NCVLI
NATIONAL CRIME VICTIM LAW INSTITUTE
PROTECTING, ENFORCING & ADVANCING VICTIMS' RIGHTS

*Victim Law Bulletin*

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL



*This product was supported by Grant No. 2017-VF-GX-K026, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.*

## Protecting Victims' Rights and Interests in the Context of Open Records Laws

Among the many collateral issues resulting from the commission of a crime that victims may face is an attempt by members of the public, offenders or their families, or the media to use open records laws to seek records held by government agencies that contain victims' information. Among the common records sought are police reports, records of 911 calls, law enforcement body worn camera footage, records associated with state crime victim compensation claims and judicial records. Open records laws—also commonly referred to as freedom of information acts, public records laws, sunshine laws or right to know acts—are designed to allow persons to request government documents and, if the government agency holding the records refuses to turn them over, to file a lawsuit to compel disclosure.[1]

These records may include private information about victims, such as information about victims' mental or medical health, and their home, employment, family and more. Because of the private nature of these types of records, their potential disclosure via open records laws implicates victims' rights and interests—including the rights to protection,[2] privacy and to be treated fairly and with dignity and respect[3]—and can result in secondary victimization.[4] Assisting victims with the meaningful exercise of their rights in the context of open records laws requires that practitioners understand their jurisdiction's laws and adopt strategies to protect these rights in the face of requests seeking victims' information.

 Last Updated February 2020

**Identifying and Understanding Open Records Laws and Their Exemptions**

The federal government and every state has laws governing public access to governmental records—i.e., public records laws.[5] The overarching purpose of the federal open records law, known as the Freedom of Information Act (FOIA), 5 U.S.C. § 552, is to afford the public broad access to public records.[6] State laws, which are often modeled on FOIA,[7] have similar stated purposes.[8] Both state and federal laws carry a presumption of disclosure, meaning that "public records" are presumed open for public inspection unless an exemption applies.[9]

For purposes of open records laws, "public records" are generally defined to include any writing or recording—including audio and video recordings—with information about the conduct of public business that is prepared, owned, used or retained by public agencies.[10] A jurisdiction's open records law and case law determine the governmental agencies to which the law applies in that jurisdiction.[11]

Just as there are many governmental agencies involved in public life, there are many types of public records that may fall within the purview of open records laws unless exempted, including judicial records; marriage, divorce and annulment records; birth and death records; automobile registration and driver's license records; automobile collision reports; corporation registration and licensing; federal tax lien information; and law enforcement records (including 911 recordings and body-worn and dashboard camera footage).

Because open records laws carry a presumption that public records are open for inspection unless an exemption applies, it is important for practitioners working with victims to understand their jurisdiction's exemptions and how they operate.[12] For example, exemptions can work to exempt an entire category of records from disclosure (e.g., all records about participants in an address confidentiality program), or can work to exempt from disclosure only specific information contained within a record (e.g., the name of victims of certain crimes within law enforcement records).[13] Further, exemptions may be framed either as a mandatory exemption (requiring the records' custodian to decline any request to access the exempted record or information), or as a discretionary exemption (permitting the records custodian to exercise discretion to either grant or decline requests to access the particular records or information).[14]

Common categories of exemptions that may directly aid protection of victims' rights to privacy, protection and to be treated with fairness, dignity and respect include: (1) records likely to contain sensitive and private information such as judicial records,[15] medical and education records, information about participants in address confidentiality programs, sexual assault or

family violence program records, records deemed confidential or protected by evidentiary privileges, and state compensation records;[16] (2) law enforcement records, including investigative records, 911 calls, and body-worn and dashboard camera recordings (often, however, this exemption limits access only when it would interfere with an active investigation);[17] and (3) a catch-all category for other information or records that are specifically exempted from disclosure by statute or rule.[18] A handful of jurisdictions also exempt from disclosure records sought under open records laws by incarcerated offenders or their representatives except under limited circumstances.[19]

**Timely Notice is Key to Challenging Records Requests for Victim Information**

For victims and their representatives to make protective arguments leveraging either open records laws' exemptions or victims' rights to privacy, protection and to be treated with fairness, dignity and respect, they must first have timely notice of the records request.

At least one jurisdiction provides an explicit procedure to challenge open records requests, and the procedure references notice. The statute recognizes the right of an agency or the "person who is named in the record or to whom the record specifically pertains" to file a motion and affidavit in the superior court in which the record is maintained to enjoin its disclosure. *See* Wash. Rev. Code Ann. § 42.56.540 (providing that the court may enjoin "[t]he examination of any specific public record . . . [if the court] finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions"). The statute further provides that "[a]n agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested[;] [h]owever, this option does not exist where the agency is required by law to provide such notice." *Id. See also Freedom Found. v. Wash. State Dep't of Soc. & Health Servs.*, 445 P.3d 971, 980 (Wash. Ct. App. 2019) (explaining that "RCW 42.56.540 allows an agency to notify an affected person of a PRA [Public Records Act] request[,]" that "former RCW 42.56.520 states that the agency may take additional time to respond to a requestor in order to provide such notice[,]" and that "[t]he purpose of this notice and the delay in production is to give a person affected by a PRA request time to request an injunction under RCW 42.56.540").

Because of victims' rights to privacy, protection, and to be treated with fairness, dignity and respect, agencies are "required by law to provide" timely notice to victims of requests for records that contain victims' information in all cases. Timely notice is a necessity for victims who wish

to assert their rights to protect their information from disclosure; thus even when not explicitly provided for in statute, victims are entitled to timely notice of requests for records that include their information. This understanding of notice—mandating notice when a right is at risk—is rooted in due process. Moreover, due process requires not only that notice is provided, but also that it is afforded in a meaningful manner.[20] Thus, due process requires that victims are provided timely notice of requests made pursuant to open records laws for records that implicate victims' rights and interests so that they may seek to protect the records from disclosure.[21] Only with sufficient notice may victims make informed decisions about whether, when and how to exercise their rights and mitigate the risk of re-victimization.[22]

Practice tips:

- Research the open records law in a jurisdiction, including all exemptions, as well as other protections provided to victims' information *before* a request is made.
- Invest time in learning about the agencies in a jurisdiction that are likely to hold records subject to a public records request that may contain victims' information. Visit their websites and meet with the personnel responsible for records requests to determine what records they hold and where, as well as what their policies are for responding to public records requests.
- Consider proactively contacting the records personnel that hold records implicating the victim's rights to: (1) request that the agency provide timely notice to the victim of any requests for the records; and (2) permit the victim and his/her/their attorney or other representative to review the records and make requests to have records exempted from disclosure and/or to request redaction of private or identifying information.
- If exemption and/or redaction are not possible, and someone seeks disclosure, consider all avenues for relief available in your jurisdiction, including filing a motion to enjoin disclosure of the records.[23]

We would like your feedback! Click or scan code to complete our questionnaire.

