Representative Federal and State Judicial Decisions and Other Materials Involving Protective Orders, Confidentiality and Public Access in Civil and Criminal Matters

Spring 2014 Digest

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NOTE TO THE READER OF THE Spring 2014 Digest*

In 2007, The Sedona Guidelines *Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*** was published as a project of The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access (WG2). The intent of the Guidelines was to recognize the relationship—and tension—between the legitimate confidentiality needs of parties and the "right of access" derived from the First Amendment, the common law, and state and federal statutes and regulations. To do so, the Guidelines cited to, among other things, case law. Not surprisingly, that case law has continued to develop and this Spring 2014 Digest incorporates "new" decisions. The Digest includes sections on statutes and regulations as well as articles that illustrate the continuing tensions described above. Several forms of protective orders are also included.

The reader should bear in mind that the Spring 2014 Digest is both over- and under-inclusive. The decisions, statutes and articles digested are *over-inclusive* in that some go beyond the "four corners" of the Guidelines and address privacy in other contexts, such as criminal and broad privacy-related matters. The decisions, statutes and articles are *under-inclusive* in that what appears is not intended to be an exhaustive compilation.

With these caveats, we know you will benefit from what has been selected. Feel free to suggest others by sending them to Ronald J. Hedges at: r_hedges@live.com

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A SPECIAL NOTE ON A CURRENT CONTROVERSY

No current compilation related to confidentiality and public access can avoid the controversy over National Security Agency ("NSA") surveillance. Having recognized that controversy, this Second Edition will simply note several sources of information about it:

- *Administration White Paper, Bulk Collection of Telephony Metadata Under Section 215 of the USA Patriot Act* (Aug. 9, 2013).
- J. Vanentino-DeVires & S. Gorman, *What You Need to Know on New Details of U.S. Spying*, WALL ST. J. (Aug. 20, 2013).
- *The President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World* (Dec. 13, 2013).
- A. Serwin, *Striking the Balance—Privacy Versus Security and the New White House Report,* THE PRIVACY ADVISOR (Int'l Ass'n of Privacy Professionals: Dec. 19, 2013).

As the Second Edition is being published, two courts have ruled on the constitutionality of the NSA surveillance:

- *Klayman v. Obama,* Civil Action No. 13-0851 (RJL), 2013 WL 6598728 (D.D.C. Dec. 16, 2013).
- *ACLU v. Clapper,* 959 F.Supp.2d 724 (S.D.N.Y. 2013).

Presumably, the "final word" on constitutionality will come from the United States Supreme Court.

Beyond the NSA surveillance controversy—and beyond the scope of this Second Edition—is a broader one about, on the one hand, the privacy and autonomy of the individual and on the other, public and private surveillance and tracking of individuals through electronic devices. Here are several examples of this controversy:

- *United States Government Accountability Office, Information Resellers: Consumer Privacy Framework Needs to Change to Reflect Changes in Technology and the Marketplace* (Sept. 25, 2013).

- S. Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES (Oct. 13, 2013).
- J.R. Reidenberg, et al., *Privacy and Cloud Computing in Public Schools*, FORDHAM LAW SCHOOL CENTER ON LAW AND INFO. POLICY (Dec. 13, 2013).
- *Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations Majority Staff,* A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES (Dec. 18, 2013).

Presumably, this broader controversy will lead to statutory and regulatory responses and litigation beyond what now exists.

United States Supreme Court

FCC v. AT&T, 131 S. Ct. 1177 (2011).
Freedom of Information Act

Underlying this FOIA action was an investigation of AT&T by the FCC. In the course of the investigation, which was resolved by consent decree, AT&T produced documents. A trade association made a FOIA request for certain of these documents. AT&T objected to the request, arguing that the documents had been "compiled for law enforcement purposes" and that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under Exemption 7C, 5 U.S.C. Sec. 551(b)(7)(C). The FCC rejected that argument. The Third Circuit Court of Appeals reversed, concluding that Exemption 7C extended to the "personal privacy" of corporations. The Supreme Court reversed: "The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal property does not extend to corporations. We trust that AT&T will not take it personally."

Maracich v. Spears, 133 S. Ct. 2191 (2013).
Miscellaneous

The Driver's Privacy Protection Act prohibits the disclosure of personal information unless for a purpose permitted by one of fourteen statutory subsections. Subsection (b)(4) permits disclosure for use "in connection with" judicial and administrative proceedings, including "investigation in anticipation of litigation." The petitioners, all South Carolina lawyers, obtained individuals' names and addresses from the South Carolina motor vehicle department to find plaintiffs for a suit they had filed against car dealers and were sued by some of those individuals for violation of the Act. "The question presented is whether an attorney's solicitation of clients for a lawsuit falls within the scope of (b)(4)." Interpreting the text of the Act, the Court answered "no" and remanded for reconsideration in light of that interpretation.

McBurney v. Young, 133 S. Ct. 1709 (2013).
Miscellaneous

The Virginia Freedom of Information Act provides that "all public records shall be open for inspection and copying by any citizens of the Commonwealth" but grants no such rights to non-Virginians. The courts below held that there was no constitutional infirmity in this distinction, although the Third Circuit Court of Appeals had held that an analogous Delaware statute was unconstitutional. The Supreme Court affirmed the lower courts, holding that "[t]he challenged provision of the State FOIA does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other States from making a profit

by trading on information contained in state records." The Court also rejected the argument that the challenged provision abridged the right to own and transfer property in Virginia: "Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden ***." The Court further rejected the argument that the challenged provision impermissibly burdened access to Virginia courts, noting that available discovery mechanisms were sufficient and that "Virginia law gives citizens and noncitizens alike access to judicial records." Finally, the Court rejected a challenge based on the "dormant Commerce Clause."

Milner v. Department of the Navy, 131 S. Ct. 1259 (2011).
Freedom of Information Act

The Navy denied a FOIA request made by a Puget Sound resident who sought data and maps related to munitions storage in the Sound, relying on what was commonly called the "High 2 Exemption" [of Exemption 2, 5 U.S.C. § 552(b)(2)]. The district and the Court of Appeals for the Ninth Circuit both upheld the Navy's invocation of the "High 2 Exemption," and affirmed the entry of summary judgment in favor of the Navy. The Ninth Circuit Court of Appeals concluded that the materials qualified for a "High 2 Exemption" because their disclosure "'would risk circumvention of the law' by 'pointing out the best targets for those bent on wreaking havoc'—for example, terrorist who wished to hit the most damaging target.'" The Supreme Court granted certiorari, citing "the Circuit split respecting Exemption 2's meaning," and reversed. The Supreme Court held that the plain meaning of the phrase "personnel rules and practices," as used in the statute, "encompasses only records relating to issues of employee relations and human resources." The Supreme Court also rejected the "High 2 – Low 2" distinction made by some of lower courts when interpreting Exemption 2. Suggesting that the Navy could ask Congress to amend FOIA, the Supreme Court remanded the case for the Court of Appeals to determine the applicability of other FOIA exemptions to the data and maps.

Federal Decisions

ACLU v. FBI, 733 F.3d 526 (3d Cir. 2013).
Freedom of Information Act

In this FOIA action, the ACLU challenged the district court's ruling that allowed the FBI to withhold certain "racial/ethnic data" as well as the district court's reliance on an *in camera* declaration submitted by the FBI. The Court of Appeals affirmed: (1) FOIA Exemption 7A, which authorizes the withholding of records, "to the extent that the production *** could reasonably be expected to interfere with [law] enforcement proceedings," furnished the rule of decision, (2) the declaration provided an adequate description of the risk of harm should the data be disclosed, (3) "the harm from disclosure lies in revealing, indirectly, the FBI's targeting preferences and investigative techniques—not in revealing demographic information that is already public," and (4) the district court acted within its discretion to conduct an *in camera* review rather than adopt, as the ACLU requested, a "Glomar-like" procedure. "[A]n *in camera* procedure provides for *more* meaningful judicial review than does the 'Glomar-like' method of adjudicating '[o]pen ended hypothetical questions,' which 'are not well suited to the litigation process.'"

In re Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010), *opinion withdrawn and superseded* by *In re Anonymous Online Speakers* 661 F.3d 1168 (9th Cir. 2011).
Discovery Materials

In this long-running business dispute, a multilevel marketing corporation sued the provider of business training materials for tortious interference with its existing contracts and with advantageous business relations. The plaintiff alleged that the defendant orchestrated an Internet smear campaign via anonymous postings and videos disparaging the corporation and its business practices. As part of the discovery process, the corporation sought testimony from an employee of the provider, regarding the identity of five anonymous online speakers who allegedly made defamatory comments about the corporation. The employee refused to identify the anonymous speakers on First Amendment grounds. The district court ordered the provider to disclose the identity of three of five nonparty anonymous speakers. Under the All Writs Act, the speakers sought a writ of mandamus directing the district court to vacate its order requiring the disclosure of their identities. The corporation cross-petitioned for mandamus relief, asking the court to direct the provider's employee to testify regarding the identity of the two remaining anonymous speakers. The Court of Appeals originally ruled on the petition for *writ of mandamus* in July 2010, but the court withdrew its opinion and issued a new one in January 2011. The later opinion denied both petitions for writs of mandamus, ultimately leaving the district court decision untouched.

Apple Inc. v. Samsung Elec. Co., 727 F.3d 1214 (Fed. Cir. 2013).
Discovery Materials
Court Proceedings

In this ongoing patent infringement action, the parties took interlocutory appeals from orders of the district court that denied their requests to seal confidential exhibits attached to pre- and post-trial motions. As the Court of Appeals noted, "[t]hese appeals are unique in that neither the appellant *** nor the cross-appellant *** opposes the other party's requested relief." Opposition came from a coalition of news organizations.

The Court of Appeals reversed the orders: (1) The coalition was *denied* leave to intervene but was *granted* leave to file an *amicus* brief, as was another media organization, (2) the court had jurisdiction under the collateral order doctrine, (3) the court would apply Ninth Circuit law as substantive patent law issues were not involved, (4), under that law, "'a particularized showing of 'good cause' under *** Rule *** 26(c) *is sufficient to preserve the secrecy of sealed discovery documents attached to nondispositive motions'"* (emphasis in original), although the court elected to apply a heightened standard used by the district court, (5) the parties did not seek to seal entire documents, but instead, sought only to redact specific information, (6) declarations submitted by the parties to the district court were sufficient to establish a "significant interest in preventing the release of their detailed financial information" (footnote omitted), and (7) the public interest in disclosure was "relatively minimal," as "the financial information at issue was not considered by the jury and is not essential to the public's understanding of the jury's damages award." The Court of Appeals undertook the same analysis for the plaintiff's market research reports, which were attached to post-trial motions and reached the same result.

Note: This is, to say the least, a *comprehensive* decision. Here is one example when the Court of Appeals is discussing the standard to apply in ruling on motions to seal:

> There may be exceptions to the Ninth Circuit's general rule that the 'good cause' standard applies to documents attached to motions that are nominally non-dispositive. Indeed, in *In re Midland,* the Ninth Circuit applied the 'compelling reasons' standard to a *Daubert* motion because it 'may be effectively dispositive of a motion for summary judgment.' However, we are not aware of any Ninth Circuit precedent applying the 'compelling reasons' standard to non-dispositive motions regarding the admissibility of evidence at trial. The district court's reasoning—that the admissibility of evidence was a closely contested issue—does not justify departure from the Ninth Circuit's general rule. Indeed, evidence which a trial court rules inadmissible—either as irrelevant or inappropriate—seems particularly unnecessary to the public's understanding of the court's judgment.

Here is another example when the Court of Appeals is discussing the public interest in disclosure of the parties' financial information:

> The First Amendment Coalition's reliance on statements by Reuters and EFF representatives to demonstrate public interest is misplaced. The presumption in favor of public access to court documents is based on 'promoting the public's understanding of the judicial process and of significant public events.' ***. Shareholders' interests in determining financial risks and consumers' interests in manufacturing and pricing decisions simply are not relevant to the balancing test. In fact, if anything, by highlighting, for example, consumers' interests in such things as pricing decisions, it further underscores the potential harm that Apple and Samsung could face if their detailed financial information becomes public.

In re Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013).

Dockets & Judicial Records

As part of its investigation of the unauthorized release of classified information to WikiLeaks, the Government secured a Section 2703(d) order that compelled Twitter to release records of electronic communications of certain individuals. The issuing magistrate judge also barred prior notice to the individuals, sealed the order and the accompanying application, and prohibited public docketing. While the application of the individuals to vacate, unseal and publically docket the application and order was pending, the district court changed its docketing procedure for 2703(d) orders: "The EC docket is a 'running list' that is publically available from the district court clerk's office. It indicates all assigned case numbers, the date of assignment, the presiding judge, and whether the case is sealed. However, it lacks individual docket entries filed in each case and the dates of such entries." Thereafter, the district court denied any relief. The individuals appealed. The Court of Appeals treated the individuals' appeal as a *mandamus* petition, "[a]s mandamus is the preferred method for reviewing courts' orders restricting access to criminal proceedings ***." The court denied the petition for the following reasons: (1) The district court had not erred in conducting a *de novo* review of the magistrate judge's decisions, (2) rights of access derive from two independent and distinguishable sources, the First Amendment and the common law, (3) the orders in issue, and related documents that were considered by the magistrate judge in determining whether to issue the orders, were "judicial records" for purposes of the presumption of access under the common law and First Amendment analysis, (4) the orders do not satisfy either the "experience" or "logic" prongs of the Supreme Court's decision in *Press-Enterprise,* and hence, there is no right of access under the First Amendment, (5) the common law right of access was outweighed by the government's significant interest in maintaining the secrecy of its investigation, and (6) the magistrate judge

satisfied the procedural requirements for sealing, having "individually considered the documents, and redacted and unsealed certain documents." The Court of Appeals then addressed the docketing procedures: It recognized that docket sheets existed to assure "meaningful access" to criminal proceedings. However, "We have never held, nor has any other federal court determined, that pre-indictment investigative matters such as ***[Section] 2703(d) orders, pen registers, and wiretaps, which are all akin to grand jury investigations, must be publically docketed ***. We refuse to venture into these uncharted waters, and as such, we refrain from requiring district courts to publically docket each matter in the *** [Section] 2703(d) context." In denying the petition, the court observed that, "at some point in the future, the government's interest in sealing may no longer outweigh the common law presumption of access."

In re ATM Fee Antitrust Litig., 2007 WL 1827635 (N.D. Cal. June 25, 2007).
Discovery Materials

The plaintiffs in this antitrust action filed a supplementary discovery request shortly after December 1, 2006, two years into discovery, requesting the defendants be required to produce all electronically stored information in a form or forms in compliance with amended Rule 34(b). The court declined the plaintiffs' request, citing a previous agreement by the parties governing the form of production and concerns about confidentiality.

