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Eliminating a Barrier to Access: Waiving or Reducing Fees for Public Records in Florida

Virginia Hamrick *

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Abstract

Florida, the Sunshine State, is one of the few states that includes a right of access to public records in its constitution. While Florida guarantees a right of access to every person, special service charges and high costs for public records restrict access to only requestors with the financial resources to pay for requests. Some agencies assert that waiving fees for requests that have a public interest would be significantly costly. This article builds on research showing that a fee waiver for requests made in the public interest would have minimal effect on Florida municipalities. This article analyzes agency public records logs to assess how a fee waiver for requests made for noncommercial purposes and in the public interest would affect state agencies. This article finds that only 14% of requests reviewed would be entitled to a fee waiver.

* Virginia Hamrick, staff attorney, First Amendment Foundation of Florida. Please send correspondence about this article to Virginia Hamrick at vhamrick@floridafaf.org. An earlier version of this work was presented at the [National Freedom of Information Coalition summit FOI Research Competition](#), Sept. 28, 2021.

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Introduction

When the nonprofit human rights organization Coalition of Immokalee Workers (CIW) asked a Florida agency for three months of keyword-specific emails between another nonprofit and state officials, the agency said it would cost over \$42,000 to produce them.¹ CIW sought the records to better understand why state officials decided against participating in a cost-free COVID-19 contact tracing program with the international nonprofit, Partners in Health.² By collaborating with Partners in Health, the Coalition argued that local and state governments could effectively trace and limit the spread of the virus among farmworkers.³

Due to cost constraints, CIW was forced to narrow its request, reducing the fee to \$769.79.⁴ The documents CIW was able to obtain informed its advocacy efforts, which were ultimately successful in helping create a comprehensive collaboration between Partners, CIW, the Healthcare Network, and the Department of Health to administer vaccines to thousands of farmworkers and provide and promote access to testing in Immokalee.⁵

Throughout the COVID-19 pandemic, as the public tried to acquire information on the spread of the coronavirus, state agencies withheld vital information related to cases in assisted living facilities, reports from the federal government, and information on virus variants.⁶ Even when agencies acknowledged that the information was public, high fees prevented non-profit organizations, journalists, and members of the public from accessing it.⁷

Exorbitant fees are not limited to records related to coronavirus information. Department of Health records show a journalist was given an initial estimate of \$914 for copies of inspections at public school kitchens and cafeterias.⁸ The Department of Business and Professional Regulation estimated that it would cost more than \$1,900 to fulfill a reporter's request for complaints against contractors and cosmetologists filed with the department in one county during a 26-month period.⁹ The Florida Department of Transportation (FDOT) sent a journalist an invoice for \$2,000 for

¹ Jenny Staletovich, *The High Cost of Sunshine: Public Records in Florida Can Cost More than a Year's Salary*, WLRN (Mar. 29, 2021), <https://www.wlrn.org/local-news/2021-03-29/the-high-cost-of-sunshine-public-records-in-florida-can-cost-more-than-a-years-salary>.

² *Id.*

³ *Gov. DeSantis, Collier County: Take Action NOW to Protect Immokalee's Farmworkers from COVID-19 Ahead of the Harvest!* COALITION OF IMMOKALEE WORKERS (Sept. 3, 2020), <https://ciw-online.org/blog/2020/09/gov-desantis-collier-county/>.

⁴ Email from CIW with invoice on file with author.

⁵ See Janine Zeitlin, *'Who is Going to Help Me?': How a Florida Team Brings Healthcare to this Community*, NAPLES DAILY NEWS (Aug. 24, 2021), <https://www.naplesnews.com/in-depth/news/2021/08/23/healthcare-team-coronavirus-test-vaccine-assistance-immokalee-fl/7878537002/>.

⁶ See Mary Eilan Klas, *Timeline: Florida's Dark Year for its Sunshine Law*, MIAMI HERALD (Mar. 1, 2021), <https://www.miamiherald.com/news/politics-government/state-politics/article249587018.html>, Katie Santich, *Florida Health Officials Agree to Release Variant Data, Pay Attorney Fees in Sentinel Lawsuit*, ORLANDO SENTINEL (Apr. 21, 2021), <https://www.orlandosentinel.com/news/os-ne-florida-department-of-health-settles-sentinel-lawsuit-over-variant-data-20210421-i5byxgkkrzczfkelkmalhzjv2q-story.html>.

