



The Journal of Civic Information

Volume 2 | Number 4

December 2020

Journal homepage: <https://journals.flvc.org/civic/>

ISSN (online): 2641-970X

COVID-19, Death Records and the Public Interest: Now is the Time to Push for Transparency

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Article Information

Received: May 4, 2020

Accepted: June 8, 2020

Published: Dec. 31, 2020

Keywords

Freedom of information
Government transparency
Death records
COVID-19

Abstract

As the U.S. has grappled with COVID-19, the government has resisted repeated requests to follow open records laws, which are essential to transparency. Current efforts to reduce access to death records and other public information amid the pandemic jeopardizes government accountability and undermines the public's trust. Given that COVID-19 has disproportionately affected low-income Americans, incarcerated populations and people of color, access to government-held data has serious implications for social justice. Importantly, those goals can be met without violating personal privacy. After analyzing state open records laws, court decisions and attorney general opinions, the author has developed a set of best practices for advocating access to death records to provide journalists and government watchdogs with important public health information that's squarely in the public interest.

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To cite this article in Bluebook: Amy Kristin Sanders, *COVID-19, Death Records and the Public Interest: Now is the Time to Push for Transparency*, 2(4) J. CIVIC INFO 1 (2020).

To cite this article in APA: Sanders, A. K. (2020). COVID-19, death records and the public interest: Now is the time to push for transparency. *Journal of Civic Information*, 2(4), 1-22.

DOI: <https://doi.org/10.32473/joci.v2i4.127490>

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Introduction

In April 2020, the *San Francisco Chronicle* reported the case of a 57-year-old California woman whose autopsy report showed she had died of a heart attack:¹ “The Santa Clara woman whose death from COVID-19 is the earliest so far known in the United States suffered a massive heart attack caused by the coronavirus infection, signs of which were found throughout her body...”² In the midst of a pandemic, that alone wouldn’t have been newsworthy. However, enterprising journalists went on to discover that the woman, who died February 6, had evidence of coronavirus infecting her heart, trachea, lungs and intestines.³ The autopsy report, which is public under the California Public Records Act⁴, was signed April 23. At the time, it revealed her death to be the first U.S. fatality related to COVID-19, displacing the current thinking about COVID’s progression.⁵ In fact, her death came three weeks before Washington state’s then-first reported death, suggesting the virus had been spreading in the United States long before public health officials first suspected.⁶ Since that time, researchers have discovered evidence of the virus in the United States as early as December 2019, even before the first cases went public in China.⁷

American citizens, scientists, medical experts and lawmakers alike have been critical of the government’s response to COVID-19.⁸ From delays in testing to allegations of miscounting, questions abound on both sides of the political spectrum. In particular, the question of whether COVID-19 deaths are being accurately reported has made headlines – with experts warning of possible dramatic undercounts.⁹ Speaking about patients like the California woman, even Dr. Deborah Birt, coordinator of the White House coronavirus task force, said, “Those individuals will have an underlying condition, but that underlying condition did not cause their acute death when it’s related to a COVID infection.”¹⁰ However, it’s likely many aren’t being recorded as coronavirus deaths; in fact, experts have turned to “excess death” figures to try to get a better estimate by calculating how much death numbers during the pandemic have strayed from their historical norm.¹¹ Further complicating matters, the White House ordered hospitals to send all COVID-19 data directly to the Department of Health and Human Services, bypassing the Centers

¹ Matthias Gafni & Jill Tucker, *Exclusive: Coronavirus Cause Heart to Rupture in Nation’s First Known Victim, Autopsy Shows*, S.F. CHRONICLE (Apr. 26, 2020), <https://www.sfchronicle.com/bayarea/article/Exclusive-Autopsy-report-of-first-known-15226422.php>.

² *Id.*

³ *Id.*

⁴ “The California Public Records Act (PRA), Government Code Sections 6250 to 6270, requires the Santa Clara County Medical Examiner-Coroner’s Office to make public records available for inspection by the public and to provide copies upon request.” See County of Santa Clara Office of the Medical Examiner-Coroner, *Medical Examiner-Coroner’s Reports*, <https://www.sccgov.org/sites/coroner/reports/Pages/reports.aspx>.

⁵ Gafni & Tucker, *supra* note 1.

⁶ *Id.*

⁷ Rachel Rettner, *COVID-19 May Have Arrived in US by December 2019*, LIVE SCIENCE (Dec. 1, 2020), <https://www.livescience.com/covid-19-united-states-december-2019.html>.

⁸ See generally Julie Scharper, *5 Ways the U.S. Botched the Response to COVID-19*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (Apr. 3, 2020), <https://www.jhsph.edu/covid-19/articles/5-ways-the-us-botched-the-response-to-covid-19.html>.

⁹ Stephanie Pappas, *How COVID-19 Deaths Are Counted*, SCIENTIFIC AMERICAN (May 19, 2020), <https://www.scientificamerican.com/article/how-covid-19-deaths-are-counted1/>.

¹⁰ Ian Richardson, *Fact Check: Is US Coronavirus Death Toll Inflated? Experts Agree It’s Likely the Opposite*, USA TODAY (Apr. 17, 2020), <https://www.usatoday.com/story/news/factcheck/2020/04/17/fact-check-covid-19-death-toll-likely-undercounted-not-overcounted/2973481001/>.

¹¹ *Id.*

for Disease Control and Prevention.¹² For myriad reasons, transparency in government decision-making and recordkeeping is more important than ever – and access to death records is a key place to start if public health officials want to get a true sense of the gravity of the coronavirus pandemic.

As the country has grappled with the spread of the virus, it has frequently pitted those who advocate for access to information against those who believe personal privacy is paramount¹³ – a conflict long enshrined in the debate over death records.¹⁴ However, privacy alone cannot justify the withholding of death records during a public health crisis. Part One of this article examines the historical foundations of public records laws, outlining the reasons behind the enactment of FOIA and state public records acts. Part Two outlines key jurisprudence in the area of death records, including the cases of Jeffrey Epstein, Dale Earnhardt and Vincent Foster. Part Three outlines current efforts to reduce access to death records and other public information amid the COVID-19 pandemic.

The author relies on data gleaned from a 50-state analysis to conclude with best practices for providing public access to death records, asserting that doing so not only advances the philosophical underpinnings of FOI laws but also provides journalists and other government watchdogs with important public health information that’s squarely in the public interest during a pandemic. Further, given that initial data suggests COVID-19 has disproportionately affected low-income Americans,¹⁵ incarcerated populations¹⁶ and people of color,¹⁷ access to government-held death record data has serious implications for social justice. Importantly, those goals can be met without violating personal privacy. Part Four outlines recent calls to further close off access to death certificates and autopsy reports and concludes with a call for access advocates, journalists and attorneys to unify their efforts to combat restrictions on death records by outlining key strategies for legislative and judicial success.

¹² Pieng Huang, *Trump Administration Orders Hospitals to Bypass CDC, Send COVID-19 Data To Washington*, NPR (July 15, 2020), <https://www.npr.org/2020/07/15/891563628/trump-administration-orders-hospitals-to-bypass-cdc-send-covid-19-data-to-washin>.

¹³ As *The Markup* reported in May 2020, a number of states suspended access to public records, using COVID-19 as a justification. Citing examples from Hawaii, New Jersey, San Diego and research by the Reporters Committee for Freedom of the Press, journalist Colin Lecher notes that such action is unprecedented even in times of national crisis. See Colin Lecher, *States Are Suspending Public Records Access Due to COVID-19*, THE MARKUP (May 1, 2020), <https://themarkup.org/coronavirus/2020/05/01/states-are-suspending-public-records-access-due-to-covid-19>.

¹⁴ See generally Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J. L. & PUB. POL’Y 237 (2012).