Best v. County of Cumberland, Case No. 4:11-cv-00896 (M.D. Pa. Oct. 1, 2013).
Settlement

The parties had reached a settlement during mediation and secured a sealing order. A local newspaper moved to intervene and unseal the settlement agreement. The district court held that the agreement was not a "judicial record" subject to the common law right of access as it had not been filed. However, the question of access was distinct from whether to modify or vacate the sealing order. "Given the strong presumption in favor of openness, the fact that this case involves a governmental entity, and that the seal would prevent disclosure *** under a relevant [Pennsylvania] freedom of information law, the seal should not continue and shall be vacated." The court noted that the parties had not made any substantive arguments in favor of maintaining the sealing order and that all the court had done was enable the newspaper to "pursue the information through other legal channels."

Branhaven, LLC v. Beeftek, Inc., 288 F.R.D. 386 (D. Md. 2013).
Discovery Materials

In this declaratory judgment action, the court imposed sanctions jointly and severally on the plaintiff and its individual attorneys for misleading responses leading up to a last-minute and flawed production of electronically stored information. Among other things, the court rejected

the argument that production was delayed because a protective order was not in place: “While the court understands that there might be some delay in actual production of documents until a satisfactory protective order was in place, the lack of a final protective order does not excuse Branhaven from identifying and gathering the responsive documents nor from essentially misrepresenting that the responsive documents were ready for review as a soon as a date and time was agreed to.”

Brennan Ctr. for Justice v. DOJ, 697 F.3d 184 (2d Cir. 2012).
Freedom of Information Act

The plaintiff brought this action against the defendant after requesting information from three agencies under the FOIA. The plaintiff received denials from all three agencies, at which point it brought the action to court at the district level. In the litigation process, the information requested was whittled down to three memoranda, and the lower court granted summary judgment in favor of the plaintiff for all three documents. On appeal, the Court of Appeals granted in part the plaintiff's motion for summary judgment and reversed in part the remainder. The first document, the "February Memorandum," was found to be a matter of public record because it was used as an authoritative reference. Therefore, the plaintiff's motion for summary judgment was granted for this memorandum. The defendant likewise filed for summary judgment on the February Memos, and its motion was denied because while attorney-client privilege does generally afford protection to private documents, when that document is adopted into policy and heavily relied upon, the same protections can no longer apply. For the remaining memo, the motion was denied. The next was the "July Memos," which were a communication series discussing proposed changes to agency policy. Because the documents were found to be purely deliberative, the Court held that these documents were protected.

Carnegie Mellon Univ. v. Marvell Tech. Grp., 2013 WL 1336204 (W.D. Pa. Mar. 29, 2013).
Court Proceedings

After a jury returned a verdict against the defendants in excess of one billion dollars in this patent infringement action, the defendants moved to seal demonstrative slides used by the plaintiff’s damages expert during trial and also moved to seal an affidavit submitted on behalf of the defendants that went to a post-trial laches defense. Reviewing the law of the Third Circuit and distinguishing between trial materials that were filed and unfiled discovery materials, the court denied the motions: (1) The common law right of public access attached to the slides and the affidavit as these were “judicial records”; (2) sealing would be inappropriate for any information that was “readily available from the public trial transcript or elsewhere”; (3)

there was a substantial public interest in the information in issue; and (4) the defendants had not demonstrated any compelling interest sufficient to overcome the presumption of access.

[Note: This summary conflates the court's analysis as to the slides and the affidavit and that, as to the latter, the court only addressed an unredacted version which the defendants intended to file].

Center for Const. Rights v. Lind, 72 M.J. 126 (C.A.A.F. 2013).
Court Proceedings

The petitioners appealed from the summary denial of their petition for a *writ of mandamus* and prohibition pursuant to which they sought public access to documents filed in the prosecution of Bradley Manning. The Court of Appeals dismissed the appeal for lack of jurisdiction: "Here, the accused had steadfastly refused to join in the litigation, or, despite the Court's invitation, to file a brief on the questions presented. We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief *** that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial." The appellate court held that it lacked statutory jurisdiction to address a nonparty's right of access claim. There were vigorous dissents which addressed the "absurd consequences" of a ruling which might give rise to a collateral challenge in an Article III court and the failure to afford standing to the media.

Center for Effective Gov't v. Department of State, 2013 WL 6641262 (D.D.C. Dec. 17, 2013).
Freedom of Information Act

At issue in this FOIA action was whether a single document, "the Presidential Policy Directive on Global Development," was protected from disclosure by Exemption 5, the "presidential communications privilege." The document had been widely circulated within the Executive Branch and discussed in public. The district court held that it was not exempt: "Simply put, the purposes of the privilege are not furthered by protecting from public disclosure presidential directives distributed beyond the President's closest advisors for non-advisory purposes. Nor does invocation of an amorphous 'need to know' cure the problem where there is no claim of an advisory role between the document-recipient and the President."

Century Indemnity Co. v. AXA Belgium, 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012).
Court Proceedings

In this case arising from a reinsurance contract dispute, both parties moved to seal documents under a confidentiality agreement that included the arbitration proceedings. The district court

denied the motions to seal the documents because the parties failed to show a sufficient basis to seal relevant documents. The court explained that the parties sought to seal judicial documents to which the presumption of access attached, and the parties did not overcome the presumption. The court added that "the weight to be given the presumption of access ... is reasonably high" for the documents involved.

Citizens for Responsibility and Ethics in Washington v. Federal Election Comm'n, 711 F.3d 180 (D.C. Cir. 2013).
Freedom of Information Act

"This case presents an important question of procedure under the Freedom of Information Act: When must a FOIA requester exhaust administrative appeal remedies before suing in federal district court to challenge an agency's failure to produce requested documents"? To answer that question, the Court of Appeals interpreted the meaning of a "determination" by an agency because, under FOIA, if an agency does not make a determination within time periods prescribed by the Act, a requester need not exhaust administrative remedies.

The plaintiff had submitted a FOIA request to the FEC. The records sought were produced over time, but some were withheld as being exempt from disclosure. The plaintiff filed suit, challenging the FEC's delay in responding to the request. The district court dismissed the action for failure to pursue administrative remedies. The Court of Appeals reversed:

"The statute requires that, within the relevant time period, an agency must determine whether to comply with a request—that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions."

Containment Tech. Grp. v. American Soc'y of Health Sys. Pharmacists, 2008 WL 4545310 (S.D. Ind. Oct. 10, 2008).
Discovery Materials

Prior to discovery in a defamation action, the parties disputed the terms of a proposed protective order affecting the production of proprietary information. The plaintiff sought an order allowing it to designate entire documents containing proprietary information as "confidential." Such documents, if filed with the court, would automatically be filed under seal. The defendants objected to blanket designations of entire documents, citing circuit precedent requiring particularized findings of "good cause" before documents could be filed under seal. The court acknowledged that document-by-document review would be "painstaking" and that "[m]assive electronic discovery production has significantly added to this challenge," but that

the parties need to distinguish between the scope of review needed for production to each other in discovery, and the scope of review needed before filing documents with the court under seal. At the level of discovery, the parties should agree to act in good faith in making confidentiality designations, but the parties need to make particularized showings that good cause exists for filing documents with the court under seal.

Delaware Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013), *cert. denied,* __ S. Ct. __ (2014).
Court Proceedings

"This appeal requires us to decide whether the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program [binding arbitration before a judge in a courtroom] … The District Court found that Delaware's proceedings were essentially civil trials that must be open to the public." The Court of Appeals affirmed but applied the "experience and logic" test: (1) "Our experience inquiry *** counsels in favor of granting public access to Delaware's proceedings because both the 'place and process' of Delaware's proceeding 'have historically been open to the press and general public;'" and (2) "[t]he benefits of openness weigh strongly in favor of granting access ***. In comparison, the drawbacks of openness *** are relatively slight." The court noted, for example, that parties could secure an order to protect confidential information.

Doe v. Megless, 654 F.3d 404 (3d Cir. 2011), *cert. denied,* 132 S. Ct. 1543 (2012).
Pleadings & Orders

The plaintiff filed a Section 1983 action against the public school officials after they distributed a flyer advising the public to contact the police if the plaintiff was seen around schools. The plaintiff moved to proceed anonymously, which was denied by the district court. After plaintiff refused to litigate openly, the case was dismissed with prejudice pursuant to FRCP 41(b). The Court of Appeals affirmed. Adopting a nine-factor balancing test to determine whether a litigant may remain anonymous, the Court of Appeals ruled that pseudonyms should be reserved only for litigants who can show a reasonable fear of severe harm that outweighs the public's interest in open litigation. The Court of Appeals found that the only factor weighing in the plaintiff's favor was that denying the use of a pseudonym could potentially sacrifice a valid claim. On the other hand, because the plaintiff's identity was already revealed and known at the time the defendant distributed the materials, the Court of Appeals concluded that litigating publicly would provide the plaintiff with the opportunity to clear his name.

Electronic Privacy Info. Ctr. v. Department of Homeland Sec., 892 F.Supp.2d 28 (D.D.C. 2012).
Freedom of Information Act

The plaintiff requested files from the defendant under the FOIA, which the defendant denied primarily under Exemption 4 of the same Act. The plaintiff filed suit in response. Because the parties did not dispute any material facts, they moved for summary judgment. Exemption 4 of the FOIA protects information that may be considered a trade secret or financial information that may be privileged or confidential. The plaintiff asserted that this Exemption did not apply to the documents in full, and thus the producing of the segregable, non-privileged information was still necessary. The Court found that the information in question was sensitive insofar as it disclosed scan rates for the defendant's body scanner technology, which could be used by competitors to gain the upper hand. Therefore, Exemption 4 applied to the materials requested by the plaintiff. Of the documents that did not fall within the scope of Exemption 4, the defendant argued that Exemption 5, which protects agency memoranda and letters that would not otherwise be available to an outside party, applied to those. The Court agreed, on the reasoning that the documents in question originated in a government agency and the documents were part of the deliberative process of governmental decisions or policies. Further, the Court found that all segregable materials had already been produced for the plaintiff. Thus, the plaintiff's motion for summary judgment was denied because all documents were protected under Exemptions 4 or 5 and were deemed unsegregable, and the defendant's motion for summary judgment was granted. Additionally, the plaintiff requested and was deemed eligible to receive attorney's fees following the opinion of the Court.

Estate of Carlock v. Williamson, 2011 WL 285626 (C.D. Ill. Jan. 26, 2011).
Discovery Materials

This was an action brought to recover damages for injuries sustained by a decedent who was allegedly subjected to excessive force and received inadequate medical treatment. The plaintiff moved for discovery-related sanctions against the defendants and attached documents to the publically filed motion, which defendants alleged, were subject to the attorney-client privilege and work product protection and had been inadvertently produced. These and other documents were ordered sealed and a newspaper publisher moved for leave to intervene and challenge the sealing. The court found that the publisher had standing under Rule 24(b) because “permissive intervention is a procedurally appropriate device for bringing a third-party challenge to a protective order.” Turning to the merits, the court then denied the motion to intervene, reasoning: (1) the documents were subject to a claim of privilege, (2) under Rule 26(b)(5)(B), the plaintiff should *not* have filed the documents publically but only for the purpose of *in camera* review, and (3) the defendants would be unduly prejudiced because, “it would aggravate the injury to Defendants’ rights to allow SJR [the publisher] to intervene to seek unsealing of documents that should not have been publically filed in the first place.”

Ferron v. Search Cactus, LLC, 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008).
Discovery Materials

In this action brought under the Ohio Consumer Sales Practices Act alleging distribution of unlawful unsolicited emails, the defendant requested inspection of the plaintiff's computer to determine if the emails were indeed unsolicited or were actively solicited to create a cause of action. The court held a telephone conference call and found that the plaintiff had not taken reasonable steps to preserve relevant information, the plaintiff had not produced relevant information, and that the computer hard drives were the only available sources of relevant information. Concerned about confidentiality and privilege, however, the court issued a detailed protocol covering the conduct of the inspection.

FTC v. Abbvie Prod. LLC, 713 F.3d 54 (11th Cir. 2013).
Dockets & Judicial Records

The FTC instituted an antitrust action against the defendant arising out of a settlement between the defendant and others. During the prelitigation investigation, the defendant voluntarily disclosed a confidential document to the FTC, which the FTC attached as the sole exhibit to the antitrust complaint. The district court sealed the document. After the dismissal of the complaint and a grant of *certiorari*, the FTC persuaded the district court to unseal the document so that it could be discussed openly in the Supreme Court. The district court did so based on a finding that the harm that the defendant might suffer from any unsealing had been reduced over the intervening three years. The Court of Appeals affirmed, holding (1) the complaint was a "judicial record" to which the common law right of access attached, (2) the exhibit to the complaint constituted a judicial record regardless of whether the exhibit played a "discernible role in the resolution of the case," (3) the district court did not err in balancing the public interest in viewing the exhibit against the defendant's confidentiality interest, and (4) the defendant's concern that a plaintiff might "exploit" the right of access to attach confidential documents to pleadings was speculative and other remedies existed to remedy any abusive tactics.

Gerlich v. DOJ, 404 U.S.App.D.C. 256, 711 F.3d 161 (2013).
Miscellaneous

This action arose out of a "dark chapter" in the history of DOJ's Honors Program. The plaintiffs alleged that they had been "de-selected" from participation in the program because of their political affiliation. The district court dismissed claims asserted by the plaintiffs under the Privacy Act. The Court of Appeals reversed, concluding that a permissive spoliation inference was appropriate. The spoliation arose from the failure of responsible DOJ officials to maintain documents relevant to the de-selection process. On appeal, the plaintiffs argued that the documents, which were admittedly not part of DOJ's system of records, should have been "functionally" incorporated in to the records system. The Court of Appeals declined to address the argument as it had not been raised below. However, the Court of Appeals did hold that,

"[t]he obligations the Privacy Act established *** apply even when the agency does not maintain the records at issue in its system of records" because the common law duty to preserve had been triggered before the documents had been destroyed, and there was sufficient evidence that the destroyed documents were relevant to a Privacy Act claim.

