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## Editor's Note

### A Sickness that Lingers

David Cuillier, Ph.D., Editor, *University of Arizona*

This is a societal illness that will linger for years, perhaps decades.

I am referring to civic information secrecy, not COVID-19.

After nearly a year of worldwide restrictions intended to thwart the coronavirus, we have continued to witness increased government secrecy, from delays and closures of health records to restricted access to elected officials' decision-making discussions.<sup>1</sup> If we have learned anything from significant human events in history, we can expect this secrecy to continue, at some level, long after the pandemic ends.

World War II, for example, resulted in a clampdown in government information that continued after the war's end in 1945, justified by the Cold War.<sup>2</sup> Following the terrorist attacks of Sept. 11, 2001, government agencies throughout the United States closed infrastructure data and other records deemed a threat to national security,<sup>3</sup> and many of those records remain secret today.

During times of mortal strife it is human nature to play it safe through restriction of information. When people are reminded of their own potential deaths they cling more dearly to their worldviews, leading to those who value national security to become less supportive of information transparency.<sup>4</sup>

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<sup>1</sup> For a list of global information closures due to the pandemic, see the COVID-19 Tracker produced by the Centre for Law and Democracy, <https://www.rti-rating.org/covid-19-tracker/>.

<sup>2</sup> MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975, at 42 (2016). Also, see Sam Archibald, *The Early Years of the Freedom of Information Act – 1955 to 1974*, 26 POL. SCI. & POL. 4, 726-731 (1993).

<sup>3</sup> See L. Elaine Halchin, *Electronic Government in the Age of Terrorism*, 19 GOV. INFO. Q., 243-254 (2002); and Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y, 479-509 (2006).

<sup>4</sup> Hundreds of studies in terror management theory from social psychology have documented this effect, including an experiment specific to attitudes toward freedom of information: David Cuillier, Blythe Duell & Jeff Joireman, *The Thought of Death, National Security Values and Polarization of Attitudes Toward Freedom of Information*, 5 OPEN GOV. J. 1 (2009).

We saw this effect throughout the U.S. starting in March 2020 in response to the pandemic. For example, Palestine, Texas, banned a news reporter from a city council meeting,<sup>5</sup> the Council of the District of Columbia said it did not have to respond promptly to records requests,<sup>6</sup> the FBI refused to accept record requests online or by email,<sup>7</sup> and de-identified nursing home data was withheld from the public.<sup>8</sup>

In April 2020, Frank LoMonte, director of the Brechner Center for Freedom of Information at the University of Florida and publisher of *The Journal of Civic Information*, wrote an essay for the journal calling out the information lockdowns. During times of strife, he wrote, accurate and complete information is even more important, and could “literally mean the difference between life and death.”<sup>9</sup>

Yet, the secrecy continues. Each summer and winter I teach an online class in accessing public records, requiring students to gather dozens of public records regarding a house for sale. In June of the pandemic, few records were provided to the students, as agencies said it would take at least 30 days to even respond. They said the same thing in December.

Anecdotes are fine, but peer-reviewed research is better. This issue of *The Journal of Civic Information* features four research articles focusing on access to civic information during the COVID-19 pandemic.

We lead the issue with Amy Kristin Sanders’ big-picture analysis of the legal landscape in the United States regarding government information related to COVID-19. She adeptly examines how public record laws and court decisions apply to citizens’ ability to acquire death records, balancing the right of access with personal privacy. She provides practical recommendations for policy makers and advocates.

Al-Amyn Sumar then explains the impact of the Health Insurance Portability and Accountability Act on access to COVID-19 information. As we have seen, HIPAA has been invoked throughout the country as a reason to hide government records. Sumar peels back that onion, highlighting the “Required by Law” exception that gives information seekers a strong case for record disclosure. He also provides a striking state-by-state list of examples of how HIPAA has been used to hide pandemic information from the public.

Yet, every jurisdiction is different, as state laws vary in their language and court interpretation. Megan Craig and Madeleine Davison provide a breakdown for the dozen states that provide death records openly, the five states that provide partial access, and the rest of the states that keep such information secret. This research can provide access advocates context for improving transparency in their own states.