⁷ Emma Ockerman, *Florida Wants \$17,000 to Release Documents About COVID-19 Vaccine Rollout*, VICE NEWS (Jan. 5, 2021), <https://www.vice.com/en/article/dy84dw/florida-wants-dollar17000-to-release-documents-about-covid-19-vaccine-rollout>

⁸ Invoice from Department of Health on file with author.

⁹ Email from DBPR with estimate on file with author.

emails related to the structural integrity of a bridge.¹⁰ These records were meant to shed light on the stability of a heavily trafficked bridge.

Excessive fees limit the media's ability to report on government agencies and matters that affect the wellbeing of the community—from school safety to infrastructure. Charges prevent many members of the public from obtaining government information. As a result, public oversight of agencies is significantly impaired, and the public is less informed about the government.

When given a high invoice, requesters may go back and forth with the records custodian to narrow the request and reduce the costs. This process delays a requester's access to information. Time spent debating over fees could be spent collecting and providing the records to the requester, who could then make the information known to the public at large. Meanwhile, for-profit businesses and requesters with the resources to pay for the records can immediately access the information.

Florida has a noted history of open government.¹¹ It is one of only seven states to guarantee a right of access to records and meetings in its constitution.¹² In reinstating the Governor's Office for Open Government, Governor Ron DeSantis proclaimed that Florida has "made a commitment within its Constitution and statutes to provide unprecedented public access to the records and proceedings of state and local government[.]"¹³ In practice, fees undermine this unprecedented access.

Federal agencies subject to the Freedom of Information Act (FOIA) and many other states allow for a fee waiver for requests made in the public interest by journalists and non-commercial requesters. Such a waiver would reduce excessive fees for nonprofit organizations and reporters in Florida. Research has examined the effect of a fee waiver on Florida municipalities.¹⁴ In fact, an analysis shows that a relatively small number of requests made to municipalities would be eligible for a fee waiver as requests made in the public interest.¹⁵

This article attempts to contribute to research on fee waivers in Florida and assess the effect of a waiver on state agencies by looking at five agencies. This article will first address the laws regarding fee waivers in Florida, other states, and the federal government to assess what type of requests are subject to a fee waiver. Then the study analyzes public record requests submitted to five state agencies to assess the number of requests that would be affected by a fee waiver—those indicating a public interest versus those for a requester's personal interest. Finally, based on the findings, this article argues for agencies to implement a waiver to make records more accessible to requesters seeking information in the public interest.

¹⁰ Joshua Solomon, *Portions of Alma Lee Loy Bridge in Vero Beach 'Unstable,' but State Wants Thousands for Detailed Records*, TC PALM, (Apr. 7, 2021), <https://www.tcpalm.com/story/news/local/2021/04/07/17th-street-alma-lee-loy-bridge-partly-unstable-fdot-says-its-safe/7068853002/>.

¹¹ See Kara M. Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525, 527 (1992).

¹² See Jessica Terkovich & Aryeh Frank, *Constitutionalizing Access: How Courts Weigh State Constitutional Claims in Open-Government Litigation*, 3(1) J. CIVIC INFO 1 (2021).

¹³ Fla. Exec. Order No. 19-11 (Jan. 8, 2019), https://www.flgov.com/wp-content/uploads/orders/2019/EO_19-11.pdf.

¹⁴ Kelly Cox & Matthew Haber, *Does Freedom of Information Mean "Free"? How Hidden Costs of FOIA and Open Records Laws Impact the Public's Ability to Request Government Documents*, N.Y.U.J. LEGIS. & PUB. POL'Y QUORUM (2020).

¹⁵ *Id.*

Fees for accessing public records

The Florida Supreme Court has held that access to public records is a “cornerstone of our political culture.”¹⁶ Access to public records is provided in statute—the Florida Public Records Act—and by the state constitution, which establishes a right for every person to inspect or copy any public record.¹⁷ Public oversight of agencies is nearly impossible without access to public records. Despite the importance of public records, excessive fees can limit—or block—that access.