In re Google, Inc., 462 F. App'x 975 (Fed. Cir. 2012).
Discovery Matters

During a business presentation held approximately three weeks before this patent and copyright infringement suit was filed, the plaintiff's attorneys asserted that the defendant's Android smartphone platform infringed on the plaintiff's patents. The defendant's senior counsel was present at this business presentation. Ten days later, the defendant's senior counsel met with a general counsel and a software engineer to formulate a response to the plaintiff's infringement claims. A week later, the engineer sent an email to the vice president and copied the senior counsel, himself, and another engineer on the email. The plaintiff subsequently filed suit. During discovery, the defendant listed the final version of the engineer's email on its privilege log, but produced "autosaves" or periodic snapshots of the email as it was being drafted. At a hearing regarding a motion to compel the engineer's deposition, plaintiff referenced the substance of the engineer's email without objection by the defendant. The following day, however, the defendant asked the plaintiff to return all versions of the email, asserting they were protected material because the engineer had purportedly prepared the email at the behest of the defendant's lawyers, as part of an investigation into the infringement lawsuit. The plaintiff filed a motion to compel disclosure of the email and its versions. After examining the material *in camera,* the magistrate judge ordered production of the documents, citing the defendant's failure to make a "clear showing" that the email was sent to counsel in his capacity as an attorney conducting a legal investigation. The district court denied the defendant's motion for relief from that order, concluding that "[r]equiring a clear showing of privilege in light of [the attorney's] role as in-house counsel was not clearly erroneous or contrary to law." The defendant appealed on the grounds of privilege. The federal circuit agreed with the plaintiff's argument that the email itself refuted the defendant's privilege claim because: (1)The engineer stated in the email that he was responding to a request from the defendant's management, not the defendant's attorneys; (2) the engineer directed the email to his vice president rather than to counsel; (3) the email explained that its purpose was "to investigate what technical alternatives exist to Java for Android and Chrome;" and (4) the email's discussion was directed at a negotiation strategy as opposed to a license negotiation as a component of legal strategy. Accordingly, the defendant's petition for a writ of mandamus was denied.

In re Grand Jury Subpoenas, 627 F.3d 1143 (9th Cir. 2010).
Miscellaneous

Note: This appeal has an unusual posture. As will be explained below, certain law firms moved to quash grand jury subpoenas. The district judge granted the motion to quash but did so to allow appellate review. As the Court of Appeals noted, "[w]e do not read the district court's decision as an exercise of discretion but as a passing of the decision to this court. We are not reviewing an exercise of discretion but a request for guidance".

The government commenced a criminal antitrust investigation. Thereafter, civil actions were commenced against the companies under investigation. Law firms were retained to represent the companies in those actions. In the course of discovery, the firms produced documents that originated outside the United States. Grand jury subpoenas were issued to the firms for the production of these documents. The Ninth Circuit reversed the order to quash because: (1) There was no evidence of collusion between the civil plaintiffs and the government; (2) there was no claim of privilege; and (3) The court applied its "per se rule that a grand jury subpoena takes precedence over a civil protective order."

Summarizing, the Ninth Circuit stated, "[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."

International Counsel Bureau v. Department of Defense, 906 F.Supp.2d 1 (D.D.C. 2012).

Freedom of Information Act

ICB brought this action under FOIA to obtain video recordings of Guantanamo Bay detainees. On cross-motions for summary judgment, the court found that the DOD provided sufficient evidence to demonstrate that releasing the videos "reasonably could be expected to result in damage to the national security." The court found ICB's assertions to be insufficient and disagreed with its argument that the DOD's position was hypothetical and conclusory.

Jacobs v. Las Vegas Sands Corp., No. 10 A 627691 (D. Nev. Sept. 14, 2012).

Discovery Materials

The plaintiff sued his former employer, Las Vegas Sands ("Sands"), alleging he was dismissed because he would not give in to "illegal demands" from the chairman and majority-owner of the Sands. Jacobs said the chairman directed him to secretly investigate Macau government officials and to use "improper leverage" against them. Following the plaintiff's allegations, the Justice Department and SEC opened investigations into whether the Sands violated the Foreign Corrupt Practices Act that prohibits companies with U.S. operations and their intermediaries from making improper payments to foreign officials to win or retain business. The Sands denied the allegations and said it is cooperating with the investigations. In June 2012, the Sands lawyers disclosed to the plaintiff that the plaintiff's emails and other computer files had been in

Las Vegas for more than a year while the defendants' lawyers argued to the court that the Macau Personal Data Privacy Act prevented them from bringing data to the U.S. from Macau and that all data had to be reviewed first by the Sands China lawyers in Macau. The judge ordered a sanctions hearing. During the three-day hearing, the Sands lawyers admitted to shipping the plaintiff's emails and a copy of his hard drive to the U.S. in 2010 to preserve evidence. The lawyers argued that they had disclosed to the plaintiff and the judge that there was evidence from Macau in the U.S. The Sands lawyers also admitted that they reviewed the plaintiff's emails. The court concluded that the Sands willfully and intentionally withheld pertinent information. Accordingly, the Sands was precluded from raising Macau's personal data privacy law as an objection to disclosing evidence, an issue that could bear on whether the Nevada court had jurisdiction over Sands China. The judge also ordered Sands to pay $25,000 to the Legal Aid Center of Southern Nevada and to pay the attorneys' fees of the plaintiff that related to those portions of hearings over the past year that were devoted to discussions of the Macau privacy law.

John B. v. Goetz, 531 F.3d 448 (6th Cir. 2008).
Discovery Materials

In this class action against the State of Tennessee alleging violation of the Social Security Act by failing to provide required medical screening, vision, hearing, and dental services to approximately 500,000 children enrolled in the state's TennCare program, the trial court ordered the defendants to allow the plaintiffs' computer expert, under the supervision of a court appointed monitor, to inspect computer hard drives of various state agencies and 50 state employees and make forensic images to determine if any relevant data had been deleted in violation of court preservation orders. The trial court's order extended beyond the state's servers and hard drives of state employees in their offices to include home computers, and authorized the court-appointed monitor, plaintiff expert, and U.S. Marshal to visit the homes of the 50 affected state employees to execute the order. The defendants petitioned the Sixth Circuit Court of Appeals for a writ of mandamus, which the court granted, finding the district court's order to be "clearly erroneous as a matter of law." Citing *The Sedona Principles* and Rules 37(a) and (e), the court noted that it is the responsibility of the responding party to preserve and produce relevant information, and "mere skepticism that an opposing party has not produced all relevant information is not sufficient to warrant drastic electronic discovery measures" such as forensic examination. The court further found that the district court's orders "fail to account properly for the significant privacy and confidentiality concerns present in this case" and "implicate federalism and comity considerations not present in typical civil litigation."

Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012).
Miscellaneous

A photojournalist plaintiff sued various government agencies, claiming that viewing restrictions at a Bureau of Land Management (BLM) horse roundup violated her First Amendment right to observe government activities. The district court denied preliminary injunctive relief and the plaintiff appealed. The Ninth Circuit reversed and remanded, holding: (1) the case was not moot because plaintiff sought unrestricted access to future horse roundups, and not just the most recent one; and, (2) the district court had erred by failing to apply the qualified right of access balancing test (as set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)) when ruling on whether plaintiff was likely to succeed on the merits of her First Amendment claim.

In re Los Angeles Times Comm'ns LLC, (9th Cir. Oct. 16, 2013).
Court Proceedings

A nonparty news organization challenged portions of a trial court's orders by an emergency petition for *mandamus* relief. The petition was granted: "The portions of the Orders that prohibit members of the media and the public from disclosing information contained in court records or disclosed in open court, including the names of individuals identified in videotapes played in court are VACATED. Those portions of the Orders that strike from the record any personal information shown during the playing of the videotapes at issue at the evidentiary hearings are also VACATED."

Marceaux v. Lafayette City-Parish Consol. Gov't, 731 F.3d 488 (5th Cir. 2013).
Court Proceedings

In this Section 1983 action, current and former officers alleged that the defendants had imposed a "code of silence" prohibiting them from reporting illegal conduct. The officers communicated with the media and maintained a website concerning the case. The district court restricted communications and directed that the website be taken down, "the primary rationale *** [being] to allow for a fair trial by avoiding a taint on the prospective jury pool." The officers took an interlocutory appeal. The Court of Appeals held that it had jurisdiction under the collateral order doctrine. The court noted that the officers were, "willing to accept the application to them of *** [rules of professional conduct that restrict communications with the media], although those rules ordinarily would not apply to clients who are not lawyers" and only challenged the direction that the website be taken down. The Court of Appeals vacated the takedown order, reasoning: (1) The district court failed to take a "nuanced approach to the delicate balance between the necessity of avoiding a tainted jury pool and the rights of the parties to freely air their views and opinions in the 'market square' now taking the form of the electronic square known as the Internet" by the "wholesale striking" of the website"; (2) the harm which the district court sought to prevent would be measured under "a substantial likelihood of prejudice" test; (3) the officers had a "propensity to make extra-judicial statements," but (4) the statements did not establish a "nexus between the comments and the

potential for prejudice to the jury venire through the entirety of the Website"; and (5) "the district court erred in concluding that the entirety of the Website was substantially likely to cause prejudice." The Court of Appeals remanded, but reminded the district court to "engage in specific review of any claimed improper material. In this process, the district court has considerable, but not unfettered, discretion."

Menifee v. Department of the Interior, 931 F.Supp.2d 149 (D.D.C. 2013).
Freedom of Information Act

In this FOIA action, the plaintiff challenged, among other things, the alleged failure of the defendants to produce documents responsive to her requests. Rejecting that challenge, the district court observed that, "[t]he question is not whether other responsive documents may exist, but whether the search itself was adequate," and that, "[t]here is no requirement that an agency search every record system, but the agency must conduct a good faith, reasonable search of those systems of records likely to possess the requested information." The court then reviewed the procedure used to respond to the plaintiff's requests and found it to be adequate.

In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115 (9th Cir. 2012).
Court Proceedings

In this class action brought under RICO and state law, an insurance company intervened and moved to unseal an expert witness' report and any related records. The expert had been appointed by the court to assist in resolving whether the parties were entitled to summary judgment. The district court granted the motion for limited purpose intervention but denied the motion to unseal the judicial records, ruling that the strong presumption in favor of public access to judicial records did not apply to the records at issue because they were attached to a non-dispositive *Daubert* motion. The district court explained that the motion was non-dispositive in nature because "it would not have been a determination on the merits of any claim or defense." Applying the "good cause" standard, the district court ruled that the insurance company had not offered a sufficient reason to unseal. On appeal, the insurance company argued that the strong presumption of access to judicial records applied, despite the connection to the *Daubert* motion, because the judicial records were also filed in connection with summary judgment proceedings. Reviewing the denial of the motion to unseal *de novo*, the appellate court held that the district court erred by asserting without elaboration that there were "compelling reasons" to keep the records sealed, instead of "conscientiously balance competing interests and articulate a factual basis for the "compelling reasons" to keep under seal the judicial records associated with a dispositive motion. The appellate court emphasized that the *Daubert* motion and related records were potentially "dispositive of a motion for

summary judgment," pertaining to "central issues bearing on the defendant's summary judgment motion."

Moffat v. DOJ, 716 F.3d 244 (1st Cir. 2013).
Freedom of Information Act

The plaintiff, a convicted murderer, filed a FOIA action for information from the FBI which he thought would exonerate him. The Government produced certain heavily redacted documents and asserted exemptions to disclosure of others. The district court found that the plaintiff had secured all the relief he was entitled to and awarded summary judgment to the Government and attorneys' fees to the plaintiff. One document was at issue on appeal, an FBI report that was produced to the plaintiff during his prosecution with some redactions but was produced in the FOIA process with *less* redactions on the grounds that the redactions in the document, which had been prepared for law enforcement purposes "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under Exemption 7(C) or "could reasonably be expected to disclose the identity of a confidential source" under Exemption 7(D). The Court of Appeals affirmed as to Exemption 7(C), concluding: (1) the earlier revelations of exempt information did not destroy an individual's privacy interests; and (2) the plaintiff had not identified a public interest sufficient to outweigh the privacy interest but had rather identified only a personal one in challenging his conviction. The Court of Appeals also affirmed as to Exemption 7(D): "Exemption 7(D)'s shield does not necessarily disappear when some fraction of the information requested has come to light." The Court of Appeals also rejected the plaintiff's contention that the Government had acted in bad faith in responding to his FOIA request: The Government appropriately applied the exemptions and the nature of the Government's search, which resulted from "resource constraints," did not evidence bad faith. The Court of Appeals also affirmed as to the fee award.

Moore v. CIA, 666 F.3d 1330 (D.C. Cir. 2011).
Freedom of Information Act

The plaintiff requested information from the CIA and DOJ relating to his grandfather, a deceased Icelandic citizen. In response, the CIA stated that it could neither confirm nor deny whether it maintained any such records (a "*Glomar* response"). The FBI, however, released one of its reports to the plaintiff, which had been redacted as requested by the CIA. The report indicated that the plaintiff's grandfather had ties to a communist party and identified the CIA as the source of this information. The plaintiff brought a FOIA action against the CIA challenging its *Glomar* response. The CIA submitted a declaration to the court confirming its request to the FBI to withhold certain CIA-originated information in the report. The district court entered summary judgment in favor of the CIA. On appeal, the plaintiff argued that the CIA, in its declaration to the court, officially acknowledged that it maintained information responsive to

the plaintiff's FOIA request and, therefore, could no longer use a *Glomar* response. The appellate court affirmed, finding that the declaration on its own did not constitute official acknowledgment sufficient to waive a *Glomar* response. Although the CIA confirmed in its declaration that some "CIA-originated information" was redacted from the report, the court concluded that the plaintiff failed to identify specific records or dispatches in the declaration matching his FOIA request.

Newsday LLC v. County of Nassau, 730 F.3d 156 (2d Cir. 2013).
Court Proceedings

This Section 1983 action arose out of allegations that various state officials had negligently contributed to a murder. The district court executed an order prohibiting the release of the contents of an internal investigation report. The parties thereafter entered into a settlement contingent on approval by a county legislature. The district court provided the report to county legislators under a second confidentiality order, which one legislator apparently violated by revealing protected information. A civil contempt hearing was held. The press was excluded in part and transcripts were sealed. The legislator was held in contempt. The press intervened and appealed. Two questions were presented: "First, does the First Amendment's presumptive right of access to court proceedings attach to civil contempt proceedings and related documents? Second, for each of the documents sought, does that presumptive right of access require disclosure in this particular case?"

Answering the first question, the Court of Appeals held that, "[u]nder the experience-and-logic approach, civil contempt proceedings, which carry the threat of coercive sanctions, implicate First Amendment values" and that, "the First Amendment right applies to civil contempt proceedings." The court also held that that, "[o]nly those documents necessary to understand the merits of a civil contempt proceeding are covered by the First Amendment's presumptive right of access."

In answering the second question, the Court of Appeals concluded: (1) Sealing the hearing transcript was improper, as it did not reveal information sufficiently confidential to outweigh access; (2) sealing the report itself was not in error, as it was used solely to refresh the recollection of a witness.

In footnote 8, the Court of Appeals had this to say about *ex ante* versus *ex post* access decisions:

> Although the issue of access to the physical courtroom as such is moot, the question is nevertheless squarely presented to us because intervenors seek release of the transcripts of those proceedings, and the question whether the

> First Amendment right applies to the transcripts is identical to whether the right applies to the physical proceedings.