Finally, Jodie Gil and Jonathan L. Wharton provide a fascinating look at how municipalities in Connecticut have attempted to conduct the public’s business online during the pandemic, for better or for worse. They surveyed officials from 95 towns, interviewed those in

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<sup>5</sup> William Patrick, *Council Meeting May Have Violated Open Meetings Act*, PALESTINE HERALD-PRESS (Mar. 24, 2020), [https://www.palestineherald.com/community/virtual-meeting-may-have-violated-open-meetings-act/article\\_58ee940e-6e25-11ea-a4db-1f9c02e61620.html](https://www.palestineherald.com/community/virtual-meeting-may-have-violated-open-meetings-act/article_58ee940e-6e25-11ea-a4db-1f9c02e61620.html).

<sup>6</sup> *Reporters Committee Statement on D.C.’s COVID-19 Emergency Legislation*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Mar. 17, 2020), <https://www.rcfp.org/statement-dc-covid-19-legislation/>.

<sup>7</sup> Jason Leopold, *The FBI Has Limited Public Records Requests During the Coronavirus Pandemic*, BUZZFEED NEWS (Mar. 17, 2020), <https://www.buzzfeednews.com/article/jasonleopold/fbi-limitng-foia-during-coronavirus-covid19>.

<sup>8</sup> Craig Harris, *Judge Rules Ducey Administration Does Not Have to Release COVID-19 Nursing Home Records*, THE ARIZONA REPUBLIC (May 29, 2020), <https://www.azcentral.com/story/news/local/arizona-health/2020/05/29/judge-rules-arizona-nursing-home-covid-19-records-private/5283835002/>.

<sup>9</sup> Frank LoMonte, *Essay: Casualties of a Pandemic: Truth, Trust and Transparency*, 2 J. CIVIC INFO. 1 (Apr. 2020), at viii. <https://journals.flvc.org/civic/article/view/121552/120350>.

charge of public meetings, and lay out specific case studies, all revealing practical insights for protecting public participation in government, which could improve the flow of civic information long after the pandemic is over.

The four research articles provide practical advice for improving government transparency, even during these trying times. Armed with these facts and recommendations, access advocates and government information custodians can better their communities, and ultimately save lives.

Here's to 2021, for better health, and a stronger information ecosystem.

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

Amy Kristin Sanders \*

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### 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.

\* Amy Kristin Sanders, University of Texas at Austin. Please send correspondence about this article to Amy Kristin Sanders at [amy.sanders@austin.utexas.edu](mailto:amy.sanders@austin.utexas.edu). An earlier version of this work was presented at the National Freedom of Information Coalition summit FOI Research Competition, Sept. 10, 2020, via Zoom session.

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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:<sup>1</sup> “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...”<sup>2</sup> 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.<sup>3</sup> The autopsy report, which is public under the California Public Records Act<sup>4</sup>, 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

American citizens, scientists, medical experts and lawmakers alike have been critical of the government’s response to COVID-19.<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> 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

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<sup>1</sup> 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>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> “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>.

<sup>5</sup> Gafni & Tucker, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> 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>.

<sup>8</sup> 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>.

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

<sup>10</sup> 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/>.

<sup>11</sup> *Id.*



for Disease Control and Prevention.<sup>12</sup> 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 paramount<sup>13</sup> – a conflict long enshrined in the debate over death records.<sup>14</sup> 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,<sup>15</sup> incarcerated populations<sup>16</sup> and people of color,<sup>17</sup> 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.

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<sup>12</sup> 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>.

<sup>13</sup> 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>.

<sup>14</sup> 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).

<sup>15</sup> 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.*

<sup>16</sup> *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.*

<sup>17</sup> 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.”<sup>18</sup>

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 Rumsfeld<sup>19</sup> 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.<sup>20</sup> 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.”<sup>21</sup>

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.<sup>22</sup> 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.”<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> At the outset, FOIA was set up to enhance government transparency. As the Senate report notes:

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<sup>18</sup> 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).

<sup>19</sup> 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>.

<sup>20</sup> 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/>.

<sup>21</sup> 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>.