[1] "Without question, the [federal Freedom of Information] Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded by statute on other grounds as recognized in Halpen v. FBI*, 181 F.3d 279, 291 (2nd Cir.1999).
[2] Victims in many jurisdiction have the rights to protection and to be free from harassment and intimidation. *See, e.g.*, 18 U.S.C. § 3771(a)(1) (guaranteeing crime victims the right to reasonable protection from the accused); Alaska Const. art. 1, § 24 (granting victims "the right to be reasonably protected from the accused"); Ariz. Const. art. 2, § 2.1(A)(1) (according victims the right "to be free from intimidation, harassment, or abuse, throughout the criminal justice process"); Conn. Const. art. 1, § 8(b)(3) (guaranteeing victims "the right to be reasonably protected from the accused"); Ill. Const. art. 1, § 8.1(a)(8) (granting victims "[t]he right to be reasonably protected from the accused"); Mich. Const. art. I, § 24(1) (guaranteeing victims the "right to be reasonably protected from the accused"); Mo. Const. art. I, § 32(1)(6) (granting victims the "right to reasonable protection from the defendant or any person acting on behalf of the defendant"); N.M. Const. art. II, § 24(A)(3) (granting victims the "right to be reasonably protected from the accused"); Ohio Const. art. I, § 10a(A)(4) (according victims the right "to reasonable protection from the accused or any person acting on behalf of the accused"); Or. Const. art. I, § 43(1)(a) (granting victims the "right to be reasonably protected from the criminal defendant"); S.C. Const. art. I, § 24(A)(6) (granting victims the right to "be reasonably protected from the accused or persons acting on his behalf"); Tenn. Const. art. I, § 35(2) (granting victims "the right to be free from intimidation, harassment and abuse throughout the criminal justice system"); Wis. Const. art. I, § 9m (granting victims the right to "reasonable protection from the accused").
[3] Some combination of victims' rights to privacy and to be treated with fairness, dignity, and respect is found in many jurisdictions' laws nationwide. *See, e.g.*, 18 U.S.C. § 3771(a)(8) (treated with fairness and with respect for the victim's dignity and privacy); Ariz. Const. art. 2, § 2.1(A)(1) (treated with fairness, respect, and dignity); Cal. Const. art. I, § 28(b)(1) (treated with fairness and respect for privacy and dignity); Colo. Rev. Stat. § 24-4.1- 302.5(1)(a) (treated with fairness, respect, and dignity); Conn. Const. art. 1, § 8(b)(1) (treated with fairness and respect); Fla. Const. art. I, § 16(b)(1) (treated with fairness and respect for the victim's dignity); Ga. Const. art. I, § 1, ¶ XXX(a) (accorded the utmost dignity and respect and be treated fairly by the criminal justice system); Haw. Rev. Stat. § 801D-1 (treated with dignity, respect, courtesy, and sensitivity); Idaho Const. art. 1, § 22(1) (treated with fairness, respect, dignity and privacy); Ill. Const. art. 1, § 8.1(a)(1) (treated with fairness and respect for victim's dignity and privacy); Ind. Const. art. 1, § 13(b) (treated with fairness, dignity, and respect); Kan. Stat. Ann. § 74-7333(a)(1) (treated with courtesy, compassion, and respect for victim's dignity and privacy); La. Const. art. I, § 25 (treated with fairness, dignity, and respect); Md. Const. Decl. of Rights art. 47(a) (treated with dignity, respect, and sensitivity); Mich. Const. art. 1, § 24(1) (treated with fairness and respect for victim's dignity and privacy); Miss. Const. art. 3, § 26A(1) (treated with fairness, dignity, and respect); Nev. Const. art. I, § 8A(1)(a) (treated with fairness and respect for victim's privacy and dignity); N.H. Rev. Stat. Ann. § 21- M:8-k(II)(a) (treated with fairness and respect for victim's dignity and privacy); N.J. Const. art. 1, § 22 (treated with fairness, compassion, and respect); N.M. Const. art. 2, § 24(A)(1) (treated with fairness and respect for victim's dignity and privacy); N.C. Const. art. I, § 37(1) (treated with dignity and respect by the criminal justice system); Ohio Const. art. I, § 10a(A)(1) (treated with fairness and respect for victim's safety, dignity and privacy); Okla. Const. art. II, § 34 (A)(treated with fairness and respect for victim's safety, dignity and privacy); Or. Const. art. I, § 42(1) (accorded due dignity and respect); Pa. Const. Stat. § 11.102(1) (treated with dignity, respect, courtesy, and sensitivity); R.I. Const. art. 1, § 23 (treated with dignity, respect, and sensitivity); S.C. Const. art. I, § 24(A)(1) (treated with fairness, respect, and dignity); Tenn. Code Ann. § 40-38-102(a)(1) (treated with dignity and compassion); Utah Const. art. I, § 28(1)(a) (treated with fairness, respect, and dignity); Vt. Stat. Ann. tit. 13, § 5303(a) (treated with dignity and respect); Va. Const. art. I, § 8-A(2) (treated with respect, dignity and fairness); Wash. Const. art. 1, § 35 (accorded due dignity and respect); Wis. Const. art. I, § 9m (treated with fairness, dignity, and respect for privacy). If a victim is to be treated with dignity,

fairness and respect, his/her/their privacy must be honored and protected. *Cf. Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (observing in the context of searches and seizures that the Fourth Amendment protects the twin "interests in human dignity and privacy"). *See also Johnson v. Carroll*, Civ. Act. No. 05-237-KAJ, 2011 WL 12854409 (D. Del. Jan. 18, 2011) (ordering documents sealed in habeas proceeding to protect the victim's privacy under both the CVRA and 18 U.S.C. § 3509). Although the rights of "fairness," "dignity" and "respect" are broad and seemingly abstract, these are enforceable rights with unique meaning. Notably, one state, Utah, has statutorily defined the terms. *See* Utah Code Ann. §§ 77-38-2(2) (defining dignity as "treating the crime victim with worthiness, honor, and esteem"), (3) (defining fairness as "treating the crime victim reasonably, even-handedly, and impartially"), (8) (defining respect as "treating the crime victim with regard and value").