¹⁵ Wyatt Koma, Samantha Artiga, Tricia Neuman, Gary Claxton, Matthew Rae, Jennifer Kates & Josh Michaud, *Low-Income and Communities of Color at Higher Risk of Serious Illness if Infected with Coronavirus*, KAISER FAMILY FOUNDATION (May 7, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus/>. “More than one in three (35%) non-elderly adults with household incomes below \$15,000 are at higher risk of serious illness if infected with coronavirus, compared to about one in seven (16%) adults with household incomes greater than \$50,000.” *Id.*

¹⁶ *COVID-19’s Impact on People in Prison*, EQUAL JUSTICE INITIATIVE (May 21, 2020), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>. “Nationwide, the known infection rate for Covid-19 in jails and prisons is about 2½ times higher than in the general population. . . . Seven of the 10 largest outbreaks in the country have been at correctional facilities. . . .” *Id.*

¹⁷ Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State By State*, NPR (May 30, 2020), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>. “Nationally, African-American deaths from COVID-19 are nearly two times greater than would be expected based on their share of the population. In four states, the rate is three or more times greater.” *Id.*

The historical foundation of freedom of information laws

“The present trend toward government secrecy could end in a dictatorship. The more information that is made available, the greater will be the nation’s security.”¹⁸

When drafting the U.S. Constitution, the founding fathers enshrined in it a system of separation of powers – and ultimately checks and balances – that are outlined in the first three articles of the document. Since that time, a distinct culture of government transparency has developed in the United States. But it did not happen by accident. U.S. Rep. John Moss, D-Cal., who championed the Freedom of Information Act, feared the power of a government where citizens were not allowed to watch over the actions of elected and appointed officials. A staunch supporter of government accountability, Moss managed to convince Republican Donald Rumsfeld¹⁹ to co-sponsor his public records legislation. At the urging of the “Moss Subcommittee,” Congress eventually passed, and President Lyndon B. Johnson eventually signed, the Freedom of Information Act into law on July 4, 1966.²⁰ Moss’ concerns stemmed from the federal government’s firing of thousands of employees believed to sympathize with the Communist Party, but his words continue to ring true in the midst of the “biggest public-health crisis in a generation.”²¹

The Freedom of Information Act was a direct response to the Administrative Procedure Act’s weak stance on government transparency during a time when myriad administrative rules and regulations were being crafted without significant oversight.²² The Supreme Court acknowledged these shortcomings in its decision in *EPA v. Mink*, noting it “was generally recognized as falling far short of its disclosure goals and came to be looked upon as more of a withholding statute than a disclosure statute.”²³ As the Court discussed in its jurisprudence, the APA gave agencies wide latitude when determining whether to release government records, and it contained no public remedy when an agency refused to disclose records.²⁴

In stark contrast to the APA, FOIA’s legislative history – along with the Court’s interpretation of its central purpose, which will be discussed in greater detail – support a presumption in favor of disclosure.²⁵ At the outset, FOIA was set up to enhance government transparency. As the Senate report notes:

¹⁸ The quote has been widely attributed to a 1956 interview with Rep. Moss. *See generally* Michael Lemov, *PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* (2011).

¹⁹ In 1974, Rumsfeld advised President Gerald Ford to veto amendments aimed at strengthening the federal law. *History of FOIA*, EFF.org, <https://www.eff.org/issues/transparency/history-of-foia>.

²⁰ Nate Jones, *John Moss’s Decade-Long Fight for FOIA, as Chronicled in “People’s Warrior” by Michael Lemov*, UNREDACTED (Oct. 1, 2011), <https://unredacted.com/2011/10/01/4230/>.

²¹ Quentin Fottrell, *5 Critical Mistakes That Created the Biggest Public Health Crisis in a Generation*, MARKET WATCH (July 4, 2020), <https://www.marketwatch.com/story/100-days-of-the-covid-19-pandemic-5-critical-mistakes-that-created-the-biggest-public-health-crisis-in-a-generation-2020-06-18>.

²² *See EPA v. Mink*, 410 U.S. 73, 79 (1973).

²³ *Id.*

²⁴ *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 754 (1989).

²⁵ S. Rep. No. 89-813 (1965).

It is the very purpose of the [FOIA] to ... establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. ...

At the same time that a broad philosophy of “freedom of information” is enacted into law, it is necessary to protect equally important rights. ...

It is not an easy task to balance the opposing interests, but it is not an impossible one either. ... Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.²⁶

To accomplish this, FOIA permits agencies to withhold information only under the law’s nine narrow exemptions – and eight of those exemptions are permissive, which means an agency may choose to disclose information even though it falls within the exemption.²⁷ A House Report recognized that FOIA provides “the necessary machinery to assure the availability of government information necessary to an informed electorate.”²⁸

Since that time, both scholars and the courts have commented on FOIA’s commitment to openness which, combined with First Amendment rights to free speech and press, allows the public to oversee and scrutinize government actions. Media law scholar Tim Gleason described a free press as “a means of combating what 18th-century men in America viewed as an inevitable condition – the abuse of government power.”²⁹ But the right to a free press is conditioned on being able to access information. Law professor Thomas Emerson urged the recognition of a right to know as an “emerging constitutional right,” rooted in the First Amendment: “As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decision making by the people, to whom that function is committed, becomes impossible.”³⁰ But perhaps the most well-known treatise on the topic, written by attorney Harold L. Cross in 1953, aptly captures these sentiments and frames them perfectly in light of current events: “Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.”³¹

The commitment to openness born with FOIA has not gone untested. Although President Johnson, when signing FOIA into law noted, “I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded,” not all administrations have been as accommodating.³² Many government transparency advocates recall when Attorney General John Ashcroft issued what has become known as the Ashcroft Memorandum shortly after the September 11 terrorist attacks. In it, Ashcroft noted that the

²⁶ *Id.*

²⁷ See H.R. REP. NO. 1497, at 7–12 (1966), generally clarifying the exemptions to be construed narrowly [hereinafter the *House Report*].

²⁸ *Id.* at 12.

²⁹ TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA* 24 (1990).

³⁰ Thomas Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 14 (1976). While Emerson acknowledged that the “right to gather information from private sources” was not encompassed by this, he focused exclusively on “private people” and not businesses; additionally, he did not address businesses doing public work funded by government sources. *Id.* at 19.

³¹ HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* XIII (1953).

³² *Id.*

Department of Justice would defend agencies' FOIA denials so long as there was a "sound legal basis," reversing a previous standard that DOJ would only defend denials where the release of information would cause "foreseeable harm."³³ In essence the memo encouraged agencies to use their discretion to withhold requested information. Reversing course, President Barack Obama instructed his agencies: "In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government."³⁴ Despite historical challenges, there's still a strong argument to be made that American society operates on the foundation of an informed citizenry brought about through government transparency.

Throughout the coronavirus pandemic, the lack of government transparency on many levels – federal, state and local – has been well documented. Even medical researchers have commented on the need for information-sharing to combat the public health crisis.³⁵ Doctors have discussed the danger of muzzling healthcare providers and the backlash these professionals face when speaking out: "This occurrence is most frightening because in the United Kingdom the culture of transparency is an old one and has even been strengthened by a comprehensive framework of legal protections..."³⁶ Kaiser Health News listed multiple stories in a recent publication recounting issues with pandemic-related data and transparency, including a story by the Associated Press detailing how Washington state decided to remove seven deaths from its COVID mortality count even though the deceased tested positive for the virus.³⁷

The Trump administration in particular was chastised for its lack of openness and transparency throughout the pandemic. Most recently, CDC Director Robert Redfield made headlines after it was reported he instructed a colleague to delete an email from the Trump administration aimed at concealing and destroying scientific reports about the coronavirus.³⁸ Similar criticisms were leveled at federal officials in September 2020, when they ordered hospitals and medical providers to bypass the CDC by sending all patient information to a central database.³⁹ But perhaps the most troubling lack of transparency involved President's Trump's own COVID-19 diagnosis, which was shrouded in emergency helicopter flights to Walter Reed Medical Center, mysterious treatments and convoluted press conferences involving his medical staff.⁴⁰

³³ <https://fas.org/sgp/foia/ashcroft.html>.

³⁴ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 FED. REF. 4683 (Jan. 21, 2009).

³⁵ Farid Rahimi & Amin Talebi Bezim Abadhi, *Transparency and Information Sharing Could Help Abate the COVID-19 Pandemic*, INFECTIOUS CONTROL HOSPITAL EPIDEMIOLOGY (Apr. 22, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7191256/>.

³⁶ Allain Braillon, *Lack of Transparency During the COVID-19 Pandemic: Nurturing a Future and More Devastating Crisis*, INFECTIOUS CONTROL HOSPITAL EPIDEMIOLOGY (June 3, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7294075/>.

³⁷ *Washington Removes Homicides, Suicides from COVID-19 Deaths*, ASSOCIATED PRESS (June 17, 2020), <https://apnews.com/03408313b495c486be3a2e781338259b>.

³⁸ Brendan Morrow, *CDC Director Allegedly Ordered Staff to Delete Email from Trump Administration Official Trying to Change COVID-19 Report*, YAHOO! NEWS (Dec. 10, 2020), <https://news.yahoo.com/cdc-director-allegedly-ordered-staff-204600586.html>.

³⁹ Sheryl Gay Stolberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/07/14/us/politics/trump-cdc-coronavirus.html>.

⁴⁰ Grace Hauck & Tom Vanden Brook, *Was Trump Ever on Oxygen? Health, Security Experts say America Needs 'Total Honesty' on President's Condition*, USA TODAY (Oct. 4, 2020), <https://www.usatoday.com/story/news/nation/2020/10/03/trump-coronavirus-condition-national-security-health-experts-urge-transparency/3609196001/>.