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

<sup>23</sup> *Id.*

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

<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> A House Report recognized that FOIA provides “the necessary machinery to assure the availability of government information necessary to an informed electorate.”<sup>28</sup>

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.”<sup>29</sup> 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.”<sup>30</sup> 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.”<sup>31</sup>

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.<sup>32</sup> 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

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<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.* at 12.

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

<sup>30</sup> 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.

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

<sup>32</sup> *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."<sup>33</sup> 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."<sup>34</sup> 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.<sup>35</sup> 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..."<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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

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

<sup>35</sup> 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/>.

<sup>36</sup> 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/>.

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

<sup>38</sup> 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>.

<sup>39</sup> 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>.

<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> The HHSC changed course only after the state Attorney General's office ruled that aggregated data should be released.<sup>44</sup> Eventually, the data revealed that Texas nursing homes had a higher rate of COVID cases and deaths compared to the national average.<sup>45</sup> 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.<sup>46</sup>

## 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.

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<sup>41</sup> 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/>.

<sup>42</sup> 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>.

<sup>43</sup> 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/>.

<sup>44</sup> 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/>.

<sup>45</sup> *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>.

<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> On the night of his death, the FBI discovered two cameras outside his cell were broken.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> CBS News obtained photographs of the inside of Epstein's cell and during his autopsy.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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."

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

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

<sup>49</sup> 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>.

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

<sup>51</sup> 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](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).

<sup>52</sup> 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/>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

Just days later, Earnhardt's widow filed a lawsuit seeking closure of the autopsy records, saying she feared they would spread over the Internet.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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

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<sup>56</sup> 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>.

<sup>57</sup> *Id.*

<sup>58</sup> 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/>.

<sup>59</sup> 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>.

<sup>60</sup> 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>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 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).

<sup>64</sup> *Id.*

mandating that video, audio and photographs of a person's death not be released to anyone other than family without a court order.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

### 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.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup>

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

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

<sup>67</sup> 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>.

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

<sup>69</sup> 541 U.S. 157 (2004).

<sup>70</sup> 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>.

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

<sup>72</sup> 538 U.S. 1012 (2003).



The Supreme Court turned to its decision in *Reporters Committee* to justify stretching Exemption 7(C)<sup>73</sup> to include the personal privacy interests of a person's family.<sup>74</sup> 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."<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup>

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,<sup>79</sup> *Favish* requires requestors justify their request if Exemption 7(C) is implicated.<sup>80</sup> They must demonstrate a "significant"<sup>81</sup> public interest in seeking the information and that releasing the information is "likely to advance that interest."<sup>82</sup> Information can be withheld if the requestor fails to demonstrate either prong.<sup>83</sup>

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.<sup>84</sup> On its face, *Favish* disadvantages the requesting party in a small segment of privacy

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<sup>73</sup> 5 U.S.C. § 552(b)(7)(C).

<sup>74</sup> *Favish*, 541 U.S. at 165–67.

<sup>75</sup> *Id.* at 165.

<sup>76</sup> *Id.* (quoting Brief for Respondent Favish 4).

<sup>77</sup> *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).

<sup>78</sup> 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.*

<sup>79</sup> *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."

<sup>80</sup> *See id.*

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 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.<sup>85</sup> 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.”<sup>86</sup> 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.”<sup>87</sup>

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.<sup>88</sup> 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.’<sup>89</sup>

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<sup>85</sup> See e.g., 5 U.S.C. § 552.

<sup>86</sup> Bemis, *supra* note 84, at 540.

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

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

<sup>89</sup> *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.”<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.”<sup>95</sup>

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.<sup>96</sup> 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

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<sup>90</sup> *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>.

<sup>91</sup> 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/>.

<sup>92</sup> 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>.

<sup>93</sup> *Id.*

<sup>94</sup> 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>.

<sup>95</sup> Lipton, *supra* note 91.

<sup>96</sup> 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.”<sup>97</sup> Chicago was not alone; other major cities to suspend or roll back public records laws included Philadelphia<sup>98</sup> and San Diego,<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> In Texas, state and local officials relied on a state law<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> “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.”<sup>107</sup> Ige eventually walked back his indefinite order, which allowed government bodies to essentially meet in private and permitted agencies to ignore records requests,

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<sup>97</sup> *Id.*

<sup>98</sup> 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>.