The Florida Public Records Act permits records custodians to charge for the cost of a certified copy of a record and for the duplication of records.¹⁸ An agency can charge up to 15 cents for copies of not more than 14-by-8 ½ inches per page.¹⁹ For all other copies, an agency may charge the actual cost of duplication.²⁰

In addition, if the nature or volume of public records requested requires “extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both...,” the agency can also charge for that time.²¹ Fees must be reasonable and based on the labor actually incurred. Otherwise, the legislature provided little guidance for what is considered reasonable or how to calculate a special service charge. Agencies vary on what is considered extensive—some agencies start charging after fifteen minutes of work while others start charging after two hours of work.²²

Frequently, excessive service charges are based on the estimated time it will take to review and redact the records for exempt or confidential information. That can include charging the requester the hourly rate of the agency’s attorney or, in the case of FDOT records, an engineer.

The Florida Attorney General has advised that providing access to records should not be considered a revenue-generating operation.²³ Similarly, the Florida Supreme Court has opined that excessive charges deter the public from seeking access to records to which they are entitled.²⁴ In practice, though, there is little a requester can do when given a costly invoice, other than attempt to narrow the scope of the request, sue the agency for an unreasonable excessive charge—or give up entirely. A special service charge costing thousands of dollars can inhibit nonprofit organizations and journalists with limited spending budgets from accessing records—a right guaranteed to every person in the state constitution and statutes.

Based on a review of statutes and policies from other states, along with the federal Freedom of Information Act, thirty-one states mention a waiver or reduction of fees.²⁵ Even where statutes

¹⁶ In re Report & Recommendations of Judicial Mgmt. Council of Fla. on Privacy & Elec. Access to Court Records, 823 So. 2d 712, 713 (Fla. 2002).

¹⁷ FLA. CONST. art. I, § 24(a).

¹⁸ FLA. STAT. § 119.07(4)(a).

¹⁹ FLA. STAT. § 119.07(4)(a)1.

²⁰ FLA. STAT. § 119.07(4)(b).

²¹ FLA. STAT. § 119.07(4)(d).

²² For example, in response to requests for agency’s public records policies, the Florida Department of Health provided a document stating that a special service charge will be charged for work exceeding fifteen minutes. The Agency for Health Care Administration, Department of Lottery, and Executive Office of the Governor each charge fees after thirty minutes of labor. The Florida Department of Agriculture and Consumer Services defines extensive labor as more than two hours spent to respond to a request.

²³ 1985-03 Fla. Op. Att’y Gen. (1985).

²⁴ Bd. of Tr., Jacksonville Police & Pension Fund v. Lee, 189 So. 3d 120, 129 (Fla. 2016).

²⁵ Cox & Haber, *supra* note 14.

are silent as to a fee waiver, courts have ruled that agencies still have discretion to waive or lessen fees to permit greater access to records.²⁶

Federal FOIA requires fees be waived or reduced when the requests are not sought for commercial purposes and the request is in the public interest.²⁷ A request is in the public interest if disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government....”²⁸ Many states use this or a similar definition for public interest.²⁹ Some states provide further guidance. For example, the Illinois Freedom of Information Act provides that waiver or reduction serves the public interest “if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public.”³⁰

Under federal FOIA, requests from individuals seeking records on themselves generally do not qualify for a fee waiver.³¹ Some states also clarify that records sought for personal use or for the requester’s interest in litigation are not made in the public interest and, therefore, not entitled to a fee waiver.³²

Method

To assess how a fee waiver might affect Florida agencies, public records request logs were requested from a number of state agencies to determine how many requests were made by for-profit businesses and individuals seeking their own records compared to journalists, nonprofits, and others who may qualify for a non-commercial fee waiver.

Requests were submitted for logs spanning Jan. 1, 2020, through April 30, 2021, for the following Florida state agencies: Agency for Health Care Administration (AHCA), the Department of Environmental Protection (DEP), the Department of Agriculture and Consumer Services (DACS), and the Department of Lottery (Lottery), and Executive Office of the Governor (EOG). These agencies provided the information without charge and within a month of receiving the request.³³

The logs contained enough information to determine the name and organization or business of the requester. Except for the log provided by DACS, each log also included a description of the records requested. The DACS log contained more than 1,000 entries that included only a name, which made it difficult to verify the requester’s business in seeking the records. The dataset indicates requests made by lawyers, lobbyists, and for-profit businesses seeking records for commercial use, individuals asking for information for personal use, and journalists and nonprofits seeking records in the public interest.