Federal officials' pandemic obfuscation seemed to trickle down to state and local leaders, who often tried to keep their constituents in the dark about the severity of the virus. Perhaps the most well-known incident occurred in Florida, where the state's top COVID-19 data scientist was fired from her job for refusing to manipulate data.⁴¹ Months after her dismissal, armed law enforcement officials raided her home, seizing her cell phone, laptop and other electronic equipment that she had used to report on the pandemic. The judge who signed the search warrant had been appointed by Florida Gov. Ron DeSantis.⁴² Across the country in Texas, the Health and Human Services Commission refused for months to release pandemic-related data for nursing homes, assisted living facilities and state-supported living centers.⁴³ The HHSC changed course only after the state Attorney General's office ruled that aggregated data should be released.⁴⁴ Eventually, the data revealed that Texas nursing homes had a higher rate of COVID cases and deaths compared to the national average.⁴⁵ As the pandemic wore on, numerous researchers and studies warned that even this data underrepresented the number of COVID-related deaths, making access to death records a key issue during the pandemic.⁴⁶

Access to death records in the United States

High-profile litigation over death records in the United States has historically only occurred when the deceased person has achieved some level of notoriety. Cases involving the deaths of Jeffrey Epstein, Dale Earnhardt and Vincent Foster are among the most prominent in recent memory, but their outcomes have little bearing on the public's right to access death records generally, as will be discussed. In nearly all instances, a combination of the state's open records law and common law will determine whether and how death records are made available to the public.

⁴¹ Alessandro Marazzi Sassoon, *Florida's Scientist was Fired for Refusing to 'Manipulate' COVID-19 Data*, USA TODAY (May 19, 2020), <https://www.usatoday.com/story/news/nation/2020/05/19/florida-covid-19-coronavirus-data-researcher-out-state-reopens/5218897002/>.

⁴² Patricia Mazzei, *A State Scientist Questions Florida's Virus Data. Now Her Home's Been Raided*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/us/florida-coronavirus-data-rebekah-jones.html>.

⁴³ Lomi Kriel, Vianna Davila & Edgar Walters, *Texas Still Won't Say Which Nursing Homes Have COVID-19 Cases. Families are Demanding Answers*, TEXAS TRIBUNE & PROPUBLICA (Apr. 30, 2020), <https://www.texastribune.org/2020/04/30/coronavirus-nursing-homes-families/>.

⁴⁴ Billy Gates, David Barer & Avery Travis, *Texas Attorney General Rules HHSC Should Release COVID-19 Nursing Home Data*, KXAN (July 20, 2020), <https://www.kxan.com/news/coronavirus/nursing-home-investigations/attorney-general-orders-covid-19-data-from-nursing-home-clusters-be-released-to-public/>.

⁴⁵ *Texas Nursing Homes Have Higher Rates of COVID-19 Cases, Deaths*, KERA (Oct. 20, 2020), <https://www.keraneews.org/health-science-tech/2020-10-20/texas-nursing-homes-have-higher-rates-of-covid-19-cases-deaths>.

⁴⁶ See, e.g., Mary Can Beuskom, *About 30% of COVID Deaths May Not be Classified as Such*, CIDRAP (July 1, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/07/about-30-covid-deaths-may-not-be-classified-such>; Adrianna Rodriguez, *About 75,000 More Americans Died From COVID-19 Pandemic Than Reported in Spring and Summer, Study Finds*, USA TODAY (Oct. 12, 2020), <https://www.usatoday.com/story/news/health/2020/10/12/us-covid-deaths-75-k-more-americans-died-than-previously-recorded-excess-deaths/5935813002/>.

Jeffrey Epstein's family searches for answers

Most recently, controversy surrounded the death of Jeffrey Epstein, who was found dead in his Manhattan jail cell in August 2019, shortly after being arrested on sex-trafficking charges.⁴⁷ The FBI opened a formal investigation into his apparent suicide, with New York City Mayor Bill de Blasio calling Epstein's death "way too convenient" because it prevented the billionaire from implicating others in his crimes.⁴⁸ On the night of his death, the FBI discovered two cameras outside his cell were broken.⁴⁹ News site MuckRock details a number of requests made in the days and months after his death: requests to the New York Governor's Office, New York State Police and Department of Corrections and Community Supervision that returned "no responsive documents," similar requests to the New York City Police Department, New York Attorney General, Department of Correction and Bureau of Prisons that were rejected, and a request to the Department of Justice/Marshals Service that was partially completed, among others.⁵⁰

Much of the controversy stemmed from a series of oversights by government employees. In November 2019, two jail employees who had failed to check on Epstein were criminally charged, with federal prosecutors alleging they had made false records during their employment at the Metropolitan Correctional Center where Epstein died.⁵¹ CBS News obtained photographs of the inside of Epstein's cell and during his autopsy.⁵² Forensic pathologists told the network that one image – the position of Epstein's body in his cell when it was found – would be needed to determine cause of death with certainty.⁵³ But no such photo exists, according to a forensic pathologist hired by Epstein's family, who argued that calling the death a suicide without that information was premature.⁵⁴ Only days after the *60 Minutes* segment, federal prosecutors announced that surveillance video from outside Epstein's cell during a previously alleged suicide attempt had been destroyed when jail officials mistakenly saved video from a different floor.⁵⁵ Court papers say the jail "inadvertently preserved video from the wrong tier within the MCC and as a result, video from outside the defendant's cell on July 22-23, 2019 no longer exists."

⁴⁷ *Jeffrey Epstein: Financier Found Dead in New York Prison Cell*, BBC (Aug. 10, 2019), <https://www.bbc.com/news/world-us-canada-49306032>.

⁴⁸ *Jeffrey Epstein: Questions Raised Over Disgraced Financier's Death*, BBC (Aug. 11, 2019), <https://www.bbc.com/news/world-us-canada-49309317>.

⁴⁹ Mark Hosenball, *FBI Studies Two Broken Cameras Outside Cell Where Epstein Died: Source*, REUTERS (Aug. 28, 2019), <https://www.reuters.com/article/us-people-jeffrey-epstein-cameras-idUSKCN1VI2LC>.

⁵⁰ *Jeffrey Epstein Files*, MUCKROCK, <https://www.muckrock.com/project/jeffrey-epstein-files-507/>.

⁵¹ Devlin Barrett, *Two Jail Workers Charged with Falsifying Records of Checks on Jeffrey Epstein the Night he Died*, WASH. POST (Nov. 19, 2019), https://www.washingtonpost.com/national-security/two-jail-workers-charged-with-falsifying-records-of-checks-on-jeffrey-epstein-the-night-he-died/2019/11/19/f6e22158-0ae8-11ea-97ac-a7ccc8dd1ebc_story.html.

⁵² Brit Mccandless Farmer, *Jeffrey Epstein's Autopsy: A Closer Look*, CBS NEWS (Jan. 5, 2020), <https://www.cbsnews.com/news/jeffrey-epstein-autopsy-a-closer-look-60-minutes-2020-01-05/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Tom Winter, *Surveillance Video From Jeffrey Epstein's First Apparent Suicide Attempt 'No Longer Exists,'* NBC NEWS (Jan. 9, 2020), <https://www.nbcnews.com/news/us-news/surveillance-video-jeffrey-epstein-s-first-apparent-suicide-attempt-no-n1113166>.

Dale Earnhardt's family asserts privacy interests

Often access to death records is withheld in the name of personal privacy, but this concern did not surface in the days and months after Epstein's death, likely because his family was searching for answers and trying to raise a narrative that ran counter to the government's finding of suicide. But in other cases involving death records, personal privacy interests play an important role in whether the public gets access. The controversy that followed Dale Earnhardt's untimely death at the 2001 Daytona 500 turned largely on his family's privacy interests and had a long-term impact on Florida's public records laws.

Earnhardt, who was 49, was killed instantly when a final-lap collision sent his race car careening into the wall at Daytona International Speedway.⁵⁶ During the previous eight months, three other NASCAR drivers had died as a result of skull fractures sustained in injuries. But it was Earnhardt's high-profile death – televised to 17 million viewers and investigated by the *Orlando Sentinel* – that led to lasting change in the sport.⁵⁷ Less than 24 hours after the incident, the autopsy, performed by the Volusia County Medical Examiner's Office, listed the cause of death. The *Orlando Sentinel*, who had published a multi-day investigation into fatal racing injuries just days before Earnhardt's death, hired an expert to look at the photos and provide a second opinion as to cause of death.⁵⁸ Basal skull fracture, determined to be Earnhardt's cause of death despite numerous injuries, had taken the lives of 12 of the 15 drivers who had died since 1991.⁵⁹ Perhaps this was the reason a county employee called NASCAR's president to alert him that autopsy documents, including photos, were public under Florida's open records law.⁶⁰ Earnhardt's widow, Teresa, had been in the county employee's office when the call took place, and a subsequent controversy arose over whether the call was to head off any possibility of lawsuits against NASCAR.⁶¹

Just days later, Earnhardt's widow filed a lawsuit seeking closure of the autopsy records, saying she feared they would spread over the Internet.⁶² A Florida trial judge ruled in her favor even though Florida's constitution places a higher value on access to public records than privacy rights.⁶³ The University of Florida's independent student newspaper filed suit to challenge the order and a newly passed law that would restrict public access to autopsy photos.⁶⁴ After the *Sentinel* requested to see the photos a second time, the Florida Legislature hastily passed the Earnhardt Family Protection Act, which gutted Florida's historically strong public records act by

⁵⁶ Richard Tribou, *19 Years Since Dale Earnhardt Death in the Daytona 500, People Still Seek Answers*, ORLANDO SENTINEL (Feb. 18, 2020), <https://www.orlandosentinel.com/sports/nascar/os-sp-dale-earnhardt-death-daytona-500-answers-20200218-tdco62p6n5bz7b6pmc7wxpiosa-story.html>.