<sup>99</sup> 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>.

<sup>100</sup> 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](https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a_story.html).

<sup>101</sup> 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>.

<sup>102</sup> 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>.

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

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

<sup>105</sup> 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/>.

<sup>106</sup> 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/>.

<sup>107</sup> *Id.*

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

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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> 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

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<sup>108</sup> 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/>.

<sup>109</sup> *Id.*

<sup>110</sup> 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/>.

<sup>111</sup> 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>.

<sup>112</sup> *Id.*

<sup>113</sup> 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>.

<sup>114</sup> Collins, *supra* note 105.

<sup>115</sup> 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.<sup>116</sup> The proposal includes a requirement that meetings be recorded and retained for at least one year.<sup>117</sup>

## 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.”<sup>118</sup> 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.”<sup>119</sup>

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.<sup>120</sup>

*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.<sup>121</sup> 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.<sup>122</sup> News outlets in Utah made similar threats to get access to the names of businesses who reportedly

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<sup>116</sup> 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/>.

<sup>117</sup> *Id.*

<sup>118</sup> 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>.

<sup>119</sup> *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>.

<sup>120</sup> *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/>.

<sup>121</sup> *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/>.

<sup>122</sup> 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](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.<sup>123</sup> 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.<sup>124</sup> Among the records sought were the state's database of coronavirus cases and reports of prison inspections during the pandemic.<sup>125</sup> The Bay Area News Group sued Alameda County, California, in an attempt to get access to records detailing coronavirus deaths at nursing homes.<sup>126</sup> 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."<sup>127</sup>

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.<sup>128</sup> Pew reported that trust in the COVID vaccine among Americans dropped from 72 percent in May to 51 percent in September.<sup>129</sup> 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."<sup>130</sup> As one former high-ranking CDC official pointed out, "If the information is not accurate, it could cost time – and lives."<sup>131</sup>

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<sup>123</sup> 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/>.

<sup>124</sup> 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/>.

<sup>125</sup> *Id.*

<sup>126</sup> 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/>.

<sup>127</sup> 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>.

<sup>128</sup> 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/>.

<sup>129</sup> 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/>.

<sup>130</sup> 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](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).

<sup>131</sup> *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.<sup>132</sup> 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.”<sup>133</sup> Importantly, journalists revealed that Hinch had attended an outdoor event only a week before he died.<sup>134</sup> 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.<sup>135</sup> 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 pathologist<sup>136</sup> – was more than 20 pages long.<sup>137</sup> Among the many

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<sup>132</sup> 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/>.

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

<sup>134</sup> 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/>.

<sup>135</sup> 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/>.

<sup>136</sup> 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/>.

<sup>137</sup> 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.<sup>138</sup>

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,<sup>139</sup> 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 Maine<sup>140</sup> and New Hampshire,<sup>141</sup> or cities like New York<sup>142</sup> – 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.<sup>143</sup>

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.”<sup>144</sup> 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.”<sup>145</sup> Citing a 1981 Alabama Supreme Court decision,<sup>146</sup> 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 reports<sup>147</sup> 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”<sup>148</sup> 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

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<sup>138</sup> *Id.*

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

<sup>140</sup> See 22 M.R.S.A. § 3022(8).

<sup>141</sup> See NH Rev. Stat. § 611-B:21.

<sup>142</sup> 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.*

<sup>143</sup> “[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.

<sup>144</sup> Ala. Code § 36-18-2.

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

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

<sup>147</sup> N.J. Rev. Stat. § 52:17B-92.

<sup>148</sup> 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.<sup>149</sup>

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.<sup>150</sup> 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."<sup>151</sup> Such an approach, of course, raises all the typical questions<sup>152</sup> 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.

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<sup>149</sup> 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.

<sup>150</sup> See Ohio Rev. Code § 313.10.