The Court found a difference between the applicable legal standards and the practical considerations involved in applying them. Noting that a district judge considering whether to close a courtroom is necessarily engaged in an exercise of prediction regarding the potential for disclosure of material that may justifiably be protected even against the presumptive right of public access, it went on to state that that fact does not warrant indiscriminate courtroom closure because, in many cases, courts will be able to identify in advance those areas of testimony and portions of proceedings in which the risk of disclosure is greater or less. Relying on its respect for the discretionary decisions of district judges, the court reasoned that judges (especially appellate judges) deciding whether transcripts can be released after the fact have the benefit of hindsight and can determine more clearly whether the actual testimony in fact disclosed matters that are appropriately sealed. Therefore, a finding *ex post* that a transcript is subject to public access in full does not entail the conclusion that the district court erred in excluding the public from the courtroom *ex ante*."

New York Times Co. v. Department of Homeland Sec., 959 F.Supp.2d 449 (S.D.N.Y. 2013).
Freedom of Information Act

The plaintiffs commenced this FOIA action to compel DHS to turn over certain information pertaining to aliens who had been convicted, served their sentences, but had not been removed from the United States. DHS had produced information but had redacted individual names, citing personal privacy interests under Exemptions 6 and 7(C). Granting summary judgment in the plaintiffs' favor, the district court held: (1) The disclosure of individual names implicates a privacy interest; and (2) the public interest in monitoring how DHS handles the aliens outweighed their privacy interests "in not releasing in compiled from information which is already public."

In addressing the privacy interests, the district court stated: "[T]here is a difference between the 'practical obscurity' of the existence of public records regarding individuals' prior convictions, and records regarding immigration status, which may be obtained with some effort, and the release of a spreadsheet compiled by ICE containing a variety of information about an individual including criminal convictions, status as an illegal immigrant, some information about that individual's current location, and the fact that he or she has not been deported" (footnotes omitted).

Nieman v. Versuslaw, Inc., 512 Fed.Appx. 635 (7th Cir. 2013) (*per curiam*).
Pleadings & Orders

The plaintiff brought suit against the owners of "legal-search websites" for, among other things, invasion of privacy. He alleged that the defendants' search engines enabled prospective employers to locate documents related to a litigation he had brought against a former employer and that, as a result, he had been "passed over" for employment. The district court dismissed the complaint for failure to state a claim. The Court of Appeals affirmed, finding that, "The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed ***. The for-profit nature of the defendants' aggregation websites does not change the analysis; speech is protected even when 'carried in a form that is 'sold' for profit' ***. All of Nieman's claims are based on the defendants' republication of documents contained in the public record, so they fall within and are barred by the First Amendment privilege." The Court of Appeals distinguished an earlier decision, *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222 (7th Cir. 1993), which concerned the publication of private facts not in the public record.

Opis Mgmt. Res. LLC v. Sec'y Fla. Agency for Health Care Admin., 713 F.3d 1291 (11th Cir. 2013).

Miscellaneous

This appeal is about pre-emption. Under Florida law, nursing homes are required to disclose deceased residents' medical records to certain individuals. Under the Health Insurance Portability and Accountability Act ("HIPPA") such information may only be disclosed to the personal representative of the deceased. The Court of Appeals affirmed the district court's award of summary judgment in favor of the nursing homes, which faced conflicting obligations under federal and State law. In doing so, it referred to the express pre-emption language in HIPPA and the "unadorned text of the state statute [, which] authorizes sweeping disclosures ***."

Opperman v. Allstate New Jersey Ins. Co., 2008 WL 5071044 (D.N.J. Nov. 24, 2008).

Discovery Materials

In this action challenging the defendant insurer's property loss estimates, the court ordered the production, in accessible form, of proprietary software owned by a nonparty and licensed to the insurer. The court found that the software was relevant to the plaintiff's claims and that an existing confidentiality order would protect the trade secret nature of the software. The court also rejected the proposition that a nonparty could prohibit the production of the software.

Paige v. Drug Enforcement Admin., 665 F.3d 1355 (D.C. Cir. 2012).

Miscellaneous

The plaintiff, a federal agent, accidentally shot himself in the thigh while speaking at a school on gun safety. A member of the audience recorded the incident with the plaintiff's knowledge. The recording was later produced to the defendant. Subsequently, a four-minute portion of the recording was aired on the Internet and within the DEA system. The plaintiff sued the defendant for violation of the Privacy Act and the Federal Tort Claims Act (FTCA). The district court granted summary judgment for the defendant and the plaintiff appealed. The Court of Appeals affirmed, finding no violation of the Privacy Act because the four-minute portion of the recording did not fall within the meaning of a "system of records" under the Privacy Act, which required that the recording be both retrievable by personal identifier and actually retrieved by personal identifier. The Court of Appeals similarly found that no violation of the FTCA occurred because the video did not contain private facts and the plaintiff's accidental discharge of a loaded weapon in a room of children was a matter of public concern.

Perfect Barrier LLC v. Woodsmart Solutions Inc., 2008 WL 2230192 (N.D. Ind. May 27, 2008).

Discovery Materials

The plaintiff requested production of all emails matching a set of search terms, to which the defendant agreed and produced the equivalent of 75,000 pages of email in electronic format. The defendant also designated the entire production as "Type C" or "Attorney-Eyes-Only," pursuant to a protective order agreed to by the parties previously. The plaintiff objected to the production and moved to compel a supplemental production of the same material without the designation and in paper form. The magistrate judge, considering the terms of the protective order, found that it allowed for "Type C" designation of entire categories. The judge also found that the plaintiff failed to designate a particular form of production in its request, and that the defendant's choice to produce the email in reasonably useable native format was proper under Rule 34.

Perry v. Brown, 667 F.3d 1078 (9th Cir. 2012).

Court Proceedings

Same-sex couples brought action against public officials, challenging the state's voter-enacted constitutional amendment prohibiting same-sex marriage. The plaintiffs moved to unseal a video recording of trial. The recording was prepared for by the trial for in-chamber use and placed in the record under seal. The district court granted the motion and the defendants appealed. The Court of Appeals held that, assuming that a common law presumption of public access applied to the recording, there was a compelling reason overriding the common law right because the defendants had reasonably relied on the trial judge's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, at least in the foreseeable future. The Ninth Circuit emphasized that

the issue did not pertain to the "freedom of the press" or to "policy questions" regarding the "openness" of judicial proceedings. Instead, the question was "whether courts are required (or even free) to *give* to the media information that is not ordinarily available—and specifically whether a recording purportedly made for the sole purpose of aiding the trial judge in the preparation of his opinion, and then placed in the record and sealed, may shortly thereafter be made public by the court."

Prison Legal News v. Executive Office for U.S. Att'ys, 628 F.3d 1243 (10th Cir. 2011) *cert. denied*, 132 S. Ct. 473 (2011).
Freedom of Information Act

In this FOIA action, the plaintiff sought disclosure of a "video depicting the aftermath of a brutal prison murder and autopsy photographs of the victim." The victim, a prisoner, was mutilated and murdered by two cellmates. After the video and photographs were introduced into evidence and shown in open court during the murderers' trials, the materials were returned to the United States Attorney's Office. The district court denied the plaintiff's request and the Court of Appeals affirmed. The Court of Appeals reasoned that the materials fell under Exemption 7(C), as these "could reasonably be expected to constitute an unwarranted invasion" into the personal privacy of the victim's family, which outweighed any public interest in disclosure. Further, use of the materials at trial was irrelevant to a waiver analysis. The Court of Appeals, however, also held that the district court had erred in withholding portions of an audio track containing statements by the murderers. Nevertheless, the court affirmed nondisclosure on 7(C) grounds given the privacy interests. Finally, the court rejected the plaintiff' argument that the "public domain doctrine" compelled disclosure: "Assuming the court was to recognize that doctrine, it would be inapplicable under the facts as the purpose of Exemption 7(C) remained intact." Notably, the Court of Appeals did not address whether the materials were properly removed from the public record or should have been made available for copying.

Rocky Mountain Bank v. Google, Inc., 428 F. App'x 690 (9th Cir. 2011).
Dockets & Judicial Records

The plaintiff bank filed action against the defendant email service provider for allegedly misdirecting email which disclosed confidential information. The district court issued an ex parte temporary restraining order against the defendant and its customer, and ordered the defendant to lodge a report with the court so that it could assess whether the defendant had complied with the temporary restraining order. The defendant's response satisfied the plaintiff and the action was dismissed. A media entity then intervened, filing a motion to access the compliance report submitted by the defendant. The motion was denied and the media entity appealed. The Court of Appeals reversed and remanded, holding that lodging, rather than filing,

the compliance report with the court was not sufficient on its own to overcome the public's right to access. The court described the compliance report as a "quintessential" judicial document. Thus, absent some further determination, the public was entitled to access to the report.

Smith & Fuller, PA v. Cooper Tire & Rubber Co., 685 F.3d 486 (5th Cir. 2012).
Discovery Materials

The district court ordered sanctions under Rule 37(b) in the amount of $29,667.71 against the plaintiff's attorney for violating a protective order. The lower court calculated the amount using a "lodestar" approach, which is based on the number of hours of additional litigation for the defendant, multiplied by the average rate for such work. On appeal, the plaintiff conceded to violating the order but contested sanctions on the grounds that such an action was outside the Court's authority, and that the amount imposed was unreasonable given the circumstances. The Court of Appeals affirmed, finding that Rule 37(b)(2) permitted sanctions for discovery matters because the protective order was written to regulate the discovery process. The Court of Appeals also found the sanctioned amount to be appropriate given the behavior of the plaintiff and nature of Rule 37.

In re Special Proceeding, 842 F.Supp.2d 232 (D.D.C. 2012).
Dockets & Judicial Records

This miscellaneous action arose out of the investigation of federal prosecutors in *United States v. Stevens*. The court appointed a prominent attorney to investigate prosecutorial misconduct. The attorney filed a report under seal. Motions were filed to seal the report permanently. The court denied the motions, concluding: (1) "[T]he public has an overriding and compelling right to access the Report, and that right is protected by the First Amendment"; (2) [the attorney's] investigation differed in significant respects from a grand jury proceeding and was not bound by the grand jury secrecy rules, and the reasons underlying the secrecy of grand jury proceedings were not relevant to the case; and (3) the factors identified in *In re North*, 16 F.3d 1234 (D.C. Cir. 1994) were relevant to determining whether to publically release a special prosecutor's report overwhelmingly in favor of publically releasing the Report under the circumstances. The court directed the attorney to file his report on the public docket but allowed the objectors to submit objections or comments "to be published as addenda."

Suarez Corp. Ind. v. Earthwise Techs. Inc., 2008 WL 2811162 (W.D. Wash. 2008).
Discovery Materials

In a trademark infringement action, the defendant produced 55,000 emails, nine boxes of paper printouts of .pdf files, and 9 CDs of data in native format. The plaintiff objected to the production as an unorganized "data dump" that was neither organized or labeled to correspond

to the categories of the requests, produced as kept in the normal course of business, nor produced in reasonably useable form. The court distinguished between a requesting party's right, under Rule 34, to request that electronically stored information be produced in a particular form or forms, and a demand by the plaintiff that the information be organized in a particular way. The court ordered the defendant to comply with the production requirements of Rule 34 and recommended that the parties work together to resolve any disputes. Further, the court declined the plaintiff's request to deem any objections the defendant may have to further discovery waived due to the failure of the defendant to fully respond within Rule 34's required 30 days, noting that both parties appear to be withholding further production until a confidentiality agreement can be reached and an appropriate protective order entered by the court.

United States v. Bonds, 2011 WL 902207 (N.D. Cal. 2011).
Court Proceedings

Here, the district court established a procedure to make completed juror questionnaires available to the public and the press during the jury selection process. The court also took steps to protect juror privacy and the defendant's right to a fair trial.

United States v. Business of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, 658 F.3d 1188 (9th Cir. 2011).
Dockets & Judicial Records

After the Government terminated its criminal investigation of the defendant without bringing charges, the defendant sought disclosure of search warrant applications and supporting affidavits. Citing generalized privacy interests of third parties, the Government sought to limit dissemination of the papers to the defendant's personal review and to restrict inclusion of the papers in any future court filings. The defendant argued that the search warrant papers should be unsealed as "presumptively public judicial records." The district court granted defendant's request but limited his access in accordance with the Government's suggestions. The defendant appealed. The Ninth Circuit held that a qualified common law right of access applied to post-investigation warrant materials, and concluded that the restrictions placed on the defendant's access were not supported by compelling reasons. The Ninth Circuit declined to consider the right of access under the First Amendment. The order was vacated, and the case was remanded for reconsideration of the application of the common law right of access.

United States v. Christie, 717 F.3d 1156 (10th Cir. 2013).
Court Proceedings

In this appeal from a conviction for second-degree murder and child abuse resulting from the death of her 3-year-old daughter, the defendant challenged, among other things, the trial

court's decision to exclude her former husband from the courtroom during the testimony of his 10-year-old daughter as a violation of the defendant's Sixth Amendment right to a public trial. Distinguishing the stringent test of *Waller v. Georgia,* 467 U.S. 39 (1984), as being applicable to a *total* closure of a trial, the Court of Appeals affirmed: (1) There was only a partial closure as to one person while a single witness testified; (2) a partial closure required a "substantial" interest, which could be met by the interest in safeguarding the physical or psychological well-being of a minor; (3) the record demonstrated that the district court had been correct in her assessment of the need for the partial closure to protect the 10-year-old girl's psychological well-being; and (4) no underlying Sixth Amendment interest had been impaired.

United States v. Kravetz, 706 F.3d 47 (1st Cir. 2013).
Dockets & Judicial Records

In criminal prosecution for scheme to defraud restaurant franchisor, journalist moved to make public various documents filed under seal in the case, including sentencing memoranda and sentencing letters submitted by third parties on defendant's behalf. The district court denied her motion and the journalist appealed. The Court of Appeals held that the sentencing documents constituted judicial documents subject to the common law presumption of public access. The sentencing memoranda was relied upon by the court in determining an integral phase of criminal prosecution, and public access to such materials served as a check against an arbitrary or disproportionate sentence, promoted accurate fact-finding, and stimulated public confidence in the criminal justice system. Further, the sentencing letters—which were expressly referenced in the sentencing memoranda—were central to, and served as an evidentiary basis for, the defendant's arguments for leniency. The Court of Appeals vacated and remanded, directing the district court to make particularized findings to support the sealing of sentencing documents.