⁵⁷ *Id.*

⁵⁸ Catherine J. Cameron, *Earnhardt Law Reverse Access to Open Records*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Spring 2001), <https://www.rcfp.org/journals/the-news-media-and-the-law-spring-2001/earnhardt-law-reverses-acce/>.

⁵⁹ Amy C. Rippel & Beth Kassab, *Skull Injury Killed Earnhardt, Autopsy confirms*, ORLANDO SENTINEL (Feb. 20, 2001), <https://www.orlandosentinel.com/news/os-xpm-2001-02-20-0102200083-story.html>.

⁶⁰ Amy C. Rippel, *Racer's Widow Can Be Asked Why She Had Photos Sealed*, ORLANDO SENTINEL (May 16, 2001), <https://www.orlandosentinel.com/news/os-xpm-2001-05-16-0105160320-story.html>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Section 23 of the Florida Constitution reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. 23 (1998).

⁶⁴ *Id.*

mandating that video, audio and photographs of a person's death not be released to anyone other than family without a court order.⁶⁵ Releasing the material is a third-degree felony, carrying penalties of jail time and up to a \$5,000 fine. The Florida Supreme Court voted 4-3 against taking the case, leaving in place the law, which applies retroactively to close off autopsies conducted before it was enacted.⁶⁶ The *Independent Alligator*, the UF student newspaper, had argued the law was unconstitutional, but the state's intermediate appellate court ruled the widow's privacy outweighed any public interest in the photos.⁶⁷ The legislation, which still limits Floridians' access, subsequently has shielded a full public inquiry into the death of Anna Nicole Smith, who died in her room at Florida's Seminole Hard Rock Hotel & Casino.⁶⁸

Vince Foster's death tips the access scales

Access to death records played a prominent role in the public's understanding of both Epstein and Earnhardt's deaths, but even before 2001, lawmakers and judges had begun to heavily scrutinize access to death records. Most open records advocates acknowledge a serious shift in the landscape with the U.S. Supreme Court's decision in *National Archives and Records Administration v. Favish*, where a unanimous court ruled Vincent Foster's death scene photos could be withheld because his family's privacy interests outweighed the public interest.⁶⁹ The *Favish* case percolated through the federal courts for years after President Bill Clinton's deputy counsel had been found shot dead in Fort Marcy Park on July 20, 1993.⁷⁰

The U.S. Park Police's initial investigation, along with myriad additional inquiries by the FBI, Congress and independent counsels, concluded Foster's death was a suicide. But that was not enough to convince Allan Favish, who had submitted a FOIA request for Foster's death-scene photos. The National Park Service, who maintained custody of the photos, rejected Favish's request, and he filed a lawsuit to compel disclosure. The D.C. District Court granted summary judgment against Favish and his organization, Accuracy in Media, and the D.C. Circuit unanimously affirmed the lower court's decision.⁷¹ Favish filed a subsequent FOIA request for the photos, but the Office of Independent Counsel determined they were exempt under Exemption 7(C). Once again, Favish filed suit – this time in California – and the U.S. District Court agreed to release one photo containing Foster's eyeglasses. After a series of trips to the Ninth Circuit, the case made its way to the Supreme Court after the Ninth Circuit panel upheld the release of all the photos except one. Noting the discrepancy between the D.C. Circuit and the Ninth Circuit, the Supreme Court granted certiorari.⁷²

⁶⁵ See <http://archive.flsenate.gov/data/session/2001/Senate/bills/billtext/pdf/s1356e1.pdf>.

⁶⁶ *Earnhardt's Autopsy Photos Stay Sealed*, STUDENT PRESS LAW CENTER (Aug. 1, 2003), <https://splc.org/2003/08/earnhardts-autopsy-photos-stay-sealed/>.

⁶⁷ David Royse, *No Further Appeal in Earnhardt Photo Case*, OCALA STAR BANNER (July 2, 2003), <https://www.ocala.com/news/20030702/no-further-appeal-in-earnhardt-photo-case>.

⁶⁸ 'Dale Earnhardt Law' May Shield Smith Autopsy Photos, CNN (Feb. 9, 2007), <https://www.cnn.com/2007/LAW/02/09/smith.pictures/index.html>.

⁶⁹ 541 U.S. 157 (2004).

⁷⁰ Matthew Yglesias, *Vincent Foster's Death and Subsequent Conspiracy Theories, Explained*, VOX (May 25, 2016), <https://www.vox.com/2016/5/25/11761128/vince-foster>.

⁷¹ Accuracy in Media, Inc. v. National Park Serv. 194 F.3d 120 (1999).

⁷² 538 U.S. 1012 (2003).

The Supreme Court turned to its decision in *Reporters Committee* to justify stretching Exemption 7(C)⁷³ to include the personal privacy interests of a person's family.⁷⁴ In his majority opinion, Justice Kennedy rejected the idea that "the individual who is the subject of the information is the only one with a privacy interest."⁷⁵ Instead, he opined:

The right to personal privacy is not confined, as Favish argues, to the 'right to control information about oneself.' ... To say that the concept of personal privacy must 'encompass' the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well.⁷⁶

Relying on the Court's broad concept of privacy established in *Reporters Committee*, Kennedy found that a person's family possesses the same Exemption 7(C) privacy rights as the deceased, allowing them to object to disclosure of their loved one's personal information.⁷⁷ The *Favish* decision contravenes any congressional intent to narrowly construe FOIA exemptions. Nowhere did Kennedy mention any *explicit* evidence that Congress intended "personal privacy" to include a family's privacy interests in a deceased loved one.⁷⁸

Since then, requestors face an uphill climb to access information that could fall within Exemption 7(C). *Favish* increased the burden on requestors who seek information potentially implicating an "unwarranted invasion of privacy." Despite previous precedent,⁷⁹ *Favish* requires requestors justify their request if Exemption 7(C) is implicated.⁸⁰ They must demonstrate a "significant"⁸¹ public interest in seeking the information and that releasing the information is "likely to advance that interest."⁸² Information can be withheld if the requestor fails to demonstrate either prong.⁸³

Attorneys, access advocates and scholars harshly criticized the decision, and its two-pronged test for disclosure, arguing that *Favish* limited the public's ability to access government information.⁸⁴ On its face, *Favish* disadvantages the requesting party in a small segment of privacy

⁷³ 5 U.S.C. § 552(b)(7)(C).

⁷⁴ *Favish*, 541 U.S. at 165–67.

⁷⁵ *Id.* at 165.

⁷⁶ *Id.* (quoting Brief for Respondent Favish 4).

⁷⁷ *See id.*, stating that "the concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea" (quoting *Reporters Committee*, 489 U.S. at 756).

⁷⁸ Justice Kennedy's discussion on the definition of privacy did not include any reference to S. REP. NO. 813 (1965), which the Court used in *Mink*, *Rose*, *Reporters Committee* and other FOIA-related cases as the leading indicator of Congress' intent when passing the FOIA. *See generally id.*

⁷⁹ *See id.* at 172, stating: "[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all."

⁸⁰ *See id.*

⁸¹ *See id.*, defining "specific" as "more specific than having the information for its own sake."

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 552–553, 560–564 (2006); *See also* Lauren Bemis, *Balancing a Citizen's Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope Exemption 7(C) of the Freedom of Information Act under National Archives & Records Administration v. Favish*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 507, 540–543 (2005).

related cases by upending the existing presumption of openness. Traditionally, FOIA had not required a requestor to justify an interest in the information sought or to prove releasing the information would further that interest; the framework required the government agency must demonstrate why the information could be withheld.⁸⁵ Often the information necessary to meet *Favish's* burden cannot be provided without access to the records the requestor is seeking: “How can an individual show that the government is acting improperly when they cannot have access to the documents to prove impropriety? The courts have created a catch-22 for requestors.”⁸⁶ Criticizing the one-two punch of *Reporters Committee* and *Favish*, media law scholars Martin E. Halstuk and Bill F. Chamberlin wrote:

[T]he Supreme Court has created [a] FOIA-related privacy framework that has reset the balance significantly in favor [of] privacy over disclosure. Taken as a whole, the Court-crafted privacy principles create [an] irrebuttable presumption of nondisclosure that stands in stark contrast to FOIA’s voluminous legislative record.

...