[4] Secondary victimization is "victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim." U.N. Office for Drug Control & Crime Prevention, Handbook on Just. for Victims 9 (1999), https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf. *See also, e.g.*, Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 Int'l R. of Victimology 33, 34 (1994) (defining "secondary victimization" as "the wounds suffered by victims when they come in contact with the criminal justice system as complainants or witnesses"); Malini Laxminarayan, *Procedural Just. and Psychol. Effects of Crim. Proc.: The Moderating Effect of Offense Type*, 25 Soc. Just. Res. 390, 392 (2012) (describing "secondary victimization" as "negative experiences" caused by criminal proceedings or "societal reactions in response to a primary victimization that may be perceived as a further violation of rights or entitlements by the victim"). For a discussion of secondary victimization and its impact on victims, *see Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Crim. Just. Sys.*, Victim Law Bull. (Nat'l Crime Victim Law Inst., Portland, Or.), Mar. 2013, https://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool.

[5] *See* 5 U.S.C. §552; Ala. Code § 36-12-40; Alaska Stat. Ann. § 40.25.110; Ariz. Rev. Stat. Ann. § 39-121; Ark. Code Ann. § 25-19-105; Cal. Gov't Code § 6253; Colo. Rev. Stat. § 24-72-203; Conn. Gen. Stat. Ann. § 1-210; Del. Code Ann. tit. 9, § 1184; D.C. Code Ann. § 2-1710; Fla. Stat. Ann. § 119.01; Ga. Code Ann. § 50-18-70; Haw. Rev. Stat. Ann. § 92-1; Idaho Code Ann. § 74-102; 5 Ill. Comp. Stat. Ann. 140/1; Ind. Code Ann. § 5-14-3-1; Iowa Code Ann. § 22.2; Kan. Stat. Ann. § 45-216; Ky. Rev. Stat. Ann. § 61.872; La. Stat. Ann. § 44:31; Me. Rev. Stat. tit. 1, § 408-A; Md. Code Ann., Gen. Prov. § 4-103; Mass. Gen. Laws Ann. ch. 66, § 10; Mich. Comp. Laws Ann. § 15.231; Minn. Stat. Ann. § 13.03; Miss. Code Ann. § 25-61-1; Mo. Rev. Stat. § 610.011; Mont. Code Ann. § 2-6-1003; Neb. Rev. Stat. Ann. § 84-712.01; Nev. Rev. Stat. § 239.010; N.H. Rev. Stat. Ann. § 91-A:4; N.J. Rev. Stat. § 47:1A-1; N.M. Stat. Ann. § 14-2-1; N.Y. Pub. Off. Law § 84; N.C. Gen. Stat. Ann. § 132-6; N.D. Const. art. 11, § 6, N.D. Cent. Code Ann. § 44-04-18; Ohio Rev. Code Ann. § 149.43; Okla. Stat. Ann. tit. 51, § 24A.2; Or. Rev. Stat. Ann. § 192.314; 65 Pa. Stat. Ann. § 67.701; 38 R.I. Gen. Laws Ann. § 38-2-3; S.C. Code Ann. § 30-4-30; S.D. Codified Laws § 1-27-1; Tenn. Code Ann. § 10-7-503; Tex. Gov't. Code Ann. § 552.001; Utah Code Ann. § 63G-2-201; Vt. Stat. Ann. tit. 1, § 316; Va. Code Ann. § 2.2-3704; Wash. Rev. Code Ann. § 42.56.001; W. Va. Code Ann. § 29B-1-3; Wis. Stat. Ann. § 19.35; Wyo. Stat. Ann. § 16-4-202.

[6] The United States Supreme Court has explained that "[t]h basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[7] Many state jurisdictions have modeled their open records laws on the federal FOIA. For this reason, state courts routinely draw on federal judicial decisions when deciding questions of statutory construction and legislative history. *See, e.g., Regents of Univ. of Cal. v. Super. Ct.*, 166 Cal. Rptr. 3d 166, 179-80 (Cal. Ct. App. 2013), *as modified on denial of reh'g*, (Jan. 14, 2014) (explaining that because "[t]he CPRA [California Public Records Act] was modeled on its federal predecessor, the FOIA[,] . . . [t]he legislative history and judicial construction of the FOIA . . . serve to illuminate the interpretation of its California counterpart"); *Powder River Basin Res. Council v. Wyo. Oil and Gas Conservation Comm'n*, 320 P.3d 222, 232-33 (Wyo. 2014) (finding that the consideration of "federal precedent is especially appropriate in this case, as the philosophy behind the FOIA is consistent with that which led to the adoption of the WPRA [Wyoming Public Records Act], and the FOIA also exempts trade secrets

from public disclosure"). Further, when few cases exist interpreting a particular open records law, state courts may consider federal case law as well as decisions of other states as guidance. *See Powder River Basic Res. Council*, 320 P.3d at 232-233 (considering federal case law as persuasive); *Kenyon v. Garrels*, 540 N.E.2d 11, 13 (Ill. App. Ct. 1989) (considering other state court decisions as persuasive); *Montenegro v. City of Dover*, 34 A.3d 717 (N.H. 2011) (considering federal and other state court decisions as persuasive); *Abdur-Rashid v. N.Y.C. Police Dep't*, 992 N.Y.S.2d 870, 873 (N.Y. Sup. Ct. 2014) (considering federal case law as persuasive). State courts are not bound by cases interpreting the federal statute or other state open records laws, however. *See State Employees Ass'n v. Dep't of Mgmt. and Budget*, 404 N.W.2d 606, 613-14 (Mich. 1987) (considering and rejecting federal approach of using balancing test when applying the privacy exemption).

[8] *See e.g.*, Ark. Code Ann. § 25-19-102 ("It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy."); Cal. Gov't Code § 6250 ("In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."); Ga. Code Ann. § 50-18-70(a) ("The General Assembly finds and declares that the strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions. The General Assembly further finds and declares that there is a strong presumption that public records should be made available for public inspection without delay. This article shall be broadly construed to allow the inspection of governmental records. The exceptions set forth in this article, together with any other exception located elsewhere in the Code, shall be interpreted narrowly to exclude only those portions of records addressed by such exception."); 5 Ill. Comp. Stat. Ann. 140/1 ("Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest."); Va. Code Ann. § 2.2-3700(B) ("The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request."); W. Va. Code Ann. § 29B-1-1 ("Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created."); Wis. Stat. Ann. § 19.31 ("In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.").

[9] *See, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) ("The [FOIA] was designed 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.' Consistently with this purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.") (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)); *see also* Va. Code Ann. § 2.2-3700(B) ("All public records and meetings shall be presumed open, unless an exemption is properly invoked."); W. Va. Code Ann. § 29B-1-1 ("The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy."); Wis. Stat. Ann. § 19.31 ("[The state's open records laws] shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.").