United States ex rel. Martin v. Life Care Ctrs. of Am., 912 F.Supp.2d 618 (E.D. Tenn. 2012).
Court Proceedings

The plaintiff filed a *qui tam* complaint in October 2008, pertaining to herself, the state of Tennessee, and the United States. The court entered a Sealed Order that same month for sixty days. The United States Government then requested three extensions between January 2009 and December 2010, the last of which was granted indefinitely. In September 2012, at a consolidation hearing to discuss this and a similar case, local media source, the Chattanooga Publishing Company (CPC), became aware of the case and moved to intervene to prevent the records from remaining under seal. Tennessee declined to intervene entirely, but the Government opted to intervene in part, and eventually produced an amended motion to unseal some of the documents related to the case. Other components of its investigation, however, it

requested to remain sealed. The court granted the Government's motion to consolidate and also CPC's motion to intervene for the purpose of opposing the Government in maintaining the case under seal. With regard to the Government's continuous extensions in this case, the court placed the Government on notice that such behavior was inappropriate, and that future requests to extend the minimum sixty day seal period for *qui tam* suits would require extensive justification. The reason for this castigation was the balancing of the Government's interest, identifying what *qui tam* suits it would participate in and the ability to briefly investigate a defendant without their knowledge, and the public's access to court documents to maintain accountability in the judicial system. Finally, the Court found the Government's request to retain sealed documents unreasonable. It was denied. However, unsealing of the entire proceedings was stayed until November 30, 2012, and the court gave the Government until November 26, 2012, to request seal retention on specified documents, keeping in mind the new policies regarding *qui tam* sealed periods.

United States v. Jenkins, 2012 WL 5868907 (E.D. Ky. 2012).
Court Proceedings

In this First Amendment case, the newspaper moved to intervene, to set aside a statute's prohibition of contact with jurors, for access to juror names and addresses, and for an order of the court to release information of willing jury members from *United States v. Jenkins,* and to permit contact with them. The newspaper argued that the statute, which allows courts to limit interaction with jurors, was unconstitutional because of its burden on the First Amendment. The district court denied all of the newspaper's motions except its motion for an order of the court to release the information of willing members of the jury and to permit contact with willing jurors. The court reasoned that the statute did not provide a blanket rule prohibiting jurors from speaking to the media. The district court stated that it would contact the jurors in writing to inform them of their right to refrain from speaking with the media, and if they were willing to speak to the media and communicated that willingness to the court, the court would provide their information to the newspaper.

United States v. Swartz, 945 F.Supp.2d 216 (D. Mass. 2013).
Discovery Materials

The defendant in this criminal action had been indicted for allegedly attempting to download certain archived materials through an MIT computer network. He committed suicide, and the charges were dismissed. Between the indictment and the dismissal, the district court barred the defendant from disclosing documents discoverable under Criminal Rule 16 to anyone other than potential witnesses. After the suicide, media interest "escalated," and a congressional investigation commenced. Threats and harassing incidents, including hacking, occurred. The defendant's estate moved to modify the protective order pursuant to Criminal Rule 16(d) to

allow it to release documents to Congress and the public. The victims of the defendant's alleged crimes intervened to oppose modification. The Government, the estate, and the victims agreed that some modification was appropriate but disputed whether names and identifying information of certain individuals, including law enforcement personnel, should be disclosed.
The district court held that: (1) It was "appropriate to analyze the 'good cause' requirement [to modify a protective order] under the criminal rules in light of precedent analyzing protective orders in civil cases"; (2) the interests of the third-party victims bore "particular emphasis"; and (3) the presumptive right of access did *not* attach to criminal *discovery* materials. Applying the "good cause" test, the district court found that, "the estate's interest in disclosing the identity of individuals named in the production, as it relates to enhancing the public's understanding of the investigation and prosecution ***, is substantially outweighed by the interest of the government and the victims in shielding their employees from potential retaliation." The district court also allowed MIT to redact information related to weaknesses in its computer network and modified the order so that the estate could, "disclose discovery materials in its possession after redaction of the identity of individuals and sensitive network information."

Walgren Company v. Schlage Lock Co., (N.D. Ind. 2011).
Discovery Materials

The court denied a proposed stipulated protective order submitted by the parties pursuant to FRCP 26(b), finding the proposed order overbroad, and thus failed comply with FRCP 26(c)(7) and established Seventh Circuit precedent. The court observed that when parties choose to resolve their disputes in court, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Thus, if the parties in this case had desired to keep such non-confidential information secret, they should have opted for arbitration instead.

Williams & Connolly v. SEC, 662 F.3d 1240 (D.C. Cir. 2011).
Freedom of Information Act

In this FOIA action, a law firm sued the SEC to compel production of documents the SEC withheld during the law firm's representation of a client convicted of securities fraud. Specifically, the law firm sought *in camera* review of notes taken by SEC staff members during their conversations with two witness and their attorneys. The SEC refused to disclose the notes, citing Exemption 5. During trial, however, the DOJ agreed to disclose thousands of documents to the law firm, including some sets of withheld SEC notes. The district court denied the law firm's request and granted the SEC's motion for summary judgment. The Court of Appeals affirmed, holding that prior disclosure of some sets of withheld SEC notes by the DOJ rendered moot the law firm's FOIA claim as to those notes. The Court of Appeals specified, however, that disclosure by the DOJ did not waive SEC's work product protection in the undisclosed sets of

notes, which could be withheld pursuant to FOIA. The Court of Appeals also noted that *in camera* review was unnecessary to determine whether the withheld information could be used for a collateral attack on its client's conviction or used as part of the client's defense.

Wiles v. Ascom Transp. Sys., Inc., 478 Fed.Appx. 283 (6th Cir. 2012).
Miscellaneous

The plaintiffs, Kentucky residents holding drivers' licenses issued by Kentucky, appealed from the dismissal of the action brought by them against the defendant for violation of the Driver's Privacy Protection Act. The plaintiffs argued on appeal that the defendant had misrepresented that it had a permissible purpose for obtaining their personal information from motor vehicle records. Affirming the dismissal, the Court of Appeals held that "bulk obtainment of personal information for a permissible purpose" does not violate the Act, that the Act did not require immediate use of information, and that obtaining information for the purpose of reselling it did not violate the Act. The Court of Appeals also held that the plaintiffs did not have a reasonable common law expectation of privacy in information which could be disclosed pursuant to the Act, that the plaintiffs had not alleged "unreasonable publication" sufficient to state a claim for invasion of privacy, and that the plaintiffs had not alleged a violation of a *federal* right sufficient to give rise to a Section 1983 cause of action.

World Pub. Co. v. USDOJ, 672 F.3d 825 (10th Cir. 2012).
Freedom of Information Act

Under FOIA, the plaintiff requested photos of six detainees from the United States Marshals Service (USMS). The USMS refused under Exemption 7(C), citing the personal privacy rights of the detainees. The district court denied the plaintiff's request. The Court of Appeals affirmed, reasoning that the potential effect of a booking photo—the format of which is widely known as well as its association with possible criminal activity—was sufficient to deem the distribution of such photos an invasion of personal privacy. While the Court of Appeals acknowledged that the public may have had an interest in the photographs, the public's interest was outweighed by the personal privacy rights of the six individuals.

Yonemoto v. Department of Veterans Affairs, 686 F.3d 681 (9th Cir. 2012).
Freedom of Information Act

A federal employee filed a FOIA action against the Department of Veterans Affairs ("VA"), seeking the disclosure of emails that contained personnel and medical information. After extensive litigation, the VA offered to produce unredacted copies of 157 disputed emails in his capacity as a VA employee. The VA also withheld redacted portions of 12 other documents under FOIA Exemption 6, which allows an agency to withhold certain personnel, medical, and similar files that would clearly constitute an unwarranted invasion of personal privacy.

Following *in camera* review of withheld emails, the district court held that the VA's offer to give the 157 emails to the employee in his capacity as an employee mooted his FOIA claim to those documents, and the redacted portions of the remaining 12 emails were properly withheld under Exemptions 2, 5, and 6. The Court of Appeals ruled that the VA's offer to release the records to the employee in his capacity as a VHA employee meant that the VA was attempting to put restrictions on the use of the records, and that the VA was still withholding the requested records. With regard to the redacted portions withheld under Exemption 6, the Ninth Circuit held that categorical privacy determinations were "only in those circumstances in which disclosing a *type* of record defined by its *content,* such as an identifiable individual's rap sheet, will invariably result in an invasion of personal privacy."

State Decisions

ACLU of Iowa v. Records Custodian, 808 N.W.2d 449 (Iowa Ct. App. 2011) (unpublished table decision), *aff'd,* 818 N.W.2d 231 (Iowa 2012).
State FOIA

A civil liberties group filed a petition seeking an injunction ordering the school district to comply with its request for information, pursuant to the Open Records Act, pertaining to the discipline imposed on two school employees after an alleged "locker room strip search" was conducted on five female students at school. The district court granted summary judgment in favor of the defendant, finding the disciplinary records exempt from disclosure under the state's open records laws. The group appealed, arguing that the district court failed to apply a balancing test to determine whether disclosure was appropriate. The appellate court affirmed, rejecting plaintiff's argument. The court found that because defendant's disciplinary records were "job performance records" and unrelated to "final disciplinary actions," they were confidential and exempted from disclosure. On appeal, the Supreme Court held that disciplinary records and information regarding discipline were exempt from disclosure under the Act as "nothing more than in-house job performance records or information."

Apple, Inc. v. Superior Court, 56 Cal.4th 128, 292 P.3d 883 (2013).
Miscellaneous

In this putative class action, the California Supreme Court interpreted the Song-Beverly Credit Card Act to be inapplicable to transactions which involved the alleged collection of personal identifiers as a condition of the use of credit cards to purchase electronically downloadable products over the Internet. The court distinguished *Pineda v. Williams-Sonoma Stores, Inc.*, which also interpreted the Act, as being limited to "the purchase of a physical product at a traditional 'brick-and-mortar' business." The court did note, however, that the Legislature was free to amend the Act to reach the electronic transactions.

Arpaio v. Davis, 221 Ariz. 116, 210 P.3d 1287 (Ct. App. 2009).
Miscellaneous

A county sheriff submitted a judicial records request to the county court administrator seeking "thousands of random, unidentified electronic messages (e-mails) and documents, without regard to subject matter, sent to or from certain individuals" within a time period that extended over one month. The sheriff made subsequent requests, omitting more specific information requested by the court to aid in the fulfillment of plaintiff's records request. The court administrator denied the requests due to the unreasonable expenditure of resources and time required to review nearly 16,000 emails. The sheriff then filed a formal request for

administrative review with the court. At the review, the judge reviewed hard copies of certain e-mails and CDs containing other requested e-mails. The judge was also given access to the offices of other named assistants in order to review original copies of requested materials "too voluminous to copy." After reviewing some of the records *in camera,* the judge observed that the request for administrative review was untimely and could be rejected for that reason alone, but nonetheless conducted a review on the merits and upheld the denial of the judicial records request. The sheriff filed a petition for special action review pursuant to a Supreme Court of Arizona rule. The appellate court held that the sheriff's request for administrative review was untimely as matter of law and subject to being barred for that reason alone. Even if the request had been timely, however, the trial judge did not abuse his discretion in finding that review of the requested materials would require unreasonable expenditure of resources and time.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wash. 2d 398, 259 P.3d 190 (2011).

State FOIA

Various citizens filed suit in various counties seeking disclosure of a criminal investigation report and an internal investigation report regarding allegations of sexual assault against a police officer. The police officer and the police union sought to enjoin disclosure, citing the state public records statute. The lower courts ruled that that the reports were statutorily exempt from disclosure as personal information. The citizens seeking the reports appealed. Upon consolidating appeals, the Washington Supreme Court reversed and remanded, instructing the state to redact the officer's identity and produce the remainder of the reports. Despite the fact that the officer failed to prevent the production of the reports to newspaper reporter, the court stated that it did not mean he was forever prohibited from protecting his right to privacy in regards to disclosure of the reports to other individuals. While the officer's name was deemed statutorily exempt from disclosure, the remainder of the investigation reports concerning the allegation was not exempt. The court held that the public did not have a legitimate interest in the name of a police officer subject to an unsubstantiated allegation of sexual misconduct; the public did, however, have a legitimate interest in knowing how police departments responded to and investigated such allegations.

Bennett v. Smith Bundy Berman Britton, PS, 176 Wash.2d 303, 291 P.3d 886 (2013).

Dockets & Judicial Records

In what began as a marriage dissolution action, an accounting firm was sued and, during discovery, produced tax records of nonparties. The parties stipulated to a confidentiality order that provided, among other things, that the tax records could be used in motions, etc., only if filed under seal. The firm moved for summary judgment and the trial court ordered that

documents be filed under seal. After opposition papers were filed, but before the court had considered the motion, the action settled. After the settlement, the parties realized that the opposition papers inadvertently included materials that should have been filed under seal and agreed to file redacted and sealed versions of those papers. The plaintiffs' expert then moved to intervene, seeking access to everything filed under seal. The trial court allowed the intervention but denied to unseal the documents. The court of appeals affirmed, as did the Washington Supreme Court. Interpreting the Washington State Constitution, the court held that "the act of filing a document does not alone transform it into a public one" and that "information does not become part of the judicial process is not governed by the open courts provision." Here, the sealed documents were not relevant to a decision and there was no presumption of public access. Instead, a five-part balancing test would govern. The Washington Supreme Court remanded to apply that test.

Billings Gazette v. City of Billings, 362 Mont. 522, 267 P.3d 11 (2011).
Dockets & Judicial Records

A newspaper brought this declaratory judgment action against the city, seeking the disclosure of a letter from police captain to former police department employee detailing evidence gathered in the investigation of former employee's alleged misuse of a city credit card. The trial court denied the city's motion for summary judgment, granted summary judgment to the newspaper, and ordered disclosure of the letter. The city appealed. The Montana Supreme Court affirmed, holding that the letter was a public document subject to disclosure under a "right to know" provision of the state constitution and the state's freedom of information act. The Court found that the former employee did not have reasonable expectation of privacy in the letter sufficient to shield the letter from disclosure. Acknowledging that disclosure of the letter could taint the criminal investigation of the former employee, the Court nevertheless concluded that this factor alone did not shield the letter from disclosure.

State ex rel. The Cincinnati Enquirer v. Hunter, 2014 Ohio. St.3d 51 (Sup. Ct. 2013).
Court Proceedings

This is an unusual civil contempt proceeding. The appellant is a juvenile court judge. After she prohibited the appellant newspaper from access to a hearing for violation of her order which barred media from publishing the full names of the juvenile defendants and their parents the intermediate court of appeals ordered the judge to allow access and stayed enforcement of the name restriction. At a subsequent hearing, the judge allowed the newspaper access but only under various conditions. The appellate court found the judge in civil contempt for failure to comply with its order but granted a stay to allow the judge to appeal. The Ohio Supreme Court affirmed the contempt.