Congress has repeatedly reiterated the statute’s strong presumption of government openness, and the Supreme Court had consistently recognized this principle for more than two decades after the FOIA’s enactment. The Court’s current FOIA privacy framework is the product of judicial overreaching grounded in historical revisionism that is clearly at odds with the bedrock democratic principles of accountability and transparent governance in an open society, as envisioned by FOIA’s framers forty years ago.”⁸⁷

The judicial overreach that occurred in *Favish* does not necessarily preclude all access to death records, but it does increase the burden on requestors seeking them. That said, as will be explained in the subsequent sections of this article, access to death records amid a pandemic – as a means of evaluating government response to that public health crisis – easily clears the hurdles that the Court established in *Favish*.

Public sentiment, political will and judicial interpretation have also certainly trended against access since *Favish*. Because *Favish* construes FOIA, it does not bind lower courts in their interpretation of state open records laws. As a result, its impact on death records, which are largely maintained at the state and local levels, is minimal.⁸⁸ Still, the state-law landscape is not particularly favorable in terms of access to death records. As Professor Jeffrey R. Boles points out:

A number of state legislatures have decided that death records as a whole should not be publicly accessible; thus, these states have prohibited the public inspection or copying of death certificates and/or autopsy records, exempting the documents from their right-to-know laws. Many courts justify these access restrictions based upon the right to privacy held by the decedent’s family that ‘protects people from suffering the unhappiness of unwanted publicity about their deceased relatives.’⁸⁹

⁸⁵ See e.g., 5 U.S.C. § 552.

⁸⁶ Bemis, *supra* note 84, at 540.

⁸⁷ Halstuk & Chamberlin, *The Freedom of Information Act 1966–2006*, *supra* note 84, at 563–64.

⁸⁸ Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J. L. & PUB. POL’Y 237 (2012).

⁸⁹ *Id.* at 241.

Not all states or courts, however, restrict access to death records. In fact, some states have rather nuanced approaches for dealing with various types of death records, including death certificates, autopsy reports and photos or videos related to death/autopsy, which will be discussed in Part Four.

Access constraints amid COVID-19

The coronavirus pandemic has been used to justify reductions in government transparency on many levels, including changes to procedures for accessing public records and meetings. Many of these actions started at the federal level and trickled down to state and local governments. On May 28, the Department of Justice released a memo addressing the administration of FOIA during the pandemic: “Most agencies have been impacted by the current circumstances in some way, but many are also able to continue operating with less significant disruptions. Agencies are, of course, impacted differently based on their unique needs, current capabilities to operate remotely, staffing issues, the types of records they process, existing FOIA processes, and technological capabilities.”⁹⁰ The memo came nearly two months after investigative news site MuckRock documented myriad threats to the public’s ability to access government records, including that only a fraction of FOIA offices were set up for remote work.⁹¹

With offices closed and employees working from home, freedom of information requests often took a backseat, either because the physical records were not accessible or because fewer employees were available to address requests. In late March, *Politico* documented a 96 percent decrease in the State Department’s capacity to process records, noting that many employees who review requested documents were at high risk for coronavirus because they were retired Foreign Service officers.⁹² In at least seven instances, State couldn’t fulfill requests that were part of pending litigation and sought leave from federal judges with deadlines looming.⁹³ The FBI made headlines in the pandemic’s early days when it said requests would only be taken by postal mail, effectively shutting off access to anyone seeking information via email.⁹⁴ The U.S. Army took the opposite approach when invoking telework, with MuckRock documenting the agency’s response to its query: “This means that we are unable to handle requests sent via traditional methods and can only respond to electronic inquiries while under elevated HPCON levels.”⁹⁵

State and local governments took similar actions. The City of Chicago, the third-largest city in the United States, went as far as suspending the processing of requests. On March 21, Mayor Lori Lightfoot’s administration deemed public records requests a non-essential city operation despite significant public outcry.⁹⁶ Attorney Ben Silver of the Citizens Advocacy Center in Elmhurst responded: “This is a time of grave uncertainty. People need to have trust in their

⁹⁰ *Guidance for Agency FOIA Administration in Light of COVID-19 Impacts*, DEPARTMENT OF JUSTICE (May 28, 2020), <https://www.justice.gov/oip/guidance-agency-foia-administration-light-covid-19-impacts>.

⁹¹ See Beryl Lipton, *The FOIA Update: COVID Plus FOIA Cases Process Changes and New Threats to Transparency*, MUCKROCK (Apr. 3, 2020), <https://www.muckrock.com/news/archives/2020/apr/03/foia-update-covid-changes-foia-process/>.

⁹² Josh Gerstein, *State Department FOIA Work Crippled by Virus Precautions*, POLITICO (Mar. 27, 2020), <https://www.politico.com/news/2020/03/27/state-department-foia-work-crippled-by-virus-precautions-151476>.

⁹³ *Id.*

⁹⁴ Jason Leopold, *The FBI Has Limited Public Records Requests During The Coronavirus Pandemic*, BUZZFEED (Mar. 17, 2020), <https://www.buzzfeednews.com/article/jasonleopold/fbi-limitng-foia-during-coronavirus-covid19>.

⁹⁵ Lipton, *supra* note 91.

⁹⁶ Gregory Pratt, *Chicago Temporarily Blocks Freedom of Information Act Requests*, GOVERNED (Mar. 21, 2020), <https://www.governing.com/security/Chicago-Temporarily-Blocks-Freedom-of-Information-Act-Requests.html>.

government. One of the reasons we have a Freedom of Information Act is people need to see what's going on in their government. These are public records people are entitled to.”⁹⁷ Chicago was not alone; other major cities to suspend or roll back public records laws included Philadelphia⁹⁸ and San Diego,⁹⁹ who were among the more than 130 state and local governments that had cited the pandemic as a reason to limit access to public records.¹⁰⁰

State governors also took advantage of the pandemic's impact to issue executive orders modifying or suspending their states' public records and open meetings laws. Connecticut Gov. Ned Lamont suspended statutory requirements related to the length of time the state's Freedom of Information Commission had to decide appeals.¹⁰¹ Delaware Gov. John Carney went further, extending the time period for response to freedom of information requests until 15 days after the state of emergency terminates.¹⁰² Both Democrats' executive orders applied retroactively, covering requests and/or appeals already received. D.C. Mayor Muriel Bowser also enacted an order allowing the time periods related to D.C.'s open records law to toll during the height of the pandemic, but it was repealed May 26, 2020 – just over two months after it was enacted.¹⁰³ In Texas, state and local officials relied on a state law¹⁰⁴ permitting governments to suspend the applicability of the Texas Public Information Act, which gives agencies 10 days to respond to requests, for two weeks in the case of a disaster. Passed in the wake of Hurricane Harvey, the provision had rarely been invoked before COVID, which found more than 80 agencies and governments filing a catastrophe notice by April 14, 2020.¹⁰⁵

But it hasn't just been procedural issues during the pandemic that have been thwarting the public's right to know. Perhaps the most extreme action taken during the pandemic occurred in Hawaii, where Gov. David Ige took drastic steps on March 16 after 175 Hawaiians tested positive for coronavirus.¹⁰⁶ “Before the stay-at-home, work-at-home orders, the 14-day quarantines and the requests that tourists cancel their vacations, [the governor] suspended the state's public records and open meetings laws.”¹⁰⁷ Ige eventually walked back his indefinite order, which allowed government bodies to essentially meet in private and permitted agencies to ignore records requests,

⁹⁷ *Id.*

⁹⁸ Joe Hernandez, *Amid The Epidemic, It Can Be Hard To Know What's Going On Behind Closed Doors*, NPR (Apr. 19, 2020), <https://www.npr.org/2020/04/19/831548200/amid-the-epidemic-it-can-be-hard-to-know-whats-going-on-behind-closed-doors>.

⁹⁹ Jeff McDonald, *San Diego County Suspends Responses to Some Public Records Act Requests Due to COVID-19 Outbreak*, SAN DIEGO UNION-TRIBUNE (May 10, 2020), <https://www.sandiegouniontribune.com/news/watchdog/story/2020-05-10/san-diego-county-suspends-responses-to-public-records-act-requests-due-to-covid-19-outbreak>.

¹⁰⁰ Nate Jones, *Public Records Requests Fall Victim to the Coronavirus Pandemic*, WASH. POST (Oct. 1, 2020), https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a_story.html.

¹⁰¹ Executive Order 7M (Mar. 25, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7M.pdf>.

¹⁰² Fourth Modification of The Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (Mar. 22, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Fourth-Modification-to-State-of-Emergency-03222020.pdf>.

¹⁰³ D.C. Act 23-247 (2020), <https://code.dccouncil.us/dc/council/acts/23-247.html>.

¹⁰⁴ Section 552.233 of the Government Code. <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.552.htm>.

¹⁰⁵ Christopher Collins, *The COVID-19 Disaster has Made a Mess of Texas' Open Government Rules*, TEXAS OBSERVER (Apr. 14, 2020), <https://www.texasobserver.org/open-government-covid-19-texas/>.

¹⁰⁶ Nick Grube, *Suspension of Hawaii's Open Government Laws More Extreme Than Other States*, HONOLULU CIVIL BEAT (Mar. 30, 2020), <https://www.civilbeat.org/2020/03/suspension-of-hawaiis-open-government-laws-more-extreme-than-other-states/>.

