d 260, 267 (Colo. App. 2013) (construing Colo. Rev. Stat. § 24-72-202(6)(a)(I)).

55. Idaho Code Ann. § 74-101(13) (2020) (emphasis supplied).

56. Idaho Conserv. League v. Idaho State Dep't of Agric., 146 P.3d 632, 634 (Idaho 2006). *See also* Fox v. Perroni, 168 S.W.3d 881 (Ark. 2004) (personal check of government employee held in private bank found to be a public record under the definition including all materials "required by law to be kept or otherwise kept").

57. Fla. Stat. § 119.011(12) (2020).

58. NCAA v. Assoc. Press, 18 So. 3d 1201, 1207 (Fla. Dist. Ct. App. 2009).

59. *See, e.g.*, City of San Jose v. Super. Ct., 389 P.3d 848, 855 (Cal. 2017) (government agencies "cannot prepare, own, use, or retain any record. . . . Only the human beings who serve in agencies can do these things").

60. Cal. Gov't Code § 6253 (2020).

61. *City of San Jose*, 389 P.3d at 855.

62. 257 So. 3d 1036, 1040–41 (Fla. Dist. Ct. App. 2018).

63. Vt. Stat. Ann. tit. 1 § 317(b) (2020).

64. 178 A.3d 1000, 1008 (Vt. 2017) (emphasis in original).

65. Wash. Rev. Code § 42.56.010(3) (2020).

66. 410 P.3d 1197, 1201 (Wash. App. 2018) (citation omitted) (citing *Nissen*, 357 P.3d).

67. *Id.* at 1203.

68. 5 Ill. Comp. Stat. § 140/2(c) (2020) (defining public records as materials "having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of (any public body)").

69. 992 N.E.2d 629 (Ill. Ct. App. 2013).

70. ___ N.E.3d __, __; No. 1-19-0038, 2020 WL 4515997, at *6–7 (Ill. Ct. App. Aug. 5, 2020).

71. N.H. Rev. Stat. Ann. § 91-A:1-a.III (2020).

72. *E.g.*, Alaska Stat. § 40.25.220(3) (2020). *See also* Haw. Rev. Stat. § 92F-3 (2020) (any physical form).

73. *E.g.*, Ark. Code Ann. § 41-151.18 (2020).

74. *E.g.*, Colo. Rev. Stat. § 24-72-202(6)(a)(I) (2020)

75. *E.g.*, 5 Ill. Comp. Stat. § 140/2.7(2) (2020).

76. Tax Data Corp. v. Hutt, 826 P.2d 353 (Colo. App. 1992) (emphasis in original).

77. 555 N.E.2d 361, 365 (Ill. 1990).

78. *Tax Data Corp.*, 826 P.2d at 357 (relying upon Dismukes v. Dep't of Interior, 603 F. Supp. 760 (D.D.C. 1984)).

79. *Id.*

80. Lapeer Cnty. Abstract & Title Co. v. Lapeer Cnty. Register of Deeds, 691 N.W.2d 11 (Mich. Ct. App. 2004).

81. Conn. Gen. Stat. 1-19a (1990).

82. 577 A.2d 300, 303 (Conn. App. Ct. 1990).

83. Conn. Gen. Stat. § 1-211(a) (2020) (reflecting revisions made in 1991 Conn. Acts 347 § 1).

84. WIREdata, Inc. v. Village of Sussex, 751 N.W.2d 736 (Wis. 2008).

85. 931 N.W.2d 898, 902 (Wis. Ct. App. 2019).

86. *Id.* at 901–02 (citing State *ex rel.* Milwaukee Police Ass'n v. Jones, 615 N.W.2d 190 (Wis. Ct. App. 2000). Chapter 2 of this volume provides a more detailed analysis of digital and electronic public records.

87. 65 Pa. Cons. Stat. § 66.2(e) (2020). *See also* Neb. Rev. Stat. § 84 712(3)(a) (2020) (providing that public records may be obtained in the format in which they are maintained by the government agency).

88. Seigle v. Barry, 422 So. 2d 63, 65 (Fla. Dist. Ct. App. 1982).

89. 141 N.E.3d 429, 441 (Mass. 2020) (citations omitted).

90. Hites v. Waubonsee Comm'ty Coll., 56 N.E.3d 1049, 1064–65 (Ill. App. Ct. 2016); Williams Law Firm v. Bd. of Supers. of La. State Univ., 878 So. 2d 557, 571 (La. App. 2004).

91. *Hites*, 56 N.E.3d at 1064.

92. Martinez v. Cook Cnty. State's Atty.'s Off., 103 N.E.3d 351 (Ill. App. Ct. 2018).

93. Am. Civil Liberties Union of Ariz. v. Ariz. Dep't of Child Safety, 377 P.3d 339 (Ariz. Ct. App. 2016).

94. *Hites*, 56 N.E.3d at 1066–67.

95. *Williams Law Firm*, 878 So.2d 571.