Note: Several other decisions have addressed restrictions that the trial judge imposed on the press. These are: (1) *State ex rel. Cincinnati Enquirer v. Hunter*, 2013-Ohio-4459 (Ct. App. 2013) (issuing *writ of mandamus* to compel judge to release unredacted court records of all cases before her in 2012 on finding that judge "failed to present clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest"); (2) *State* ex rel. *Cincinnati Enquirer v. Hunter*, 2013-Ohio-4567 (Ct. App. 2013) (denying writ of prohibition absent evidence that judge "is about to exercise her judicial power to deny access to the media and public without a closure hearing ***"); (3) State *ex rel. Scripps Media, Inc. v. Hunter*, 2013-Ohio-5895 (Ct. App. 2013) (granting writ of prohibition "to prevent Judge Hunter from enforcing the access and reporting restrictions without conducting an evidentiary hearing and making the required findings"). The Supreme Court decision, and decisions (2) and (3) in this Note, all apply to a delinquency proceeding which "generated considerable public interest."

City of Champaign v. Madigan, 372 Ill.Dec. 787, 992 N.E.2d 629 (Ill. App. Ct. 2013).
State FOIA

At issue here was whether "communications relating to city business to and from individual city council members, on their personal electronic devices, constituted public records" and were subject to access under the Illinois Freedom of Information Act. The Attorney General of Illinois had issued a binding opinion that concluded that such communications were "public records" as defined by the Act. Interpreting the Act, the appellate court held that, "communications 'pertaining to public business' and sent to and from individual city council member's personal electronic devices during the time city council meetings (and study sessions) were convened" met the statutory definition and, after administrative review for exempt information, should be released. The court noted the Preamble to the Act, which stated that, "technology may advance at a rate that outpaces its ability to address those advances legislatively," urged the State legislature to explicitly address the issue, and encouraged local governments to, "consider promulgating their own rules prohibiting *** members from using their personal electronic devices during *** meetings."

City of Dallas v. Abbott, 304 S.W.3d 380 (Tex. 2010).
State FOIA

The plaintiff made a Public Information Act request of the state that was vague. The state responded in good faith requesting clarification from the plaintiff. Plaintiff narrowed his request and the state provided the majority of the requested documents, withholding two that allegedly fell under attorney-client privilege. The state then requested that the attorney general provide an opinion on those two documents. The attorney general believed that, because more than ten days had passed since the original request, a time-frame permitted by the law that

allows the state to seek legal guidance from the attorney general, the statutory presumption in favor of the documents being public record required their release. The state then brought suit seeking a declaratory judgment. The trial and appellate courts held that the ten-day provision began on the plaintiff's original date of request for the records. The Texas Supreme Court reversed. In instances where the state makes a good faith effort to clarify what is being requested, as was the case here, the ten-day provision to seek an attorney general opinion does not commence until the date of the receipt of the clarified request. This, the court held, was not contrary to the legislative intent behind the law and served the public by ensuring that public information requests were fulfilled in a meaningful manner.

City of Riverdale v. Diercks, 806 N.W.2d 643 (Iowa 2011).
State FOIA

Residents, pursuant to the state's FOIA, requested a city hall security video of a confrontation with the mayor over an earlier records request at the city clerk's counter. The city refused and sought a declaration that the videotape was confidential and thus exempt from disclosure. The city further argued that disclosing the contents of the videotape would jeopardize security at city hall. Residents counterclaimed, seeking an order compelling disclosure of videotape and payment of all attorney fees and costs. After the mayor showed the video to a reporter, the city's counsel advised the mayor not to show the video to others in light of the city's position that the video was confidential. The district court ordered disclosure of the videotape and also ordered the city to pay the residents' attorney fees. Both parties appealed and the court of appeals reversed, and vacated the attorney fee award. The Iowa Supreme Court granted the residents' application for further review. The court held that the trial court did not abuse its discretion in awarding attorney fees without a finding of bad faith on part of the city and did not err in rejecting the city's advice-of-counsel defense at trial. Thus, the court vacated the court of appeals' decision, affirmed the district court's award of attorney fees to residents and remanded.

Court of Common Pleas of Lackawanna Cnty. v. Pennsylvania Office of Open Records, 2 A.3d 810 (Pa. Commw. Ct. 2010).
Dockets & Judicial Records

The Court of Common pleas brought action seeking a declaratory judgment stating that the Office of Public Records ("OOR") did not have the right to release information that pertained to court employees or court documents stored on county-provided equipment. The Court of Common Please also requested a declaration that the OOR lacked jurisdiction over requests seeking such information and injunctive relief permanently enjoining the OOR and county from ordering release, or releasing, such requested information. The Commonwealth Court held that the records of the director of the office of domestic relations—"an administrative staff

employee"—constituted records of a judicial agency that were not subject to the jurisdiction of the OOR, even though director was paid by the county, and county had access to director's emails because it provided the court computer system. Thus, the OOR order granting the records request and ordering the release of information constituted a blatant and unconstitutional violation of the separation of powers doctrine.

Denver Post Corp. v. Ritter, 230 P.3d 1238 (Colo. Ct. App. 2009) *aff'd,* 255 P.3d 1083 (Colo. 2011).

State FOIA

Interpreting the Colorado Open Records Act, the Court held that the personal cell phone billing statements of the governor were not a "public record." Although the governor used his cell phone for official business, there was insufficient proof that the governor "made, maintained, or kept" the bills in his official capacity: (1) The bills were made by a service provider which determined what calls would be listed on the bill; (2) the governor did not "maintain" the bills for any reason other than personal ones; and (3) the governor only kept the bills for personal reasons. The appellate court also denied leave to amend, concluding that any amendment would be futile.

Drinker Biddle & Reath LLP v. Department of Law & Pub. Safety, 421 N.J. Super. 489, 24 A.3d 829 (N.J. App. Div. 2011).

Discovery Materials

The plaintiff challenged the state's denial of his request for transcripts of unfiled depositions in the state's underlying environmental lawsuit against a refinery operator. The plaintiff alleged violations of the state's open records law, the common-law right of access, and the federal and state constitutions. The plaintiff argued that the transcripts were government records subject to access under state's open records law in the absence of a confidentiality order, and that state law did not exclude unfiled discovery documents from access. The plaintiff also argued that case law supported access, and that the state had failed to demonstrate that the legislature intended to exclude unfiled discovery documents from the state's open records law. The trial court dismissed the plaintiff's claims, and the plaintiff appealed. The appellate court held that the records were statutorily exempt from disclosure under state law as unfiled discovery. A three-step balancing test, however, was required under common law to determine whether the transcripts were accessible. In this case, the trial judge merely stated that unfiled discovery is not accessible and failed to carefully evaluate plaintiff's asserted public interest or whether the transcripts were relevant to the vindication of that public interest. Accordingly, the court reversed and remanded for the court to conduct the appropriate common-law balancing test.

In re Enforcement of a Subpoena, 463 Mass. 162, 972 N.E.2d 1022 (2012). Miscellaneous

The petitioner in this judicial disciplinary proceeding before the Commission on Judicial Conduct moved for a protective order against a subpoena that, "plainly and admittedly direct *** [him] to produce notes and other material concerning his decision-making in cases over which he presided." The motion was reported without decision to the Supreme Judicial Court. After canvassing the law of other jurisdictions and considering the policy reasons behind it, the court recognized the judicial deliberative privilege: "This absolute privilege covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored mentally or memorialized in other nonpublic materials." The court, in recognizing the privilege, noted that, "[t]here are multiple sources of primary information, available to the public and the commission on the basis of which judicial conduct and outward expressions of potential partiality can be assessed. Accessing these sources does not require intrusions into the deliberative processes of judges." The court remanded for the issuance of a revised subpoena.

Freedom Found. v. Gregoire, 178 Wash.2d 686, 10 P.3d 1252 (2013) (*en banc*). State FOIA

In this action brought under the Public Records Act, the plaintiff organization brought suit to compel production of certain documents after the governor had asserted executive privilege. Relying in part on *United States v. Nixon,* 418 U.S. 683 (1974), the Washington Supreme Court held that the separation of powers doctrine gave rise to a qualified executive communications privilege that served as an exemption from the Act. The court then reviewed the record before the trial court, which included a privilege log and letter that explained the log, noted that the plaintiff had refused to make any effort to rebut the presumption against production created by the privilege, and affirmed the trial court.

Galloway v. Town of Hartford, 192 Vt. 171, 57 A.3d 684 (2012). State FOIA

A journalist requested records relating to the police's response to a possible burglary in progress. The police used considerable force in restraining the suspect, who turned out to be the homeowner. The police chief and town manager denied the request, claiming the records related to a criminal investigation, and thus, were protected from disclosure under "exemption five" of the state's public records act. The journalist filed an action against the town to compel production of the records. The trial court concluded that the records created by police were exempt from disclosure under the state's public records act "because they were created during the course of an investigation into suspected criminal activity." Because the investigation was terminated without any resulting criminal charges, however, the court held that "any records

created after the decision that there would be no criminal charges had to be disclosed." The trial court reasoned that "the records revealing the outcome of an investigation are not records 'of the investigation,' but are its product." The journalist objected to this decision on the grounds that it contravened the purposes of the public records act, and that the criminal investigation ended when the handcuffs were removed from the suspect. The trial court declined to modify its decision and the journalist appealed. The Vermont Supreme Court reversed, holding that the homeowner was subjected to a de facto "arrest," requiring the disclosure of "all records considered by the trial court that were identified by the police as being generated as a result of the incident." The Court found "exemption five" inapplicable because the town failed to demonstrate that disclosure "pose[d] a concrete harm to law enforcement interests." In weighing the competing interests in determining whether the records were public, the Court also noted that "many other states are guided by statutory criteria that provide police and courts with a far better and more defined framework in making decisions about disclosure of this type of record." Two of the Justices concurred, agreeing with that the result, but stating that the reason why the records did not fall within the exemption was because "there was no crime." One dissenting justice found that the plain language of the exemption clearly evidenced a legislative intent "to withhold information on criminal investigations and investigative detentions not resulting in charges, while mandating disclosure of arrests accompanied by a formal criminal charge." The dissenting judge criticized the majority opinion for ignoring the plain language of the statute, and instead, "impos[ing] a variable, or floating, test for public access of police records, requiring a determination of "whether the temporary detention of a suspect amounts to an arrest for purposes of Fourth Amendment protection, even when, as here, no such claim of unconstitutional invasion is at issue. As a result of this "floating" test, the dissenting judge believed that custodians of police records "must now puzzle over 'de facto' arrest versus investigative detention not amounting to arrest—a moving target worthy of countless and diverse court decisions."

Globe Newspaper Co. v. Superior Court for the Cnty. of Norfolk (In re Globe Newspaper Co., Inc.), 461 Mass. 113, 958 N.E.2d 822 (2011).

After a woman was indicted by a grand jury for the murder of her brother, a newspaper filed a motion to inspect and copy the inquest report and transcript of the inquest proceedings. The judge denied the newspaper's motion and ordered the inquest report and transcript to be impounded until further order of the court. The newspaper challenged the denial of its motion, claiming that the judge erred in concluding that the impoundment was governed by the common-law principles in *Kennedy v. Justice of the District Court of Dukes County*, 356 Mass. 367, 252 N.E.2d 201 (1969) (*Kennedy*), rather than the statute addressing inquest reports enacted after the *Kennedy* decision. The Massachusetts Supreme Judicial Court held that the report and transcript became presumptively public documents once the district attorney filed a

notice, which indicated that the grand jury returned an indictment. The case was remanded with instructions to vacate the judge's denial of the motion.

In re Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012).
Pleadings & Orders

The plaintiff, a former president of civic organization, brought a defamation action against an anonymous commenter to an online news article, and filed a motion to compel a newspaper to disclose the identity of the commenter. The superior court granted the plaintiff's motion and the newspaper appealed. The Court of Appeals held that the newspaper did not waive its privilege under the Shield Law, and as a matter of first impression, that the Shield Law did not allow newspaper to refuse to conceal commenter's identity. The court further held that the statement posted by the commenter was defamatory *per se*. Finally, *prima facie* evidence of actual malice was not required to compel discovery of the commenter's identity. Judgment was reversed and remanded with instructions.

Judicial Watch, Inc. v. City of Phoenix, 228 Ariz. 393, 267 P.3d 1185 (Ct. App. 2011).
State FOIA

A police department provided a security detail for the mayor's protection and kept two types of records related to its activities: (1) annotations on the mayor's daily public calendar of his public activities ("annotated calendars"); and, (2) activity logs related to the mayor's daily unscheduled and personal activities ("worksheets"). The plaintiff organization made a public records request seeking all activity logs. The city provided the annotated calendars but refused to provide the worksheets, citing the mayor's safety, confidentiality, and that the worksheets were protected by the "deliberative process privilege." The plaintiff filed a special action to compel the city to disclose the worksheets. After an evidentiary hearing and *in camera* review of a "representative sample" of the worksheets, the court concluded that the worksheets were public records under state law. The court found that the mayor's privacy interest in the worksheets was insufficient to overcome the presumption favoring inspection but that security and confidentiality concerns outweighed the public's interest in disclosure. Moreover, it was not "necessary or feasible" to produce redacted versions of the worksheets because redacted versions would largely duplicate the annotated calendars. Both parties appealed. The issue on appeal was whether it was "necessary or feasible" to allow inspection of redacted worksheets. First, the court found that disclosure was necessary because the city failed to demonstrate how the redacted worksheets would merely duplicate the annotated calendars. Further, the court found that the city failed to specifically demonstrate how release of particular information would adversely affect the mayor's privacy interest. Second, disclosure was feasible because redacting the approximately 600 pages was not too burdensome a task. The case was

remanded for a judgment ordering the city to redact the worksheets and make them available for inspection.

Juneau County Star-Times v. Juneau County, 345 Wis. 2d 122, 824 N.W.2d 457 (2013).
State FOIA

This open records case examines whether a newspaper's request to the county for certain invoices—generated in the course of a law firm's representation of the county and an insurance company under the liability insurance policy between the county and the insurance company—were subject to disclosure under the Wisconsin Open Records Law. The provision required the government to disclose "any record produced or collected under a contract" entered into by the government. The Supreme Court of Wisconsin affirmed, holding that the invoices were "contractors' records" within meaning of the Law because the invoices were produced pursuant to the liability insurance policy, which constituted a contract between the county and the insurance company.

In re Jury Questionnaires, 37 A.3d 879 (D.C. 2012).
Dockets & Judicial Records

This matter arose out of the highly publicized disappearance of a congressional intern and trial for her murder almost ten years later. In the middle of the government's case-in-chief, the court denied a newspaper's motion for leave to intervene to access written juror questionnaires. On appeal, the court held that the newspaper, as a surrogate for the public, had a presumptive First Amendment right to access written jury questionnaires used in a criminal proceeding as part of *voir dire* process, and that such a right did not expire once a trial ends. According to the court, there was no reason to distinguish written jury questionnaires from oral *voir dire* questions, since it was evident that the jury questionnaires in this case were used to facilitate the jury selection process by exposing any biases that otherwise would have been explored through oral questioning. Further, even though the jurors had been promised confidentiality regarding the questionnaires, the trial court erred in issuing a blanket denial of the newspaper's motion for leave to intervene. The court reversed and remanded to determine whether the First Amendment presumption had been overcome.