¹⁰⁷ *Id.*

in early May after the move garnered significant public scrutiny.¹⁰⁸ Open government advocates had called his actions “recklessly overbroad.”¹⁰⁹

Like Ige, New Jersey Gov. Phil Murphy is no stranger to negative press over his actions amid the pandemic. *New Jersey Spotlight* published an article titled “Despite Commitment to Transparency, Murphy Less Than Open About COVID-19 Spending” detailing how the governor and his administration made it impossible for state residents to see how more than \$5 billion in federal CARES Act funding was being spent.¹¹⁰ But that was not Murphy’s only attempt to limit public access to information. Early in the pandemic, Murphy signed new legislation into law that relaxed the seven-day response timeline provided for by the state’s Open Public Records Act.¹¹¹ As a result, if there’s a state of emergency declared, agencies need only make “reasonable efforts” to meet the deadline or provide a response “as soon as possible thereafter.” Unlike actions other states have taken, New Jersey’s amendment to its public records law does not include a sunset provision.¹¹²

Perhaps the most troubling changes to public records and meetings laws involve actions that limit information specifically related to the pandemic. Journalists in New Jersey have documented Murphy’s administration using a 2005 law, the Emergency Health Powers Act, to reject public records requests from the media seeking information on the state’s response to coronavirus.¹¹³ In Texas, major health-related entities, including the Texas Department of State Health Services and the Health and Human Services Commission, used the state’s disaster provision to suspend access to their records, including public health data.¹¹⁴

Not all the news has been bad. A small number of state legislatures have used the pandemic-forced adaptations to re-think public access to government meetings and records – changes that might improve access. Colorado Gov. Jared Polis signed amendments to the state’s open meetings law in mid-March, allowing public bodies to meet telephonically or electronically.¹¹⁵ These meetings still require adequate notice, and the public must be permitted to attend. In Arkansas, state Rep. Lanny Fite proposed an amendment to House Bill 1082 that would allow government entities to hold open public meetings using telephone, electronic conferencing platforms like Zoom or Microsoft Teams, or video broadcasts if the governor declares a disaster

¹⁰⁸ Nick Grube, *Ige Backs Off His Suspension of State Open Government Laws*, HONOLULU CIVIL BEAT (May 6, 2020), <https://www.civilbeat.org/2020/05/ige-backs-off-his-suspension-of-state-open-government-laws/>.

¹⁰⁹ *Id.*

¹¹⁰ Colleen O’Dea, *Despite Commitment to Transparency, Murphy Less Than Open About COVID-19 Spending*, N.J. SPOTLIGHT (July 20, 2020), <https://www.njspotlight.com/2020/07/despite-commitment-to-transparency-murphy-less-than-open-about-covid-19-spending/>.

¹¹¹ Steve Strunsky, *After Murphy laws, Watchdogs Warn Gov’t Transparency Might be Next Coronavirus Victim*, NJ.COM (Mar. 28, 2020), <https://www.nj.com/coronavirus/2020/03/after-murphy-laws-watchdogs-warn-govt-transparency-might-be-next-coronavirus-victim.html>.

¹¹² *Id.*

¹¹³ Brent Johnson, *Requests for N.J. Public Records Rejected During Coronavirus Crisis as Murphy Administration Uses Little-Known Law*, NJ.COM (May 18, 2020), <https://www.nj.com/coronavirus/2020/05/requests-for-nj-public-records-rejected-during-coronavirus-crisis-as-murphy-uses-little-known-law.html>.

¹¹⁴ Collins, *supra* note 105.

¹¹⁵ Jeffrey A. Roberts, *Update: Gov. Jared Polis Signed HB 20-1301 Into Law on Wednesday, Mar. 18*, COLORADO FREEDOM OF INFORMATION COALITION (Mar. 16, 2020), <https://coloradoforc.org/coronavirus-and-colorados-sunshine-law/>.

emergency.¹¹⁶ The proposal includes a requirement that meetings be recorded and retained for at least one year.¹¹⁷

The state of access to death records: A call for action

Although the federal Freedom of Information Act only dates to 1966, the United States has certainly faced large-scale crises before – from acts of domestic and international terrorism to massive natural disasters like Hurricane Katrina, which displaced more than a million people – without suspending public records and open meetings laws. Investigative reporting newcomer *The Markup* noted that these actions are largely unprecedented, citing Attorney General John Ashcroft’s post-9/11 memo, noting that his Department of Justice and the Bush Administration were “committed to full compliance with the Freedom of Information Act.”¹¹⁸ The story also pointed out that the New Jersey government’s guidance after Hurricane Sandy stated the “right to access government records is not suspended” despite the declaration of a state of emergency. Similarly, the Electronic Frontier Foundation warned the California government that there was “no legal basis” to suspend access to records: “The coronavirus is not California’s first major crisis, and the legislature has never authorized the suspension of the California Public Records Act.”¹¹⁹

In practicality, what does it mean that governments are suspending access to records amid the coronavirus pandemic? For journalists at *The Markup*, it means their public records requests to all 50 states, New York City and Washington, D.C. seeking coronavirus testing algorithms have essentially gone unanswered by nearly half of the jurisdictions queried. Hawaii, of course, responded that the request would “be postponed indefinitely,” citing Iger’s actions. At the end of August, nonpartisan access advocate Open the Government reported that more than 600 of its federal FOIA requests filed since March had gone unanswered.¹²⁰

The Markup and Open the Government were not alone. A number of news organizations have sought access to the records of long-term care facilities with coronavirus outbreaks. The *Idaho Statesman* has threatened to sue after the state’s Department of Health and Welfare denied its public records request.¹²¹ Journalists in Texas were only able to get that information, which had been requested by nearly 30 parties, after the Attorney General ordered the numbers be released.¹²² News outlets in Utah made similar threats to get access to the names of businesses who reportedly

¹¹⁶ Michael R. Wickline, *Open-Meetings Law Change Put Forward*, ARKANSAS DEMOCRAT GAZETTE (Apr. 10, 2020), <https://www.arkansasonline.com/news/2020/apr/10/open-meetings-law-change-put-forward/>.

¹¹⁷ *Id.*

¹¹⁸ See Colin Lecher, *States Are Suspending Public Records Access Due to COVID-19*, THE MARKUP (May 1, 2020), <https://themarkup.org/coronavirus/2020/05/01/states-are-suspending-public-records-access-due-to-covid-19>, citing Memorandum for Heads of All Federal Departments and Agencies, DEPARTMENT OF JUSTICE (Oct. 12, 2001), <https://www.justice.gov/archive/oip/011012.htm>.

¹¹⁹ *Statement on Open Government Amid COVID-19 Crisis in California*, ELECTRONIC FRONTIER FOUNDATION (Mar. 23, 2020), <https://www.eff.org/document/letter-california-public-records-act-and-covid-19>.

¹²⁰ *COVID-19 Secrecy Rampant as Agencies Clampdown on FOIA*, Open the Government (Aug. 28, 2020), <https://www.openthegovernment.org/covid-19-secrecy-rampant-as-agencies-clampdown-on-foia/>.

¹²¹ *Idaho Newspaper Plans Lawsuit Over COVID-19 Records Denial*, IDAHO BUSINESS REVIEW (June 1, 2020), <https://idahobusinessreview.com/2020/06/01/idaho-newspaper-plans-lawsuit-over-covid-19-records-denial/>.

¹²² Kali Venable, *Attorney General Rules HHSX Should Release COVID-19 Nursing Home Data*, VICTORIA ADVOCATE (July 22, 2020), https://www.victoriaadvocate.com/news/local/attorney-general-rules-hhsc-should-release-covid-19-nursing-home-data/article_0986a0ea-cc36-11ea-b391-87dfb5d13f10.html.

let employees continue working with COVID.¹²³ A coalition of North Carolina media companies sued North Carolina Gov. Roy Cooper and members of his Cabinet, seeking access to myriad records related to COVID, citing 26 outstanding public records requests to the state's Departments of Public Safety and Health and Human Services.¹²⁴ Among the records sought were the state's database of coronavirus cases and reports of prison inspections during the pandemic.¹²⁵ The Bay Area News Group sued Alameda County, California, in an attempt to get access to records detailing coronavirus deaths at nursing homes.¹²⁶ A number of journalism and civil society organizations have expressed concerns about the impact on journalism: "COVID-19 is no excuse to relax the fundamentals of open government and transparency."¹²⁷

Perhaps then, the COVID-19 pandemic is the perfect time to encourage a resurgence in open government and transparency by touting its ability to restore trust in government. A Pew Research Center survey in late June 2020 found that only 3 in 10 Americans trusted President Trump and his administration in matters related to coronavirus.¹²⁸ Pew reported that trust in the COVID vaccine among Americans dropped from 72 percent in May to 51 percent in September.¹²⁹ In December, only 41 percent of Black Americans, who have been disproportionately impacted by the virus, reported they would be willing to get the vaccine.