²⁶ See *N. Cty. Parents Org. v. Dep’t of Educ.*, 28 Cal. Rptr. 359 (Cal. Ct. App. 1994).

²⁷ 5 U.S. § 552(a)(4).

²⁸ 5 U.S. § 552(a)(4)(A)(iii).

²⁹ See, e.g., HAW. CODE R. § 2-71-32(b) (“A waiver of fees is in the public interest when: the requested record pertains to the operation or activities of an agency...the requester has the primary intention and actual ability to widely disseminate information from the government record to the general public at large.”).

³⁰ 5 ILL. COMP. STAT. 140/6(c) (2020).

³¹ FOIA FAQ, <https://www.foia.gov/faq.html>.

³² 5 ILL. COMP. STAT. 140/6(c) (2020); IDAHO CODE § 74-102(10)(f)(i)–(ii) (2020).

³³ The Florida Department of Law Enforcement responded to a request nearly three months after the author sent it and estimated that it would cost \$66 to complete the request. The Florida Department of Transportation provided a log with the name of requesters for free. The agency estimated that it would cost more than \$100,000 to also provide a description of the requests and whether any special service charges were imposed.

Requests deemed in the public interest included those from the media, academics, government, and nonprofit organizations. Journalists were noted as in the public interest based on the federal definition that a request is in the public interest if disclosure will likely contribute to the public understanding of the operations of government.³⁴ The label “media” includes requests from journalists at newspapers, public radio stations, television news stations, websites such as Politico, nonprofit news outlets such as ProPublica, and The Center for Investigative Reporting. Bloggers with few followers were not included. Requests made by 501(c)(3) nonprofit organizations, academic institutions, and governmental agencies also were noted as in the public interest. These entities all have non-commercial interests and responsibilities to educate and serve the public.³⁵ However, non-profit organizations seeking their own records—such as a nonprofit hospital seeking complaints about the facility submitted to AHCA—were not considered in the public interest because this information could be used for the entity’s own internal use.

Requests deemed not in the public interest included those from lobbyists, for-profit businesses, consulting firms, insurance companies, unions, individuals seeking their own records, anonymous requests, and requests with insufficient information to make a determination regarding the requester’s identity or purpose. These records would be considered commercial interests of the requester (or their client) or the personal interests of an individual. In coding the requesters, the category “legal” included lawyers and paralegals in private practice. “For-profit business” included for-profit companies based on filings available with Florida Department of State or other state business records sites. “Insurance” included businesses primarily providing insurance. “Lobbyists” included individuals or firms with the primary purpose of influencing legislation and government policy. “Individual/uncoded” indicated that the requester did not fit into a specific category or sought records about themselves.

Results

In all, 2,312 requests out of 16,318—or 14%—would be entitled to a fee waiver for records sought in the public interest and not for commercial or personal use. Nearly one third of all requests came from for-profit businesses (see Table 1 and Figure 1, below). Many businesses sought information about agency contracts for services. For instance, printing companies sought records related to Lottery’s evaluation of bids and awarding a contract for printing lottery games. Businesses, attorneys, and paralegals (one-fifth of all requests) frequently asked for permit and licenses applications, particularly to DEP and AHCA.

A significant number of requests were individuals seeking their own records or records about themselves or their organization. For instance, many notaries public sought complaints filed against them to the Executive Office of the Governor and health care facilities asked AHCA for their own records.

Based on the requests with sufficient information, nearly one third of requests submitted to DACS could receive a fee waiver. The higher percentage might be attributed to the number of requests from government agencies, specifically from state attorney offices.

The EOG responded to the highest percentage of requests that would be entitled to a fee waiver. Of the 816 requests fulfilled during the applicable time period, more than half came from reporters, nonprofits, academic researchers, and other government agencies. Nonprofit

³⁴ 5 U.S. § 552(a)(4)(A)(ii)(II).