[10] FOIA uses the term "agency records" instead of "public records[,]" which has been interpreted to include material created or obtained by an agency, and that is in the agency's control at the time the FOIA request is made. *See* 5 U.S.C. § 552(f)(2)(A)-(B) (defining "record" to include "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and . . .any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management"); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989) (explaining that to meet FOIA's definition of "agency records" an "agency must 'either create or obtain' the requested materials" and "must be in control of the requested materials at the time the FOIA request is made"; and further explaining that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties"). *See also, e.g.*, Ark. Code Ann. § 25-19-103(7)(A) ("'Public records' means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records."); Cal. Gov't Code § 6252(e), (g) (defining "[p]ublic records" to "include[] any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics[,]" and defining "writing" to "mean[] any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored"); Colo. Rev. Stat. Ann. § 24-72-202(6)(a)(I) ("'Public records' means and includes all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or political subdivision of the state, or that are described in section 29-1-902, C.R.S., and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds."); D.C. Code Ann. § 2-1701(13) ("'Public record' means any document, book, photographic image, electronic data recording, electronic mail, paper, video recording, sound recording, microfilm, computer disk, or other material, regardless of physical form or characteristic, that documents a transaction or activity made, received, or retained pursuant to law or in connection with the transaction of public business by or with any officer or employee of the District. The medium upon which such information is recorded shall have no bearing on the determination of whether the record is a public record."); Fla. Stat. Ann. § 119.011(12) ("'Public records' means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."); Ga. Code Ann. § 50-18-70(b)(2) ("'Public record' means all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material

prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use."); Neb. Rev. Stat. Ann. § 84-712.01(1) ("Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files."); N.Y. Pub. Off. Law § 86(4) ("'Record' means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."); Tenn. Code Ann. § 10-7-503(a)(1)(A)(i) ("As used in this part and title 8, chapter 4, part 6: (A) 'Public record or records' or 'state record or records': (i) Means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]"); Va. Code Ann. § 2.2-3701 ("'Public records' means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business."); Wis. Stat. Ann. § 19.32(2) ("'Record' means any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. 'Record' includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved. 'Record' does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.").

[11] For example, the federal FOIA statute provides that for purposes of FOIA, "agency" is defined to mean: "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but excludes: "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix[.]" 5 U.S.C. § 551(1). Interpretive judicial decisions have provided further clarification. *See, e.g.*, *Rocky Mountain Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258, 1261 (10th Cir. 2018) (holding that third-party contractor for the Forest Service was not a "federal agency" for purposes of the FOIA disclosure requirements even though agency and contractor had entered into an employment agreement, as "[i]n general, FOIA . . . does not apply to private companies, persons who receive federal contracts or grants, private organizations, or state or local governments" and the Forest Service did not exercise sufficient control over the day-to-day performance of the contractor to make it a federal instrumentality or FOIA agency"); *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 568 (2d Cir. 2016) (concluding that the National Security Council "is not an agency subject to FOIA because both the Council itself and the NSC System (a) function only to

advise and assist the President in performing his national security responsibilities and (b) exercise no authority independent of the President"); *United States v. Chandler*, 220 F. Supp. 2d 165, 167-68 (E.D.N.Y. 2002) (internal citations omitted) (holding that because "[t]he United States Courts are expressly exempt from the definition of the word "agency" . . . and the Probation Department is an arm of the United States District Court[,] . . . the Probation Department is exempt from the disclosure requirements of the FOIA and the Privacy Act"). Some jurisdictions' open records laws explicitly provide that the law does not apply to certain governmental bodies, exempting them from public records requests. *See, e.g.*, 5 U.S.C. § 551(1) (excluding from the definition of "agency" for purposes of the federal FOIA: "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix[.]"); Va. Code Ann. § 2.2-3703(A)(1), (4), (5) (providing that the state's freedom of information act does not apply to certain entities and records including the state parole board, sexual assault response teams, and multidisciplinary child sexual abuse response teams).

[12] Because of the presumption of openness that frames open records laws, courts typically conclude that the exceptions to disclosure are to be strictly construed and that—unless otherwise provided—the records' custodian bears the burden of establishing the applicability of an exception. *See, e.g., State ex rel. Anderson v. Vermilion*, 980 N.E.2d 975, 978-79 (Ohio 2012) (internal citations omitted) (explaining that it "construe[s] the Public Records Act liberally in favor of broad access and resolve[s] any doubt in favor of disclosure of public records[,]" and that it strictly construes exceptions against the records custodian, who "has the burden to establish the applicability of an exception"); *Koenig v. Thurston Cty.*, 287 P.3d 523, 525, 527 (Wash. 2012) (en banc) (noting that "[i]t is well settled that a reviewing court interprets the disclosure provisions of the PRA [Public Records Act] liberally and exemptions narrowly" and that "[t]he agency claiming the exemption bears the burden of proving that the documents requested fall within the scope of the exemption[,]" and holding that "[b]ecause the victim impact statement is not part of a prosecutor's investigation into criminal activity or alleged malfeasance, the investigative records exemption does not apply").

[13] Under circumstances in which some but not all of the information in a public record is exempted from disclosure, open records laws may explicitly require the records' custodian to disclose a redacted version of the record. *See, e.g.*, 5 U.S.C. § 552 ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made."); Fla. Stat. Ann. § 119.07(1)(d) ("A person who has custody of a public record who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying."); Mo. Ann. Stat. § 610.024(1) ("If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying."); 38 R.I. Gen. Laws Ann. § 38-2-3(b) ("Any reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion. If an entire document or record is deemed non-public, the public body shall state in writing that no portion of the document or record contains reasonable segregable information that is releasable."); Va. Code Ann. § 2.2-3704.01 ("No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other

provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.").

[14] Using one jurisdiction—Oregon—as an example, the general rule with respect to exemptions is that, "[i]f [a] public body is satisfied that a claimed exemption from disclosure is justified, it may, but is not required to, withhold disclosure of the information." *Guard Pub. Co. v. Lane Cty. Sch. Dist. No. 4J*, 791 P.2d 854, 857 (Or. 1990) (emphasis in original) (explaining that "[a]n individual claiming an exemption from disclosure must *initially show* a public body that the exemption is legally and factually justified . . . . [and] [i]f the public body is satisfied that a claimed exemption from disclosure is justified, it may, *but is not required to*, withhold disclosure of the information"). However, in Oregon as well as other jurisdictions, there are some categories of records and information that public agencies are legally prohibited from disclosing or that may be disclosed only under specific circumstances or to select entities. For example, the Oregon Department of Human Services "may not" disclose records compiled in the course of investigating child abuse reports, but must make such records available to certain entities, such as a law enforcement agency investigating a subsequent case of child abuse. Or. Rev. Stat. Ann. § 419B.035(1)(a). As a general rule, statutes that use terms such as "may not[,]" "shall not[,]" "it is prohibited[,]" or "it is unlawful" prohibit disclosure, without leaving any discretion to the public agency.