Open government advocates may be able to capitalize on public mistrust of government and the change in presidential administrations to advance their pro-transparency agenda. In particular, public pressure about the government's handling of the pandemic may help lessen concerns about personal privacy when releasing death records and other pandemic-related information. Criticism of the White House's decision to bypass the CDC with COVID-19 data provides a powerful example in support of greater government oversight: "The data would be more complete and transparent ... administration officials said. Instead the public data hub ... is updated erratically and is rife with inconsistencies and errors, data analysts say."¹³⁰ As one former high-ranking CDC official pointed out, "If the information is not accurate, it could cost time – and lives."¹³¹

¹²³ Stephanie Tsoflias Siegel, *Utah News Outlets Threaten Lawsuit Over Denied Covid-19 Public Records*, TV SPY (May 21, 2020), <https://www.adweek.com/tvspy/utah-news-outlets-threaten-lawsuit-over-denied-covid-19-public-records-request/221688/>.

¹²⁴ Nick Ochsner, *Media Coalition Sues N.C. Gov. Cooper, Cabinet Agencies for COVID-19 Records*, WBTV (May 28, 2020), <https://www.wbtv.com/2020/05/28/media-coalition-sues-cooper-cabinet-agencies-covid-records/>.

¹²⁵ *Id.*

¹²⁶ Angela Ruggiero, *Bay Area News Group Sues Alameda County for Nursing Home Coronavirus Records*, THE MERCURY NEWS (June 5, 2020), <https://www.mercurynews.com/2020/06/04/bay-area-news-group-sues-alameda-county-for-nursing-home-coronavirus-records/>.

¹²⁷ Colin Lecher, *States Are Suspending Public Records Access Due to COVID-19*, THE MARKUP (May 1, 2020), <https://themarkup.org/coronavirus/2020/05/01/states-are-suspending-public-records-access-due-to-covid-19>.

¹²⁸ Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elisa Shearer, *Three Months In, Many Americans See Exaggeration, Conspiracy Theories and Partisanship in COVID-19 News*, PEW RESEARCH CENTER (June 29, 2020), <https://www.journalism.org/2020/06/29/three-months-in-many-americans-see-exaggeration-conspiracy-theories-and-partisanship-in-covid-19-news/>.

¹²⁹ Alec Tyson, Courtney Johnson & Cary Funk, *U.S. Public Now Divided Over Whether To Get COVID-19 Vaccine*, PEW RESEARCH CENTER (Sept. 17, 2020), <https://www.pewresearch.org/science/2020/09/17/u-s-public-now-divided-over-whether-to-get-covid-19-vaccine/>.

¹³⁰ Pien Huang & Selena Simmons-Duffin, *COVID-19 Hospital Data System That Bypasses CDC Plagued By Delays, Inaccuracies*, NPR (July 31, 2020), https://www.npr.org/sections/health-shots/2020/07/31/897429054/covid-19-hospital-data-system-that-bypasses-cdc-plagued-by-delays-inaccuracies?utm_term=nprnews&utm_source=facebook.com&utm_medium=social&utm_campaign=npr&fbclid=IwAR3xsEOsRnoECyp-LQN4h4LBvbGcozJ3b4rs-CpXE1JfCFAi51GN_D2dfOk.

¹³¹ *Id.*

Using the strategy outlined below, freedom of information coalitions, access advocates and news organizations may be able to make significant headway by lobbying legislatures for changes to public records laws concerning death records:

Access to autopsy reports is critical for government oversight

In many matters of public interest – such as whether the government is accurately sharing COVID-19 information or what caused a person’s death at the hands of law enforcement – it is the autopsy report and photos or video of the autopsy that are most revealing and can help identify government wrongdoing. Autopsy reports in the death of Breonna Taylor, who was fatally shot in her home, revealed that just one of the six shots that struck her was fatal.¹³² Although a state ballistics test was inconclusive, the FBI linked the fatal shot to Louisville Police Detective Myles Cosgrove. More recently, an autopsy report confirmed that New Hampshire’s House Speaker Richard Hinch died of COVID-19, but that information could not have been made public without permission from his family. New Hampshire’s public records law states “autopsy reports, investigative reports, and supporting documentation are confidential medical records and, as such, are exempt from the provisions of [the public records law]. Copies of such documents may be made available to the next of kin, a law enforcement, prosecutorial, or other governmental agency involved in the investigation of the death, the decedent’s treating physician, and a medical or scientific body or university or similar organization for educational or research purposes. Autopsy reports, investigative reports, and supporting documents shall not otherwise be released without the authorization of next of kin.”¹³³ Importantly, journalists revealed that Hinch had attended an outdoor event only a week before he died.¹³⁴ Earlier that week, several Republican members of the New Hampshire House of Representatives had tested positive for COVID-19 after caucusing indoors.

When citizens die at the hands of government officials, autopsy reports can be key to determining what actually transpired and whether a full and fair investigation occurred. Family members questioning the classification of Jeffrey Epstein’s death as suicide hired a private medical expert to examine the autopsy report and photos.¹³⁵ As a result, it often makes sense to start with those records when advocating for increased access for the purpose of government oversight. In the case of George Floyd’s death, his autopsy report – which was made public and has since been criticized by a privately hired pathologist¹³⁶ – was more than 20 pages long.¹³⁷ Among the many

¹³² Tessa Duvall, *Breonna Taylor Autopsy Report Reveal Show Louisville Police Bullets Killed Her*, LOUISVILLE COURIER JOURNAL (Sept. 25, 2020), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/25/breonna-taylor-autopsy-report-reveals-how-police-bullets-killed-her/3537839001/>.

¹³³ NH Rev. Stat. § 611-B:21 (2007), <https://www.gencourt.state.nh.us/rsa/html/LIX/611-B/611-B-21.htm>.

¹³⁴ Carol Robidoux, *Autopsy Report: Speaker Hinch’s Cause of Death Was COVID-19*, MANCHESTER INK LINK (Dec. 10, 2020), <https://manchesterinklink.com/autopsy-report-speaker-hinchs-cause-of-death-was-covid-19/>.

¹³⁵ Kristine Phillips & Kevin Johnson, *Private Pathologist Questions Whether Jeffrey Epstein Died by Suicide; Medical Examiner Stands by Conclusion*, USA TODAY (Oct. 30, 2019), <https://www.usatoday.com/story/news/politics/2019/10/30/pathologist-questions-whether-jeffrey-epstein-died-suicide/4096618002/>.

¹³⁶ Erin Donaghue, *Two Autopsies Both Find George Floyd Died by Homicide, but Differ on Some Key Details*, CBS NEWS (June 4, 2020), <https://www.cbsnews.com/news/george-floyd-death-autopsies-homicide-axphyxiation-details/>.

¹³⁷ Scott Neuman, *Medical Examiner’s Autopsy Reveals George Floyd Had Positive Test For Coronavirus*, NPR (June 4, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/04/869278494/medical-examiners-autopsy-reveals-george-floyd-had-positive-test-for-coronavirus>.

details George Floyd’s autopsy report contained was the revelation that he was positive for SARS-CoV-2, the virus that causes COVID-19.¹³⁸

One of the key issues throughout the pandemic has been how to determine an accurate death toll. Although Dr. Deborah Birx, who heads the White House coronavirus task force told the public “if someone dies with COVID-19, we are counting that as a COVID-19 death” in early April,¹³⁹ that no longer appeared to be the case by summer, when states had begun revising their practices for classifying COVID-19 deaths. To make these determinations, it is often necessary to review autopsy reports. Given the government’s incentive to limit deaths from the virus and the documented lack of testing, this seems like an area ripe for abuse of power – particularly in states like Maine¹⁴⁰ and New Hampshire,¹⁴¹ or cities like New York¹⁴² – where autopsy reports are essentially closed to the public. That said, autopsy records – though not always photos and videos – are more likely to be open than death certificates, which often have decades-long exemption from public access.¹⁴³

A specific right of access for the public should be advocated

For true oversight of government actions, the right of access must be based on the public’s right to know. With regard to death records, only a small number of states offer this kind of broad access to the public – and caveat language often appears in the statutes, case law or attorney general opinions. Alabama, for example, states: “Any person desiring reproductions of original [autopsy] reports shall be furnished same upon payment of the fee now proscribed by law.”¹⁴⁴ A 1987 Alabama Attorney General’s opinion notes: “Autopsy reports done by the State Department of Forensic Science are public records. State law specifically provides that such reports are open to the public.”¹⁴⁵ Citing a 1981 Alabama Supreme Court decision,¹⁴⁶ it further notes that coroner’s reports are also public record and that they should only be withheld from the public “when disclosure would be detrimental to the best interests of the public.” New Jersey also considers autopsy reports¹⁴⁷ to be public records, but the statute notes that they are available to requestors “with a proper interest in such records.” New Mexico employs the phrase “tangible and direct interest”¹⁴⁸ in determining access to death records, yet neither the statute nor any reported cases define its meaning. As a result, it is unclear whether a journalist trying to determine whether any of these state governments were accurately reporting cases of COVID-19 could access death

¹³⁸ *Id.*

¹³⁹ Judy Melinek, *How Accurate is the Coronavirus Death Toll?* MEDPAGE TODAY (Apr. 13, 2020), <https://www.medpagetoday.com/blogs/working-stiff/85925>.