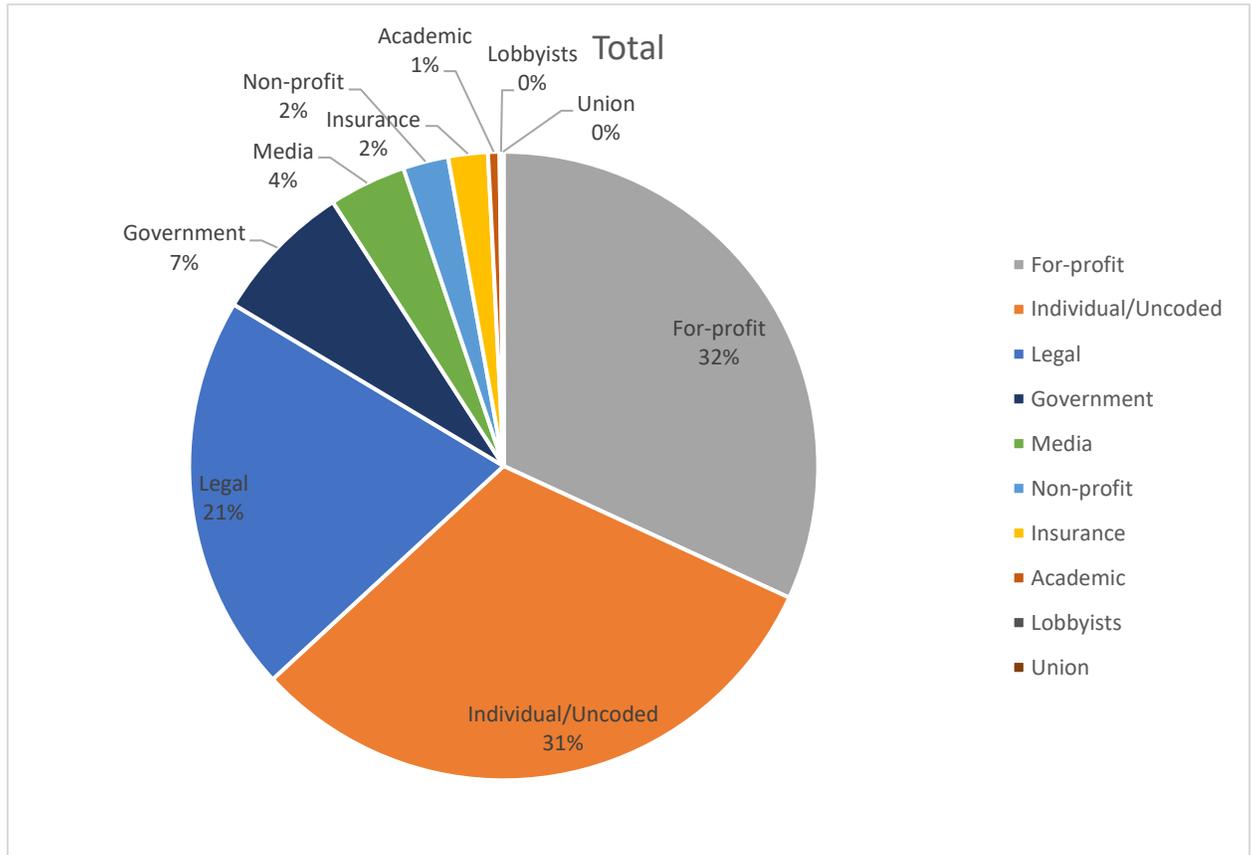
³⁵ See I.R.C. § 501(c)(3).

organizations like Earth Justice sought reports by the state’s Chief Resiliency Officer, who reports to the EOG and responsible for helping prepare the state for the effects of sea level rise in Florida. Journalists at newspapers and television stations asked for information about the administration’s plans for distributing vaccines. The agency had the highest percentage of requests from journalists—41%. No other agency had more than 7% of requests from journalists. A fee waiver would have the most effect on the EOG and its ability to impose special service charges for public records requests.