KSTP-TV v. Ramsey County, 806 N.W.2d 785 (Minn. Ct. App. 2011).
State FOIA

Television stations sought access to the rejected absentee ballots from the election for United States Senate in the possession of the county. The district court granted summary judgment to the stations and the county appealed. The Court of Appeals reversed. The stations sought further review. The Supreme Court held that: (1) The statutory provision that classified certain

government data as "private data with regard to data on individuals," and "nonpublic data with regard to data not on individuals," was not ambiguous simply because it classified sealed absentee ballots as containing information that was both private and nonpublic under the Minnesota Government Data Practices Act's (MGDPA) classification system; (2) the statutory language "sealed absentee ballots prior to opening by an election judge" was reasonably susceptible to only one meaning, and thus, unambiguous; and (3) sealed absentee ballots constituted non-public government data, and thus, television stations were precluded from accessing and copying the ballots. Judgment was affirmed.

Lawson v. Office of the Att'y Gen., 415 S.W.3d 59 (Ky. 2013).
State FOIA

In this "reverse" action under the Open Records Act, an individual challenged the failure of lower courts to enjoin the Kentucky Attorney General from disclosing a statement the individual had provided in 1983 related to his involvement in a bid rigging scheme. Affirming the ruling the lower appellate ruling, the Kentucky Supreme Court held: (1) The individual had standing to invoke the privacy exemption under the Act; (2) the individual lacked standing to invoke an exemption intended to benefit prosecutors, and (3) disclosure would not be an "unwarranted" invasion of the individual's personal privacy. The individual's privacy interests had been "significantly diminished" as the statement had followed a federal guilty plea, the public had a legitimate interest in learning why and how the individual's bidding privileges in Kentucky had been reinstated after the plea, and the "age" of the statement had not diminished the public interest.

Maese v. Tooele County, 273 P.3d 388 (Utah Ct. App. 2012).
State FOIA

The plaintiff sought judicial review of a county commission chair's decision to uphold the denial of his Government Records Access Management Act (GRAMA) request. The plaintiff sought an electronic copy of the county's entire property transaction database as kept by the county, or in the alternative, a complete twenty-year historic property transaction report in electronic format. The county refused the request, stating that it required the county to improperly "...create a record or compile, format, manipulate, package, summarize, or tailor information; [or]...provide a record in a particular format, medium, or program not currently maintained by the government entity" in violation of GRAMA. Additionally, the county claimed the information was available for public review and copying during regular business hours. Summary judgment was granted to the county on the grounds that the language of GRAMA did not require the county to provide an electronic copy of the record if there is a paper equivalent. The appellate court upheld the decision, holding that GRAMA did not require them to fulfill the

request, and that a paper copy, including scanned images, were available for review during business hours.

In re Maine Today Media Inc., 59 A.3d 499, 2013 ME 12 (Me. 2013).
Court Proceedings

The trial court in this criminal case initiated jury selection through a process regularly used in Maine courts that provided for extensive individual *voir dire*, with the practical effect that the public was excluded from the *voir dire* process. After jury selection had begun, the trial court received a letter from counsel for a media company asserting a greater right to public access. The court initially agreed to open the process to the public upon the defendant's agreement. After considering his options and consultation with his attorney, however, the defendant expressed concerns about the ability to draw an impartial jury if the process used by the court was changed. The court then agreed to continue with the individual *voir dire* process. After jury selection had begun, the media company filed a motion to intervene. Given the lateness of the request and a concern that juror candor would be reduced, the trial court denied the motion. The media company filed an interlocutory appeal. The Maine Supreme Court held that, although the trial court exercises substantial discretion over the mode and conduct of *voir dire*, the trial court's generalized concern that juror candor might be reduced if *voir dire* was conducted in public was insufficient to bar the public or media from the entirety of the process. Accordingly, the matter was remanded for the trial court "to conduct the remaining voir dire in a presumptively public manner, exercising its considerable discretion to prevent the dissemination of sensitive juror information." The Supreme Court stated that public access to the jury selection that already occurred could be addressed, at the court's discretion, by the release of appropriately redacted transcripts.

McLeod v. Parnell, 286 P.3d 509 (Alaska 2012).
State FOIA

Under the state's Public Records Act, the plaintiff initially sought the release of then-governor's email from both her state-issued email account and her private email account. Summary judgment was granted in favor of the governor's office. On appeal by the plaintiff, the issue before the Alaska Supreme Court was whether a state employee using a private email address during the course of state business creates a public record, and whether this use constitutes a *per se* violation of the Act. The Alaska Supreme Court affirmed, holding that "public records" under the Public Records Act included those records which were "appropriate for preservation" under the state's Records Management Act. Although the use of private email accounts was not a *per se* violation of the law, the Court concluded that the use of private email accounts in matters "appropriate for preservation" constituted public records, which state officials was required to provide upon request.

Media Publishing Grp., LLC v. State, Case No.: 1D13-5721 (Fla. 1st Dist. Ct. App. Dec. 18, 2013).
Court Proceedings

Nonparty news organizations were granted leave to intervene and appeal from closure orders in an ongoing criminal proceeding. On appeal, the court held: "Petitioners' emergency petition for review of orders excluding the press from receiving public records is granted ***. This disposition is without prejudice to a subsequent motion to determine confidentiality of the records at issue or for a protective order limiting the disclosure of discovery materials. Should such a motion be filed, or if the trial court considers the matter on its own motion, the court is directed to immediately convene an evidentiary hearing, after providing appropriate notice to the Petitioners, for the purpose of determining whether closure (including, but not limited to, deferral of public access to pretrial discovery materials upon timely *in camera* review of such materials) in this cause is warranted by law ***. Following the hearing, the trial court shall promptly enter an order, stating with specificity its findings of fact and its reasons for granting or denying closure in this matter. Any party or intervenor adversely affected *** may file a timely petition for review ***." (footnote omitted).

Montenegro v. City of Dover, 162 N.H. 641, 34 A.3d 717 (2011).
State FOIA

The plaintiff sought disclosure of information under the state's right-to-know law, pertaining to certain surveillance equipment and procedures under the control of defendant city. The court denied the request. On appeal, the Supreme Court of New Hampshire affirmed in part, holding that the materials were exempt under the "law enforcement purposes" exemption. The court added that the defendant was not required to establish that materials were investigatory in order for the exemption to apply. Further, the court found that the exemption did not conflict with the constitutional right to access to public records under state law. Conversely, on issue of apparent first impression, the court reversed and remanded regarding the disclosure of job titles, on the grounds that job titles did not constitute "internal personnel practice" within the meaning of the exemption.

Paff v. Borough of Chatham, 2011 WL 5105477 (N.J. App. Div. 2011) (unpublished).
State FOIA

Following a police officer's demotion and suspension, the plaintiff blogger requested information regarding the length of the officer's suspension. Public officials refused to provide the information, citing the confidentiality accorded to personnel matters. The blogger sued the public officials under the state's Open Records Law and the common law right of access. After

the trial judge reviewed the officer's disciplinary records *in camera*, it granted summary judgment in favor of the public officials. The appellate court affirmed, holding that the information was exempt as personnel records under state law. Under the common law right of access, the court held that the public interest in confidentiality outweighed the blogger's interest in the records. The court explained that disclosure would have a "chilling effect" on the police department's ability to hire personnel if applicants knew "that disciplinary sanction short of demotion" would be made public. Moreover, disclosure would implicitly and improperly reveal other confidential information about an officer, such as length of service, prior evaluations, prior infractions or commendations, and other mitigating circumstances.

People v. Harris (*In re Gee*), 2010 IL App (4th) 100275, 956 N.E.2d 460 (2010). Dockets & Judicial Records

During the prosecution of a murder, newspapers petitioned to intervene and gain access to a sealed search warrant file. The district court granted the petitions to intervene but ordered the affidavit supporting the search warrant and the inventory to remain sealed. The newspapers appealed. The Court of Appeals affirmed, holding the presumption of public access in criminal proceedings did not attach to sealed-search warrant affidavit and inventory, either under the First Amendment, common law, or state law. The court noted that federal circuit courts were split over the issue, but emphasized that the warrant application process had not been historically open to the public. Further, even assuming that a qualified right of access applied, the court found that the generalized public interest was far outweighed by the substantial probability of compromising and interfering with an ongoing investigation. The court stated that a warrant application involved no public or adversary proceedings.

People v. Holmes, Case No. 12CR1522 (D. Co. Apr. 4, 2013). Dockets & Court Records

This is the prosecution arising out of the mass shootings in Aurora. Various media organizations moved to compel the release of probable cause affidavits in support of warrants and requests for the production of records. These had been sealed prior to the preliminary hearing, which had been conducted. The trial court determined that: (1) The organizations had standing to be heard; (2) the criminal justice records in issue were held by the court in its official capacity, (3) Colorado law required that a balancing test be conducted to determine whether "unrestricted access would pose a substantial probability of harm to the fairness of the trial, if suppression would effectively prevent such harm, and if there is no less restrictive alternative reasonably available to prevent the harm." Undertaking the balancing test, the court found that: (1) The organizations had a First Amendment right to the sealed records; (2) given that the identities of victims and witnesses have been released, there was no valid privacy or safety concern that

would outweigh unsealing; and (3) the defendant had failed to demonstrate any factor that would justify sealing.

Rapid City Journal v. Delaney, 2011 S.D. 55, 804 N.W.2d 388 (2011).
Court Proceedings

In a civil dispute over the management and control of a corporation, the trial judge was asked to determine the value of the corporation so that one faction of the family could buy the other out. At trial, both parties sought to protect "confidential business information" and moved to close the courtroom when financial information and testimony was presented on the corporation's value. The judge imposed a gag order on the parties and closed the trial and court records to the public. The media intervened and unsuccessfully petitioned for a *writ of mandamus* or prohibition, asserting that the gag order unlawfully interfered with media's First Amendment and common law rights. The Supreme Court granted the media's petition for review and held that, although the underlying trial was complete, the media's claims could be considered under an exception to the mootness doctrine. Additionally, it held that the First Amendment afforded the media and the public a qualified right of access. Finally, the court concluded that the trial court abused its discretion because: (1) It lacked the statutory or legal authority to issue a gag order; (2) failed to correctly apply the First Amendment or the common law presumption of openness; (3) failed to require the parties to show that closure was necessary to preserve higher value; (4) failed to articulate findings specific enough that a reviewing court could determine whether the closure order was properly entered; and (5) failed to narrowly tailor the closure order.

Reno Newspapers, Inc. v. Gibbons, 266 P.3d 623 (Nev. 2011).
State FOIA

This case arose out of a newspaper's public records request for e-mails between the governor and ten people over a six-month time period. In the event that the governor objected to the request, the newspaper asked that it alternatively be provided with a log indicating each e-mail's sender, recipients, message dates, and the basis on which access was being denied. The governor denied the request, claiming the e-mails were either privileged or not considered public records. The newspaper filed a petition for a *writ of mandamus* in the district court, seeking access to the e-mails or the alternative log. After a hearing and a review of the e-mails by the judge *in camera*, the district court granted the writ as to six e-mails, and denied the writ as to the remaining e-mails. The newspaper appealed. The Supreme Court held that, after the commencement of a lawsuit under the state's open records law, the requesting party generally is entitled to a log containing a factual description of each withheld record and a specific explanation for nondisclosure. Further, the Court found that the state had failed to satisfy pre-litigation requirements for claiming confidentiality of withheld e-mails since it did not cite to

specific authority making the records confidential, and its informal employee e-mail policy did not have force of law. Thus, the court reversed and remanded with instructions.

Republican Party of New Mexico v. New Mexico Taxation & Revenue Dept., 2012 -NMSC- 026, 283 P.3d 853 (2012).
State FOIA

A political party and director of voting organization brought action against various state departments and the custodian of public records after the state provided public records pursuant to the state's public records act, but redacted much of the information in the documents. The custodian of records claimed that, under the act, the redacted information was protected from disclosure by executive privilege. The district court granted summary judgment in favor of the state. The New Mexico Supreme Court granted *certiorari* before events transpired that effectively rendered the appeal moot. The Court exercised its authority to issue an opinion holding that the executive privilege exemption can only apply to communications between the governor (as chief executive) and those individuals close to the governor's office in an organizational and functional capacity. Thus, routine records such as those sought in this case—although managed by the executive branch or government—were not permissibly withheld through executive privilege.

Rueger v. Natural Res. Bd., 191 Vt. 429, 49 A.3d 112 (Vt. 2012).
State FOIA

The plaintiffs sought records pursuant to an Access to Public Records Act (PRA) request. The respondents withheld some of the requested documents claiming a lawful exemption under the statute because they reflected the deliberations of a state agency, acting in a quasi-judicial role. Plaintiffs sued to compel disclosure and the trial court ruled in favor of the state. Upon appeal, the Vermont Supreme Court affirmed the prior decision find that the documents requested fell within the plain language of the statute that exempts records of or materials prepared for deliberations or quasi-judicial procedures. Additionally, the Court noted that protecting deliberations of this nature was for the public good in that judicial and quasi-judicial officers would be reluctant to engage in frank dialogue, or otherwise may be persuaded by public opinion, if they knew that their deliberations would be public record.

Rutland Herald v. Vermont State Police, 191 Vt. 357, 49 A.3d 91 (2012).
State FOIA

The plaintiffs made a public records request to the state police relating to a criminal investigation into the possession of child pornography by employees at a state police academy. The state refused, citing statutory provisions permitting the withholding of records dealing with the detection and investigation of crime. The plaintiffs filed suit and the trial court granted

summary judgment in favor of the state. The appellate court affirmed and held that the legislative intent of the state public records act was that criminal investigative records be permanently exempt, citing the omission of temporal language in this area that pervades other areas of the PRA.

Sander v. State Bar, 58 Cal.4th 300, 314 P.3d 488, 165 Cal.Rptr.3d 250 (2013).
Dockets & Judicial Records

The plaintiffs sought to compel the State Bar of California to disclose certain information in its bar admission database to "conduct research on racial and ethnic disparities in bar passage rates and law school grades." The trial court denied access. The Court of Appeal reversed, holding that the common law right of access to judicial records created a presumption in favor of disclosure. The California Supreme Court found that: (1) "the statutes and rules specifically applicable to the State Bar neither demand nor prohibit access to the State Bar's admissions database that plaintiffs seek, although they do confirm that members and applicants have some expectation of privacy in their records;" (2) the common law right of access to public records extended beyond those that "officially memorialize or record government action" to documents in which there is a "legitimate public interest;" and (3) "the public's interest in the information in the database would contribute to the public's understanding of the State Bar's admission activities, and is sufficient to warrant further consideration of whether any countervailing consideration weighs against public access." The court then noted that, "[b]ecause plaintiffs do not seek the information in a manner that would reveal the identities of individual applicants, the State Bar's promises of confidentiality do not necessarily preclude public access to the database. It also recognized that questions of fact remained about a form of production that would, "satisfy the public's right of access while preserving applicants' privacy."