¹⁴⁰ See 22 M.R.S.A. § 3022(8).

¹⁴¹ See NH Rev. Stat. § 611-B:21.

¹⁴² See NY City Charter § 557(g). “The chief medical examiner shall keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality. Such records shall not be open to public inspection.” *Id.*

¹⁴³ “[W]hen 100 years have elapsed after the date of a birth, or 50 years have elapsed after the date of a death, marriage, divorce, dissolution of marriage, or annulment, the records of these events in the custody of the state registrar become public records subject to inspection and copying as provided.” See, e.g., A.S. § 18.50.310.

¹⁴⁴ Ala. Code § 36-18-2.

¹⁴⁵ Ala. Att’y Gen. Op. No. 88-00011 (Oct. 8, 1987), <https://www.alabamaag.gov/Documents/opin/8800011.pdf>.

¹⁴⁶ *Stone v. Consolidated Pub. Co.*, 404 So.2d 678 (Ala. 1981).

¹⁴⁷ N.J. Rev. Stat. § 52:17B-92.

¹⁴⁸ See NMSA 1978 § 24-14-28(A).

records in these states. Similarly, Utah allows autopsy and coroner's reports to be released for the purpose of research, but the statute's specific requirements (an advanced degree, affiliation with a university, etc.) suggest journalists would rarely qualify.¹⁴⁹

For a variety of reasons, a special carve-out for journalists, like the one that exists in Ohio, would be less desirable than a broad public access right. In general, the Ohio law exempts from public release a number of components of coroner documents, including preliminary autopsy notes, photographs, suicide notes and other documents that may compromise privacy.¹⁵⁰ Journalists seeking access to these materials can submit a written request to view them under 313.10(D), which provides: "The request shall include the journalist's name and title and the name and address of the journalist's employer and state that the granting of the request would be in the best interest of the public. If a journalist submits a written request to the coroner to view the records described in this division, the coroner shall grant the journalist's request. The journalist shall not copy the preliminary autopsy and investigative notes and findings, suicide notes, or photographs of the decedent."¹⁵¹ Such an approach, of course, raises all the typical questions¹⁵² associated with any special right for journalists, including how to define who would qualify. Because of this, it seems prudent to advocate for a broad public right of access wherever possible.

Account for your state's approach to balancing privacy versus public interest

Any advocacy strategy has to look holistically at how a particular state views personal privacy. Strong case law broadly construing personal privacy or constricting public interest could thwart attempts to gain access to autopsy reports. Florida provides a strong cautionary tale. Despite the Florida Constitution provision elevating access to public records above personal privacy, the courts and legislature disregarded the provision when considering death records. As a result, access advocates must scrutinize legislative responses and judicial decisions in this space when adopting a strategy to further access. In states where courts are inclined to favor personal privacy over public interest, advocating for a legislative approach is more likely to result in a favorable outcome. Alternatively, when exemptions from, and statutory caveats to, the public records law indicate a legislative interest in protecting privacy, case-by-case adjudication may be the preferred strategy for gaining access to death records.

It is advisable to have a sense whether the burden is on the government to prove the disclosure would invade privacy or on the requestor to prove release would be in the public interest.

¹⁴⁹ See Utah Code § 26-4-17 (4). In relevant part, it reads:

- (4) The medical examiner may provide a medical examiner record to a researcher who:
 - (a) has an advanced degree;
 - (b) (i) is affiliated with an accredited college or university, a hospital, or another system of care, including an emergency medical response or a local health agency; or
(ii) is part of a research firm contracted with an accredited college or university, a hospital, or another system of care;
 - (c) requests a medical examiner record for a research project or a quality improvement initiative that will have a public health benefit, as determined by the Department of Health; and
 - (d) provides to the medical examiner an approval from:
 - (i) the researcher's sponsoring organization; and
 - (ii) the Utah Department of Health Institutional Review Board.

¹⁵⁰ See Ohio Rev. Code § 313.10.

¹⁵¹ *Id.*

¹⁵² For a thorough discussion of this topic, see generally Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241 (2007).

In Oregon, the law conditionally exempts “a medical examiner’s report, autopsy report or laboratory test report ordered by a medical examiner.”¹⁵³ As a result, anyone seeking this information must overcome the burden by demonstrating that “public interest requires the disclosure” of the records. Much like the situation in *Favish*, it is usually quite challenging to make such a showing without first having access to the documents.

In states where common law or administrative rulings limit personal privacy, advocating for legislative changes might be advisable. The Supreme Court of Michigan declared in 1991: “We follow the general rule that the right of privacy is personal, and the relatives of deceased persons who are objects of publicity may not maintain actions for invasion of privacy unless their own privacy is violated. There is no relational right to privacy in Michigan.”¹⁵⁴ As a result, autopsy reports and test results are not exempt from disclosure under the state’s Freedom of Information Act.¹⁵⁵

But these rulings constraining privacy might also help in court. For example, Hawaii has an Office of Information Personnel advisory opinion that concluded that deceased persons have no personal privacy rights.¹⁵⁶ It would be quite helpful for attorneys trying to argue that the state’s public records law, which does not require disclosure of records that “would constitute a clearly unwarranted invasion of personal privacy,”¹⁵⁷ should mandate release of autopsy reports because deceased persons have no personal privacy rights.

Access advocates in other states, like South Carolina, may struggle to overcome unhelpful court precedent that requires a legislative fix. The state’s supreme court has adopted a broad definition of medical records, ruling in 2014 that autopsy reports contain medical information. As such, they are exempt from disclosure under the state’s Freedom of Information Act.¹⁵⁸ Based on the *Perry v. Bullock* decision, the Municipal Association of South Carolina advised members to be cautious about releasing COVID-related information.¹⁵⁹ Given these developments, the only likely solution would be to advocate a legislative amendment to specifically open autopsy records.

If necessary, consider permitting clearly articulated limitations and redactions

A right of public access need not be absolute to be meaningful; even in states where these records are generally open, courts are often allowed to close off parts or redact certain information. As a result, some compromises may be necessary with a legislative approach, and several states’ approaches offer up possible options. In some states like New Jersey¹⁶⁰ and Wyoming,¹⁶¹ the text of autopsy reports is seemingly open, but photos, videos or other multimedia records created during the autopsy are exempt from disclosure. Compare that to North Carolina, where autopsy

¹⁵³ See ORS § 192.345 (36).

¹⁵⁴ *Swickard v. Wayne County Medical Examiner*, 475 N.W.2d 304 (Mich. 1991).

¹⁵⁵ *Id.*

¹⁵⁶ See OIP Op. Ltr. No. 91-33 (Dec. 31, 1991).

¹⁵⁷ HI Rev Stat § 92F-13 (2017).

¹⁵⁸ See *Perry v. Bullock*, 761 S.E.2d 251 (S.C. 2014).

¹⁵⁹ See FOIA Requests for COVID-19 Records, <https://www.masc.sc/Pages/FOIA-Requests-on-Employee-COVID-19-Records.aspx>

¹⁶⁰ See N.J.S.A. 47:1A-1.1 in relevant part: “any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person, taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the medical examiner...” *Id.*

¹⁶¹ See WY Stat § 16-4-203 (d)(i).

photos and recordings are open to inspection so long as no copies are made.¹⁶² Another alternative, particularly when examining autopsy records in light of public health crises, is to consider allowing redactions for certain identifying information or requesting records in some aggregated format. In many instances, a limited right of access is better than no access at all.

Conclusion

In recent years, fighting for government transparency has often felt like swimming upstream, but access advocates, attorneys and news organizations must not relent. The current coronavirus pandemic offers a prime opportunity to galvanize support in favor of disclosure of public records that can shed light on government failures and wrongdoings. In at least one state, Washington, progress has been made with regard to autopsy reports. Effective January 1, 2021, “the county coroner, medical examiner, or prosecuting attorney having jurisdiction may release information contained in a report of death ... to the media and general public.”¹⁶³ Although this is not an all-encompassing right of public access to death records, it provides discretion to allow officials to share information. In a state where autopsy records were considered confidential and exempt from disclosure,¹⁶⁴ any incremental change in favor of transparency is a welcome development. In an era where secrecy seems to be growing, any legislative action that shines light on the workings of government must be considered a step in the right direction.

¹⁶² See North Carolina G.S. § 130a-389.1. “Except as otherwise provided by law, any person may inspect and examine original photographs or video or audio recordings of an autopsy performed pursuant to G.S. 130A-389(a) at reasonable times and under reasonable supervision of the custodian of the photographs or recordings.” *Id.*

¹⁶³ See RCW § 68.50.300(3).

¹⁶⁴ See generally RCW § 68.50.105.