[15] This Bulletin focuses on the right to access public records, which is derived from the common law and from open records laws, and is generally not of constitutional dimension. Although courts have recognized a public right to access judicial proceedings grounded in the First Amendment of the Constitution as well as in common law, courts apply differing analysis to attempts to access judicial records. *Compare People v. Owens*, 420 P.3d 257, 258 (Colo. 2018) (finding "no support in United States Supreme Court jurisprudence for Petitioner's contention that the First Amendment provides the public with a constitutional right of access to any and all court records in cases involving matters of public concern" and finding instead that "[t]he Tenth Circuit has more than once declined to recognize a First Amendment right of access to court records") (citing *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) ("[T]here is no general First Amendment right in the public to access criminal justice records.") and *United States v. Hickey*, 767 F.2d 705, 709 (10th Cir. 1985) (distinguishing between the acknowledged right of the public and press to attend trial proceedings and a claimed of right to access court files)) *with Giuffre v. Maxwell*, 325 F. Supp. 3d 428, 440 (S.D.N.Y. 2018) (internal citations omitted) (explaining that "[t]here are two 'related but distinct presumptions in favor of public access to court . . . records: a strong form rooted in the First Amendment and a slightly weaker form based in federal common law.' Generally, the public holds an affirmative, enforceable right of access to judicial records under both the common law and the First Amendment to the U.S. Constitution. 'The presumption of access is based on the need for federal courts, although independent–indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.' However, 'the right to inspect . . . judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes' such as using records 'to gratify spite or promote scandals' or where files might serve 'as reservoirs of libelous statements for press consumption'"). Typically, open records act requests are analyzed pursuant to the jurisdiction's public records laws, although some states have adopted specific rules placing additional limitations on the disclosure of court records. *See, e.g.*, Wyo. R. Gov. Access Ct. Rec. R. 6(a), (e), (i), (n), (p), (r)-(u), (cc), (hh), (kk) (providing a "partial list" of court records that are not publicly accessible, which includes: (1) records exempted from inspection pursuant to public records' laws in [Wyoming Statutes, section] 16-4-203(b) and (d); (2) "domestic violence protection order petitioners' and their children's identifying information pursuant to [Wyoming Statutes, section] 35-21-105(e)[;]" (3) "[r]ecords from child abuse and neglect proceedings, including but not limited to records of the multidisciplinary team, pursuant to [Wyoming Statutes, sections] 14-3-424, 14-3-427(g), 14-3-437, and 14-3-439[;]" (4) "[d]iscovery material or other items submitted to a court for *in camera* review[;]" (5) "[m]ental health and counseling records pursuant to [Wyoming Statutes, sections] 33-27-123,

33-38-113, 9-2-125, and 9-2-126[;]" (6) "[r]ecords sealed by a court[;]" (7) "[s]exual assault victim's identifying information prior to filing of the information or indictment in district court, and minor sexual assault victim's name pursuant to [Wyoming Statutes, section] 6-2-319(a) and (b)[;]" (8) "[m]edical records pursuant to [Wyoming Statutes, section] 16-4-203(d)(i)[;]" (9) "[c]rime victim's compensation application pursuant to [Wyoming Statutes, section] 1-40-107(d)[;]" (10) "[c]hild abuse and neglect information pursuant to [Wyoming Statutes, section] 14-3-214[;]" (11) "[s]exual assault victim medical examination information and reports pursuant to [Wyoming Statutes, section] 6-2-309(m)[;]" and (12) "[c]oroner's records, including toxicology reports, photographs, video recordings or audio recordings made at the scene of the death or made in the course of postmortem examinations pursuant to [Wyoming Statutes, section] 7-4-105").

[16] *See, e.g.*, 5 U.S.C. § 552(b)(6) (exempting from FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); Alaska Stat. Ann. § 40.25.120(a)(3), (4) (providing for the right of people to inspect public records "except . . . records required to be kept confidential by a federal law or regulation or by state law" and "medical and related public health records"); Ark. Code Ann. § 25-19-105(b)(2) ("It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter: . . . [m]edical records . . . and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act"); Cal. Gov't Code § 6254(c) (exempting from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"); Cal. Gov't Code § 6254(k) (exempting from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege"); Cal. Gov't Code § 6276.01 (noting the intent of the legislature to exempt crime victims' "confidential information or records" based on the state victims' rights constitutional amendment); Cal. Gov't Code § 6254.17(a) ("Nothing in this chapter shall be construed to require disclosure of records of the California Victim Compensation Board that relate to a request for assistance under Article 1 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2."); Colo. Rev. Stat. Ann. § 24-72-202(6)(b)(I), (IV) (excluding from the definition of "public records" subject to disclosure "[c]riminal justice records that are subject to the provisions of part 3 of this article" and "[m]aterials received, made, or kept by a crime victim compensation board or a district attorney that are confidential pursuant to the provisions of section 24-4.1-107.5"); Colo. Rev. Stat. Ann. § 24-72-204(2)(c) ("Notwithstanding any provision to the contrary in subparagraph (I) of paragraph (a) of this subsection (2), the custodian shall deny the right of inspection of any materials received, made, or kept by a crime victim compensation board or a district attorney that are confidential pursuant to the provisions of section 24-4.1-107.5."); Colo. Rev. Stat. Ann. § 24-72-204(2)(d) ("Notwithstanding any provision to the contrary in subparagraph (I) of paragraph (a) of this subsection (2), the custodian shall deny the right of inspection of any materials received, made, or kept by a witness protection board, the department of public safety, or a prosecuting attorney that are confidential pursuant to section 24-33.5-106.5."); Colo. Rev. Stat. Ann. § 24-72-204(2)(e) ("Notwithstanding any provision to the contrary in subparagraph (I) of paragraph (a) of this subsection (2), the custodian shall deny the right of inspection of any materials received, made, or kept by the safe2tell program, as described in section 24-31-606."); Colo. Rev. Stat. Ann. § 24-72-204(3)(a)(I) ("The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest pursuant to this subsection (3): (I) Medical, mental health, sociological . . . and electronic health records, on individual persons . . . exclusive of coroners' autopsy reports . . .; but either the custodian or the person in interest may request a professionally qualified person, who shall be furnished by the said custodian, to be present to interpret the records[.]"); Colo. Rev. Stat. Ann. § 24-72-204 (3)(a)(XXII) ("The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest pursuant to this subsection (3): . . . (XXII) Personal information, as defined in section 18-9-313(1)(e), in a record for which the custodian has received a request under section 18-9-313;" where "personal information" is defined to include the home address,