Table 1: Requester type by public interest versus nonpublic interest

		ACHA	DEP	DACS	Lottery	EOG	TOTAL
Public Interest							
	Nonprofit	170	91	46	2	72	381
	Media	153	58	67	38	332	648
	Academic	27	33	22	3	11	96
	Government	90	153	914	8	22	1,187
	SUBTOTAL	440	335	1,049	51	437	2,312
Nonpublic Interest							
	Legal	2,468	453	346	21	51	3,339
	Individual	2,306	930	1,309	270	284	5,099
	Businesses	510	3,955	450	254	33	5,202
	Insurance	311	5	8	1	7	332
	Lobbyist	11	4	4	1	4	24
	Union	3		3	4		10
	SUBTOTAL	5,609	5,347	2,120	551	379	14,006
TOTAL		6,049	5,682	3,169	602	816	16,318

Figure 1: Requester type



Conclusion

Public records are essential to oversight of state agencies. Florida lawmakers and voters considered access to public information critical and provided a right of access to records both in statute and in the state constitution. Despite the importance of public records and guarantees of access for every person, charges preclude many individuals from seeking public records. Only requesters with the resources to pay thousands of dollars can reliably exercise their constitutional right to access public records.

This study was attempted to build on research showing that Florida municipalities would not be significantly affected by a fee waiver for records sought in the public interest, by analyzing data related to the impact of fee waivers on state agencies.³⁶ While this is a limited sample, the findings are in line with previous research.³⁷ Four of the agencies reviewed receive a majority of records requests from entities with commercial interests or individuals with personal interests in the records. When considering all requests made to four agencies, only 14% would be subject to a fee waiver for requests made in the public interest by nonprofit organizations and journalists or for noncommercial purposes, such as academic research.

³⁶ See Cox & Haber, *supra* note 14.

³⁷ *Id.*

Apart from the EOG, only a small percentage of requesters at agencies would be entitled to a fee waiver. An agency could still charge for extensive use of information technology resources or labor for a large majority of requests, particularly commercial requesters. The effect of a fee waiver or reduction for requests made in the public interest would have a minimal financial effect on the reviewed state agencies.

Agencies could consider policies to reduce fees for those seeking records in the public interest. For instance, an agency could charge a fee only if the request takes at least one, two, or four hours to complete—a practice in other states—rather than charging after fifteen or thirty minutes.³⁸ Several states permit a custodian to charge only for the time spent redacting exempt information from a record and not for the time an attorney or employee spends determining whether the record is exempt from disclosure—a common charge in Florida.³⁹ Even without waiving fees, agencies could reduce the costs of records requests if made in the public interest by revising what is considered “extensive” labor.

Waiving fees entirely for requests made in the public interest could ensure that information about the operations of government is available to the public and not limited by a requester’s ability to pay. A fee waiver, or changes to policies on special services charges, would ensure that reporters and nonprofit organizations with limited budgets are not denied access to information. Nothing prohibits agencies or municipalities from implementing a procedure to waive or reduce fees. Agencies are free to adopt a fee waiver today.

Alternatively, the Florida legislature could amend the public records law to provide a definition of requests made in the public interest and a mechanism to waive or reduce fees for such requests. Legislation requiring records custodians to waive or limit fees for requests made for noncommercial purposes and in the public interest would create uniformity of the application of fee waivers across state and local entities. Legislation should mandate a waiver or reduction of fees for requests made for non-commercial purposes of the requester and where disclosure of information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interests of the requester.⁴⁰

As evidenced throughout the coronavirus pandemic, a lack of information can cause distrust and confusion. Access to information leads to a more informed public. A fee waiver and, in turn, greater accessibility to public information can dispel shade in the Sunshine State.

³⁸ NEB. REV. STAT. §84-712 (3)(c) (allowing a custodian to charge only after four hours of labor). *See also*, IDAHO STAT. § 74-102(10)(b)(i) and N.Y. PUB. OFF. § 87(1)(c)iv. (permitting charge for search and review of records after two hours of labor).

³⁹ *See e.g.*, DEL. CODE ANN. tit. 29 § 10003(m)(2) (2020) (“Administrative fees shall not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt under FOIA.”) *See also* NEB. REV. STAT. §84-712 (3)(c); OR. REV. STAT. § 192.324(4)(b); 65 PA. STAT. ANN. § 67.1307(g); UTAH CODE ANN § 63G-2-203(5)(a).

⁴⁰ *See* 5 U.S.C. § 552(a)(4)(A)(iii).