Sierra Club v. Superior Court, 57 Cal.4th 157, 158 Cal.Rptr.3d 639, 302 P.3d 1026 (2013).
State FOIA

"The issue in this case is whether the OC [Orange County] Landbase [by which a user can create a layered digital map containing information for over 640,000 parcels of land that includes various information] is subject to disclosure in a GIS file format at the actual cost of duplication under the California Public Records Act or whether *** it is covered by the statute's exclusion of '[c]omputer software' *** from the definition of a public record. We hold that although GIS mapping software falls within the statutory exclusion, a GIS-formatted database like the OC Landbase does not. Accordingly, such databases are public records that, unless otherwise exempt, must be produced upon request at the actual cost of duplication."

Smith v. Township of Richmond, 82 A.3d 407 (Pa. 2013).
State FOIA

"This Sunshine Act dispute concerns whether meetings between an agency and outside entities, including those involved in ongoing litigation with the agency, entailed 'deliberations'—and thus, should have been opened to the public— where the subject of the meetings was the same as that of the litigation, although the agency claims the meetings were for information-gathering purposes only." The Pennsylvania Supreme Court held: "Gatherings held solely for the purpose of collecting information or educating agency members about an issue do not fit in this description [of a "meeting" that must be open to the public under the Act], notwithstanding that the information may later assist the members in taking official action on the issue." The court did note that two public officials had expressed differing views about a settlement of litigation during one "gathering," but the exchange appeared to have been *de minimus,* and that, in any event, "the Sunshine Act does not authorize courts to invalidate official action taken at a subsequent public meeting that conforms to the Act's requirements, based on an earlier, improper closed-door meeting."

Sorenson v. Superior Court, 219 Cal.App.4th 409, 161 Cal.Rptr.3d 794 (2013).
Court Proceedings

Two jury trials had been conducted to determine whether an individual should be involuntarily committed. He was not. Thereafter, he was charged with the murder of his mother. The prosecutor and a local newspaper sought access to the trial transcripts. The requests were granted. The Court of Appeal reversed, concluding, "involuntary conservatorship proceedings *** are not 'ordinary civil trials and proceedings' *** that are presumptively public. Rather, they are special proceedings. But they are not special proceedings for which there is a qualified First Amendment right of public access. There is not such a tradition of openness and utility associated with having the proceedings public to support a finding of a constitutional right of access."

State ex rel. Missouri Lawyers Media, LLC v. Disciplinary Hearing Panel No. DHP-11-029, 396 S.W. 3d 931 (Mo. 2013) (*per curiam*).
Court Proceedings

In this original matter, the Missouri Supreme Court construed recently-adopted Rule 5.31, which governs "Records of Investigations and Formal Proceedings." The rule "sets out standards for determining when [attorney] disciplinary hearings and records shall be confidential and when they shall be made public." The rule provides that a protective order may issue if good cause is shown to "protect the interests of a complainant, witness, third party, or respondent" and that any order must be narrowly drawn. Here, the chair of a hearing

panel issued a blanket protective order. A legal media organization challenged the order through an application for a writ of *mandamus.* The Missouri Supreme Court granted the writ in part, concluding that the panel erred "in making all aspects of the proceeding confidential subject to later review to determine whether portions should be made public." The court directed the panel to comply with Rule 5.31, which set forth requirements for confidentiality.

In re Subpoena Duces Tecum on Custodian of Records, 214 N.J. 147, 68 A.3d 308 (2013) (*per curiam*).
Dockets & Judicial Records

This matter came before the New Jersey Supreme Court to consider the confidentiality of a form used to determine whether a criminal defendant was indigent and entitled to appointed counsel. The form includes financial data which a defendant must certify to be accurate. The State alleged that the defendant's data was inaccurate and false and issued a trial subpoena to determine whether a second prosecution would be warranted. The Supreme Court affirmed the quashing of the subpoena given assurances of confidentiality that appeared on the form. Exercising its supervisory power, the court directed that the form be modified to permit the disclosure of financial information pursuant to a grand jury subpoena. The court set forth other conditions that must be satisfied to obtain financial information: (1) Prosecutors must ask that the defendant make certain affirmations "at an early court appearance attended by court-appointed counsel"; (2) prosecutors may not use financial disclosures on the form to "prove the pending case"; and (3) prosecutors must present grand jury subpoenas with a detailed affidavit.

Union Leader Corp. v. New Hampshire Ret. Sys., 162 N.H. 673, 34 A.3d 725 (2011).
State FOIA

A newspaper publisher requested from the state a list containing the names of 500 state retirement system members who received the highest annual pension payments during a specific year, as well as the specific amounts received by each member. After the state refused to provide the information, the plaintiff filed an action under the state's public access law. The trial court ordered the state to disclose the records, finding the information "subject to mandatory disclosure" under state law and not exempt as a record "whose disclosure would constitute invasion of privacy." The State appealed. The appellate court held that, based on the plain language of the public access law, the records were not subject to mandatory disclosure. The court then applied a three-part test to determine whether release of the public records would entail an invasion of privacy. First, the court found that retirees had privacy interests in their names and benefit amounts, similar to public employees' privacy interests in their names and salaries. Second, the court found that the public had an interest in knowing how public funds were spent, and in uncovering corruption and error. Finally, the court found that the

privacy interests at stake were outweighed by the public interest in knowing where and how tax dollars were spent. Accordingly, the court concluded that disclosure would not constitute an invasion of privacy under the state law.

Vares-Ebert v. Kelberg, 2012 WL 33902 (N.J. App. Div. Jan. 9, 2012) (unpublished).
Settlement

The plaintiff filed a complaint against doctors in a wrongful death action, and the matter was settled prior to trial. On appeal, the plaintiff challenged the trial court's order that enforced the settlement agreement. The plaintiff claimed, among other things, that the confidentiality provisions in the agreement were unconstitutional. The appellate court agreed, holding that the confidentiality provisions were inconsistent with the state's public access laws and should thus be severed from the agreement. The lower court order was affirmed as modified.

Ward & Lee, P.L.C. v. City of Claremore, 316 P.3d 225 (Okla. Civ. App. 2013).
State FOIA

The plaintiff law firm requested, pursuant to the Oklahoma Open Records Act, that the defendant police department produce video and audio recordings as well as written reports related to the drunken driving arrest of an individual. The defendant complied in part but refused to produce a "dash camera" video, arguing that it was not a "record" as defined by the Act, although the video was produced in discovery in the individual's prosecution. The trial court denied injunctive and declaratory relief to the firm in an action brought under the Act. The appellate court reversed, holding that the trial court erred in finding that there had been "technical compliance" with the Act because the firm's disclosure request had listed an incorrect date, and "[t]he dash cam video *** is a recording created by and under the authority of public officials in connection with the transaction of public business. Thus, the arrest video is a 'record' as defined by the Act." The appellate court also held that the video constituted a "fact[] concerning the arrest" under the Act and that the Act did not have an exemption for something that might constitute evidence in a prosecution. The appellate court remanded for further proceedings and awarded reasonable attorneys' fees to the plaintiff.

Statutes, Regulations, Etc.—Federal

Privacy Protection for Filings Made with the Court, FED. R. CIV. P. 5.2
Dockets & Judicial Records

(requiring redaction of certain personal information in filings, limiting electronic access to certain electronic filings, etc.).

Public Access to Documents and Proceedings, D. COLO. L. CIV. R. 7.2
Dockets & Judicial Records, Court Proceedings

(declaring presumptive public right of access to all filed documents and court proceedings and establishing procedure for motions to restrict access).

Public Access to Documents and Proceedings, D. COLO. L. CRIM. R. 47.1
Dockets & Judicial Records, Court Proceedings

(same as above applied to *criminal* filings and proceedings).

Filings Under Seal; Disposal of Sealed Materials, S.D. FLA. GENERAL RULE 5.4
Dockets & Judicial Records, Court Proceedings

(declaring presumptive right of access to civil and criminal filings and proceedings and establishing procedures for motions to restrict access).

PROCEDURE 8: CONFIDENTIALITY VOLUNTARY E-MEDIATION PROGRAM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (OCT. 1, 2013)
Settlement

("Except as otherwise provided by law, communications between the mediator and parties are confidential and should not be disclosed other than to participants in the mediation, and will not be a part of the public record *** .").

Policy with Regard to Open Judicial Proceedings, 28 C.F.R. § 50.9
Court Proceedings

(Department of Justice guidelines for all "attorneys of the United States" with regard to moving or consenting to closing of civil or criminal judicial proceedings).

Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions (JUD. CONF. OF UNITED STATES: MAY 22, 2009)
Miscellaneous

(suggesting procedures regarding use and preservation of cited Internet information to ensure reliability of citations in opinions).

Statutes, Regulations, Etc.—State

Guidelines for Use of Laptops by the Media (Del. Ch. SEPT. 18, 2012)
Court Proceedings

(establishing guidelines to be "strictly adhered to" for "use of laptops by members of the media attending Court of Chancery proceedings").

Public Access to Documents Filed with the Court in Civil Actions, Del. Ch. R. 5.1
Dockets & Judicial Records, Court Proceedings

(declaring presumptive public right of access to all filed documents and court proceedings and establishing procedure for "confidential treatment" of documents; *see* explanatory document, PROTECTING PUBLIC ACCESS TO THE COURTS: CHANCERY RULE 5.1).

Public Access to Judicial Branch Records, FLA. R. JUD. ADMIN. 2.420 (2014)
Dockets & Judicial Records, Court Proceedings

(establishing procedures for determining confidentiality of judicial records and filing of documents containing confidential information in civil and criminal proceedings).

Opinion 239, GEORGIA JUDICIAL QUALIFICATIONS COMM'N (Aug. 28, 2013)
Court Proceedings

(clarifying "how the open courtroom issue relates to our role as this state's regulatory body for the judiciary and in specific response to requests by judges for guidance as to how best to ensure compliance with the law regarding public access to judicial proceedings" and recognizing that, "judges who do not adhere to the open courtroom principles" may be in violation of the Georgia Code of Judicial Conduct).

Access to Court and ADLRO (Administrative Driver's License Revocation Office) RECORDS, HAWAI'I CT. RECS. R. 10.1 (2010)
Dockets & Judicial Records

(declaring presumptive right of accessibility to court and ADLRO records, describing manner in which electronic records may be provided, prescribing procedure for documents or evidence submitted for *in camera* review, addressing requests for "bulk, discrete or compiled information," etc.).

Rules for Expanded Media Coverage, *IOWA COURT RULES,* CH. 25 (2010)
Court Proceedings

(establishing procedures for "[b]roadcasting, televising, recording, and photographing *** in the courtroom and adjacent area during sessions of the court, including recesses between sessions").

Metadata Retention Guidance, RECORDS MANAGEMENT SERVICES, MI. DEPT. OF TECH., MGMT., & BUDGET (2013)

Dockets & Judicial Records

(defining four categories of metadata in context of recommending that State agencies establish procedures for disposal of metadata).

Oklahoma Open Records Act: Definitions, 51 O.S. 24A.3(1)(h)(3)(2005)

State FOIA

("'Record' does not mean audio or video recordings of the Department of Public Safety").

Destruction, Sealing, and Redaction of Court Records, WA.ST. CT. GEN. R. GR15 (2006)

Dockets & Judicial Records

(establishing "uniform procedure for the destruction, sealing, and redaction of court records" for "all court records, regardless of the physical form ***, the method of recording ***, or the method of storage ***").

Articles

R. Bradway, *Metadata as a Public Record: What It Means, What It Does*, DIGITAL MEDIA LAW PROJECT (JULY 25, 2013)
Dockets & Judicial Records
(analyzing *O'Neill v. City of Shoreline* (*q.v.*) and suggesting that States "clearly define what constitutes metadata and implement procedures to regulate its collection and preservation" under open records laws).

S. Gidiere & T. Simpson, *Federal Information Access Gets an Upgrade*, TRENDS (ABA Sec. on Environment, Energy, and Resources) Mar./Apr. 2013
Freedom of Information Act
(reporting on Web-based tool for "submitting, tracking, and reviewing" FOIA requests).

K.B. Kaplan, *Will Virtual Courts Create Courthouse Relics?*, 52 THE JUDGES' JOURNAL 2 (ABA Judicial Div., Spring 2013)
Court Proceedings
(questioning whether, among other things, lack of physical accessibility to courts may result in "loss of trust and confidence in the courts because the public will no longer be in the presence" of judges, etc.).

A. Liptak, *Prosecutors Can't Keep a Secret in Case on Steroid Use*, N.Y. TIMES, JUNE 23, 2006)
Miscellaneous
(reporting on prosecutorial error in redacting sensitive information which allowed redactions to be viewed in different electronic form).

***Restored Historic Court Records are Returned to Virgin Islands*, THIRD BRANCH NEWS (UNITED STATES COURTS: NOV. 26, 2013)**
Dockets & Judicial Records
(reporting on restoration and rebinding of judicial records from 1767 to 1880).

S.M. SMITH, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177 (2009)
Court Proceedings
(addressing judicial power to seal court proceedings and concluding that, "a court's inherent power to supervise its own records does not include the power to undermine the source of its own legitimacy").

H.S. TEMPLE, *Are Digitalization and Budget Cuts Compromising History?* ABA J. (May 1, 2013)
Miscellaneous
(reporting that "law libraries are trying to adapt to the digital revolution and preserve historic and precedential documents" but that budget cuts are "creating concerns that the public will lose access to essential legal documents").

J. VALENTINO-DEVRIES & D. YADRON, *Open Secret About Google's Surveillance Case No Longer Secret*, WALL ST. J. (AUG. 26, 2013)
Miscellaneous
(reporting on error in releasing name of entity in electronically-filed brief *after* Justice Department had secured redaction order).

Sample Protective Orders

***In re Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, 27 F.C.C.R. 13098 (OCT. 17, 2012)**
Pleadings & Orders
Discovery Materials
(adopting procedures to "provide more limited access to certain particularly competitively sensitive information that may be filed").

The Sedona Conference® *International Principles on Discovery, Disclosure, & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation & Discovery of Protected Data in U.S. Litigation, Appendix B: Stipulated Protective Order Re: Protected Data* (Dec. 2011)
Pleadings & Orders
Discovery Materials
(This form of order is intended to "facilitate the production and receipt of information during discovery" in litigation in a United States district court and includes provisions addressing the production of information protected by, among other things, foreign privacy laws).