home telephone number, personal mobile telephone number, pager number, personal e-mail address, and a personal photograph of a participant in the address confidentiality program); Conn. Gen. Stat. Ann. § 1-210(b)(2), (10), (21) ("Nothing in the Freedom of Information Act shall be construed to require disclosure of. . . [p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy"; "[r]ecords, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes"; or "[t]he residential, work or school address of any participant in the address confidentiality program established pursuant to sections 54-240 to 54-240*o*, inclusive"); D.C. Code Ann. § 2-1707(a) ("Any public record made confidential by law shall be so treated."); D.C. Code Ann. § 2-1707(b) ("No provision of this chapter shall be construed to authorize or require the opening of any records ordered to be sealed by a court."); Idaho Code Ann. § 74-104(2) (exempting from disclosure "[r]ecords contained in court files of judicial proceedings, the disclosure of which is prohibited by or under rules adopted by the Idaho supreme court, but only to the extent that confidentiality is provided under such rules"); Idaho Code Ann. § 74-106(27) (exempting from disclosure "[r]ecords in an address confidentiality program participant's file as provided for in chapter 57, title 19, Idaho Code, other than the address designated by the secretary of state, except under the following circumstances: (a) If requested by a law enforcement agency, to the law enforcement agency; or (b) If directed by a court order, to a person identified in the order"); Kan. Stat. Ann. § 45-221(a)(2), (3), (30), (47) ("Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose: . . . [r]ecords which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure"; "[m]edical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients"; "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy"; or "[i]nformation that would reveal the location of a shelter or a safehouse or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault"); Miss. Code. Ann. § 25-61-12(3) ("Personal information of victims, including victim impact statements and letters of support on behalf of victims that are contained in records on file with the Mississippi Department of Corrections and State Parole Board, shall be exempt from the provisions of this chapter."); N.J. Stat. Ann. § 47:1A-1.1 (exempting from the definition of "government records" and finding confidential and therefore not to be disclosed pursuant to the state's open records law "victims' records, except that a victim of a crime shall have access to the victim's own records"); 38 R.I. Gen. Laws Ann. § 38-2-2(4)(A)(1)(a) ("For the purposes of this chapter, the following records shall not be deemed public: . . . [a]ll records relating to a client/attorney relationship and to a doctor/patient relationship, including all medical information relating to an individual in any files"); Tex. Gov't Code Ann. § 552.138(b)(1)-(6) (providing that "[i]nformation maintained by a family violence shelter center, victims of trafficking shelter center, or sexual assault program is excepted from the requirements of Section 552.021 if it is information that relates to: (1) the home address, home telephone number, or social security number of an employee or a volunteer worker of a family violence shelter center, victims of trafficking shelter center, or sexual assault program, regardless of whether the employee or worker complies with Section 552.024; (2) the location or physical layout of a family violence shelter center or victims of trafficking shelter center; (3) the name, home address, home telephone number, or numeric identifier of a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program; (4) the provision of services, including counseling and sheltering, to a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program; (5) the name, home address, or home telephone number of a private donor to a family violence shelter center, victims of trafficking shelter center, or sexual assault program; or (6) the home address or home telephone number of a member of the board of directors or the board of trustees of a family violence shelter center, victims of trafficking shelter center, or sexual assault program, regardless of whether the board member complies with Section 552.024"); Tex. Gov't Code Ann. § 552.1325(b)(1)-(2) (declaring certain

information in a victim impact statement to be confidential and exempt from disclosure, including "(1) the name, social security number, address, and telephone number of a crime victim; and (2) any other information the disclosure of which would identify or tend to identify the crime victim"); Tex. Gov't Code Ann. § 552.101 (exempting information from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision"); Va. Code Ann. § 2.2-3705.2(1) (excluding "[c]onfidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses" from the mandatory disclosure provisions of the state's freedom of information act but providing that it "may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law"); W. Va. Code Ann. § 29B-1-4(a)(2) (exempting from disclosure "[i]nformation of a personal nature such as that kept in a personal, medical, or similar file, if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in this particular instance"); Va. Code Ann. § 2.2-3705.2(1), (5) (excluding "[c]onfidential information, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses" and "[i]nformation concerning the mental health assessment of an individual subject to commitment as a sexually violent predator . . . held by the Commitment Review Committee" from the mandatory disclosure provisions of the state's freedom of information act but providing that—with the exception of "information identifying the victims of a sexually violent predator[,] which may never be disclosed—this information "may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law"); Wyo. Stat. Ann. § 16-4-203(d)(i), (vii)-(viii) (providing that disclosure of the following pursuant to a public records request shall be denied "unless otherwise provided by law": (1) "[m]edical, psychological and sociological data on individual persons, exclusive of coroners' verdicts and written dockets as provided in W.S. 7-4-105(a);" (2) "[h]ospital records relating to medical administration, medical staff, personnel, medical care and other medical information, whether on individual persons or groups, or whether of a general or specific classification;" and (3) "[s]chool district records containing information relating to the biography, family, physiology, religion, academic achievement and physical or mental ability of any student except to the person in interest or to the officials duly elected and appointed to supervise him").

[17] *See, e.g.*, 5 U.S.C. § 552(b)(7)(C), (F) (exempting "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings, . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or . . . could reasonably be expected to endanger the life or physical safety of any individual"); Alaska Stat. Ann. § 40.25.120(a)(6)(C), (G) (providing for the right of people to inspect public records "except . . . records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;" or "[]could reasonably be expected to endanger the life or physical safety of an individual"); Cal. Gov't Code § 6254(f) (exempting from disclosure "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes[;]" however, victims are entitled to receive from "state and local law enforcement agencies" information including "the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants"); Cal. Gov't Code § 6254(f)(2)(A) (noting that even though investigative records generally are exempted from disclosure, "state and local law enforcement agencies shall make public" certain information, "except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation[,]" including "[s]ubject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and

nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved[,]" except that "[t]he name of a victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3, 288.4, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph"); Cal. Gov't Code § 6254(f)(2)(B) ("Subject to the restrictions imposed by Section 841.5 of the Penal Code, the names and images of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, and of that victim's immediate family, other than a family member who is charged with a criminal offense arising from the same incident, may be withheld at the victim's request until the investigation or any subsequent prosecution is complete."); Cal. Gov't Code § 6254(f)(3) (providing that notwithstanding the general policy of non-disclosure of law enforcement records, and "[s]ubject to the restrictions of Section 841.5 of the Penal Code and this subdivision," certain information may be disclosed, including "the current address of every individual arrested by the agency and the current address of the victim of a crime, if the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3, 288.4, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. This paragraph shall not be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph."); Cal. Gov't Code § 6254(f)(4) (providing that "[n]otwithstanding any other provision of this subdivision, commencing July 1, 2019, a video or audio recording that relates to a critical incident, as defined in subparagraph (C), may be withheld only" under certain circumstances, including "if, based on the facts and circumstances depicted in the recording, disclosure would substantially interfere with the investigation, such as by endangering the safety of a witness or a confidential source[,]" or "[i]f the agency demonstrates, on the facts of the particular case, that the public interest in withholding a video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording," and where "the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction as described in clause (i) and that interest outweighs the public interest in disclosure"); Cal. Gov't Code § 6254.4.5(a) (providing that state open records laws do "not require disclosure of a video or audio recording that was created during the commission or investigation of the crime of rape, incest, sexual assault, domestic violence, or child abuse that depicts the face, intimate body part, or voice of a victim of the incident depicted in the recording[,]" and that "[a]n agency shall justify withholding such a video or audio recording by demonstrating, pursuant to Section 6255, that on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording"); Colo. Rev. Stat. Ann. § 24-72-204(2)(a)(1) (providing that "[t]he custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest: Any records of the investigations conducted by any sheriff, prosecuting attorney, or police department, any records of the intelligence information or security procedures of any sheriff, prosecuting attorney,

or police department, or any investigatory files compiled for any other law enforcement purpose"); Colo. Rev. Stat. Ann. § 24-72-305(5) ("On the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, including as required by section 24-72-303(4), the custodian may deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose."); Conn. Gen. Stat. Ann. § 1-210(b)(3), (27) ("Nothing in the Freedom of Information Act shall be construed to require disclosure of: . . .[1] [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses . . . [or] (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, injury or risk of injury, or impairing of morals under section 53-21 or family violence, as defined in section 46b-38a, or of an attempt thereof"; or "[2] [a]ny record created by a law enforcement agency or other federal, state, or municipal governmental agency consisting of a photograph, film, video or digital or other visual image depicting the victim of a homicide, to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members"); Idaho Code Ann. §§ 74-105(1), 74-106(17) (exempting from disclosure "[i]nvestigatory records of a law enforcement agency, as defined in section 74-101(7), Idaho Code, under the conditions set forth in section 74-124, Idaho Code" and "[r]ecords of the Idaho state police or department of correction received or maintained pursuant to section 19-5514, Idaho Code, relating to DNA databases and databanks"); Idaho Code Ann. § 74-124(1) ("Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would: (a) Interfere with enforcement proceedings; (b) Deprive a person of a right to a fair trial or an impartial adjudication; [or] (c) Constitute an unwarranted invasion of personal privacy[.]"); Kan. Stat. Ann. § 45-221(a)(10) ("Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose . . . [c]riminal investigation records, except as provided herein. The district court, in an action brought pursuant to K.S.A. 45-222, and amendments thereto, may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure: (A) Is in the public interest; (B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution; (C) would not reveal the identity of any confidential source or undercover agent; (D) would not reveal confidential investigative techniques or procedures not known to the general public; (E) would not endanger the life or physical safety of any person; and (F) would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto[.]"); Tex. Gov't Code Ann. § 552.1085(c) (providing that "[a] sensitive crime scene image in the custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section"); N.M. Stat. Ann. § 14-2-1(D)(2)(b) ("Every person has a right to inspect public records of this state except . . . portions of law enforcement records that reveal . . . before charges are filed, names, address, contact information, or protected personal identifier information as defined in this Act of individuals who are . . . victims of or non-law-enforcement witnesses to an alleged crime of: 1) assault with intent to commit a violent felony pursuant to Section 30-3-3 NMSA 1978 when the violent felony is criminal sexual penetration; 2) assault against a household member with intent to commit a violent felony pursuant to Section 30-3-14 NMSA 1978 when the violent felony is criminal sexual penetration; 3) stalking pursuant to Section 30-3A-3 NMSA 1978; 4) aggravated stalking pursuant to Section 30-3A-3.1 NMSA 1978; 5) criminal sexual penetration pursuant to Section 30-9-11 NMSA 1978; or 6) criminal sexual contact pursuant to Section 30-9-12 NMSA 1978."); Or. Rev. Stat. Ann. § 192.345(40) ("The following public

records are exempt from disclosure under ORS 192.311 to 192.478 unless the public interest requires disclosure in the particular instance: . . . Audio or video recordings, whether digital or analog, resulting from a law enforcement officer's operation of a video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty. When a recording described in this subsection is subject to disclosure, the following apply: (a) Recordings that have been sealed in a court's record of a court proceeding or otherwise ordered by a court not to be disclosed may not be disclosed. (b) A request for disclosure under this subsection must identify the approximate date and time of an incident for which the recordings are requested and be reasonably tailored to include only that material for which a public interest requires disclosure. (c) A video recording disclosed under this subsection must, prior to disclosure, be edited in a manner as to render the faces of all persons within the recording unidentifiable."); Tex. Gov't Code Ann. § 552.108(a)(1)-(4) (exempting from release "information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; (3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or (4) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state"); Va. Code Ann. § 2.2-3706(B)(1) (excluding criminal investigative files—defined as any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information subject to release—from the mandatory disclosure provisions of the state's freedom of information act but providing that these records "may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law"); Va. Code Ann. § 2.2-3706(B)(10) (excluding from mandatory disclosure provisions of the state's open records laws "[t]he identity of any victim [or] witness, or undercover officer, or investigative techniques or procedures[,] but allowing release by the custodian unless "disclosure is prohibited or restricted under § 19.2-11.2"); Va. Code Ann. § 2.2-3706(E) (providing that "[r]ecords of any call for service or other communication to an emergency 911 system or communicated with any other equivalent reporting system shall be subject to" the state's freedom of information act); W. Va. Code Ann. § 29B-1-4(a)(4)(A) (exempting from disclosure "[r]ecords of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement"); Wyo. Stat. Ann. § 16-4-203(b)(i) (exempting from disclosure the following records if disclosure to the applicant would run contrary to the public interest: "[r]ecords of investigations conducted by, or of intelligence information or security procedures of, any sheriff, county attorney, city attorney, the attorney general, the state auditor, police department or any investigatory files compiled for any other law enforcement or prosecution purposes"); Wyo. Stat. Ann. § 16-4-203(d)(xviii) (denying access to "information obtained through a peace officer recording"—otherwise known as a body-worn or dashboard camera recording—"provided that: (A) The custodian shall allow the right of inspection to law enforcement personnel or public agencies for the purpose of conducting official business or pursuant to a court order; (B) The custodian may allow the right of inspection: (I) To the person in interest; (II) If the information involves an incident of deadly force or serious bodily injury as defined in W.S. 6-1-104(a)(x); (III) In response to a complaint against a law enforcement personnel and the custodian of the information determines inspection is not contrary to the public interest;" and "(IV) In the interest of public safety").

[18] *See, e.g.*, 5 U.S.C. § 552(b)(3)(A)-(B) (excluding from disclosure under FOIA "matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title)," if the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld; and . . . if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph"); Colo. Rev. Stat. Ann. § 24-72-305(1) (providing that "[t]he custodian of criminal justice records may allow any person to inspect such records or any portion thereof" unless the "inspection would be contrary to any state statute[,]" or "is prohibited by rules

promulgated by the supreme court or by the order of any court"); Idaho Code Ann. § 74-104(1) (exempting from disclosure "[a]ny public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation"); W. Va. Code Ann. § 29B-1-4(a)(5) (exempting from disclosure "[i]nformation specifically exempted from disclosure by statute"); Wyo. Stat. Ann. § 16-4-203(a)(i)-(iii) (requiring denial of open records' request if public inspection "would be contrary to any state statute[,] . . . federal statute or regulation[,] . . . [or] rules promulgated by the supreme court or by the order of any court of record"); *but see* Ark. Code Ann. § 25-19-110(a) ("Beginning July 1, 2009, in order to be effective, a law that enacts a new exemption to the requirements of this chapter or that substantially amends an existing exemption to the requirements of this chapter shall state that the record or meeting is exempt from the Freedom of Information Act of 1967, § 25-19-101 et seq.").

[19] *See, e.g.,* Ark. Code Ann. § 25-19-105(a)(1)(B) ("[A]ccess to inspect and copy public records shall be denied to: (i) A person who at the time of the request has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility; and (ii) The representative of a person under subdivision (a)(1)(B)(i) of this section unless the representative is the person's attorney who is requesting information that is subject to disclosure under this section."); Ind. Code Ann. §§ 5-14-3-4(Sec. 4)(b)(23), 5-14-3-2(Sec.2)(l) (exempting from disclosure "[r]ecords requested by an offender that . . . contain personal information relating to . . . the victim of a crime[,]" except when "access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery[,]" and defining "offender" to mean "a person confined in a penal institution as the result of the conviction for a crime"); La. Stat. Ann. § 44:31.1 ("For the purposes of this Chapter, person does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post conviction relief under Code of Criminal Procedure Article 930.3. Notwithstanding the provisions contained in R.S. 44:32, the custodian may make an inquiry of any individual who applies for a public record to determine if such individual is in custody after sentence following a felony conviction who has exhausted his appellate remedies and the custodian may make any inquiry necessary to determine if the request of any such individual in custody for a felony conviction is limited to grounds upon which such individual may file for post-conviction relief under Code of Criminal Procedure Article 930.3."); Mich. Comp. Laws Ann. § 15.231(2) ("It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act."); S.C. Code Ann. § 30-4-30(A)(1) ("A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access. This right does not extend to individuals serving a sentence of imprisonment in a state or county correctional facility in this State, in another state, or in a federal correctional facility; however, this may not be construed to prevent those individuals from exercising their constitutionally protected rights, including, but not limited to, their right to call for evidence in their favor in a criminal prosecution under the South Carolina Rules of Criminal Procedure."). *See also* Conn. Gen. Stat. Ann. § 1-210(c) ("Whenever a public agency receives a request from any person confined in a correctional institution or facility or a Whiting Forensic Hospital facility, for disclosure of any public record under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Correction or the Commissioner of Mental Health and Addiction Services in the case of a person confined in a Whiting Forensic Hospital facility of such request, in the manner prescribed by the commissioner, before complying with the request as required by the Freedom of Information Act. If the commissioner believes the requested record is exempt from disclosure pursuant to subdivision (18) of subsection (b) of this section, the commissioner may withhold such record from such person when the record is delivered to the person's correctional institution or facility or Whiting Forensic Hospital facility.").

[20] *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (explaining that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'").

[21] As the United States Supreme Court has noted, at the heart of due process is the idea that "[p]arties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal citations omitted). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (internal citations omitted) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded."); *People v. Scott*, No. F065665, 2014 WL 130479, at *5 (Cal. Ct. App. Jan. 15, 2014) (citing *Fuentes* for the proposition that due process requires notice); *Smith v. State*, 676 S.E.2d 750, 755 (Ga. Ct. App. 2009) (same); *Conner v. Dep't of Commerce*, 443 P.3d 1250, 1262-63 (Utah Ct. App. 2019) (quoting *McBride v. Utah State Bar*, 242 P.3d 769, 774 (Utah 2010)) ("Procedural due process requires, at a minimum, timely and adequate notice and an opportunity to be heard in a meaningful way.").

[22] Notice is critical to victim agency as it helps ensure that victims have the information necessary to make fundamental decisions affecting their lives. *See* Paul G. Cassell, *Balancing the Scales of Just.: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 Utah L. Rev. 1373, 1389 (1994) (discussing the anxiety and fear experienced by victims due to a lack of notice of proceedings). *See also* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Law. for Sexual Assault Victims*, 13 Ohio St. J. Crim. L. 67, 68 (2015) (describing "agency" as "akin to the concept of crime victim autonomy, and at its core is the right and power of individuals to make fundamental decisions about their lives[,]" and arguing that providing independent lawyers for sexual assault victims in civilian criminal processes will improve victim agency and reduce secondary victimization). When respect for victim agency is demonstrated in the aftermath of crime, participation in the criminal justice system can be beneficial for crime victims. *See, e.g.*, Margaret E. Bell, et al., *Battered Women's Perceptions of Civil and Crim. Ct. Helpfulness: The Role of Ct. Outcome and Process*, 17 Violence Against Women 71, 72 (2011) (noting that studies of intimate partner violence and rape victims "have in fact found that positive experiences in the justice system are associated with less physical and psychological distress and better posttraumatic adjustment"); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. of Traumatic Stress 159, 160-61 (2003) (discussing potential benefits of participating in the justice system); Jim Parsons & Tiffany Bergin, *The Impact of Crim. Just. Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182, 182 (2010) (same).

[23] For questions about the intersection of victims' rights and open records laws in a specific jurisdiction, please submit a technical assistance request to NCVLI at www.ncvli.org.