<sup>151</sup> *Id.*

<sup>152</sup> 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.”<sup>153</sup> 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.”<sup>154</sup> As a result, autopsy reports and test results are not exempt from disclosure under the state’s Freedom of Information Act.<sup>155</sup>

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.<sup>156</sup> 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,”<sup>157</sup> 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.<sup>158</sup> Based on the *Perry v. Bullock* decision, the Municipal Association of South Carolina advised members to be cautious about releasing COVID-related information.<sup>159</sup> 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 Jersey<sup>160</sup> and Wyoming,<sup>161</sup> 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

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<sup>153</sup> See ORS § 192.345 (36).

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

<sup>155</sup> *Id.*

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

<sup>157</sup> HI Rev Stat § 92F-13 (2017).

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

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

<sup>160</sup> 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.*

<sup>161</sup> See WY Stat § 16-4-203 (d)(i).

photos and recordings are open to inspection so long as no copies are made.<sup>162</sup> 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.”<sup>163</sup> 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,<sup>164</sup> 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.

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<sup>162</sup> 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.*

<sup>163</sup> See RCW § 68.50.300(3).

<sup>164</sup> See generally RCW § 68.50.105.



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## Transparency and Access in a Pandemic: Understanding the Impact of HIPAA on Government Disclosures

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### Abstract

From the start of the pandemic, the American public has had inconsistent and often limited access to the COVID-19 data held by their governments. As legal cover for this lack of transparency, state and local officials have frequently invoked one federal law – the Health Insurance Portability and Accountability Act, better known as HIPAA – and its associated regulations. This article examines that trend. It unpacks the key parts of the regulations and explains why, in many cases, they provide no legal basis for agency refusals to disclose coronavirus-related information. The article also offers potential strategies to requesters seeking to pry that data loose.

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## Introduction

As the COVID-19 pandemic tore through the United States in early 2020, states and localities grappled with a raft of difficult decisions. One was about transparency: How much information should residents be given about the spread of the coronavirus in their own communities?

It quickly became clear that no consistent approach would emerge. Government transparency about coronavirus data varied (and continues to vary) among states – and sometimes within them.<sup>1</sup> Troublingly, moreover, many officials have opted to keep their communities in the dark about basic facts regarding the spread of the disease. In some states, for instance, governments have declined to disclose the number of confirmed cases in a given town or community, releasing only county-wide data. Some have also pointedly refused to identify the places where coronavirus outbreaks have occurred, like long-term care facilities and meatpacking plants. And frequently, officials have said that their hands were tied by regulations issued under a 1996 federal law – the Health Insurance Portability and Accountability Act, or HIPAA<sup>2</sup> – that forbid disclosure of health information.<sup>3</sup>

The truth, however, is more complicated. In invoking HIPAA, government officials and agencies have often disregarded or simply ignored the law’s basic criteria and exceptions. In the context of public records requests, one exception – known as the “required by law” exception – is of particular significance.<sup>4</sup> As courts around the country have held, the import of this exception is that HIPAA does not apply where disclosure is mandated by another law, such as a public records statute. And even outside the context of public records laws (*e.g.*, proactive government disclosures), governments appear to have ignored some of HIPAA’s key provisions.

This paper proceeds in three parts. It begins with an explanation of the basics of HIPAA and the relevant regulations (collectively known as the Privacy Rule), and then examines how the Privacy Rule has functioned as a roadblock to government transparency during the COVID-19 pandemic. The paper’s third part both explains why this lack of transparency is not necessarily justified by HIPAA and suggests strategies for journalists and lawyers seeking access to coronavirus-related information. The appendix then lists examples of how records were closed by HIPAA in every state.

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<sup>1</sup> See, *e.g.*, Thomas Fuller, *How Much Information Should the Public Know About the Coronavirus?*, N.Y. TIMES (March 28, 2020), <https://nyti.ms/30jhcFW>.

<sup>2</sup> Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.). As I explain herein, the HIPAA regulations that restrict disclosure of health information are collectively known as the Privacy Rule. In this paper I use the terms HIPAA and Privacy Rule interchangeably, although there is much more to HIPAA than just the Privacy Rule.

<sup>3</sup> In the Appendix to this paper, I have compiled examples of governmental refusals to disclose coronavirus-related information from virtually every state in the country. (I did not find an example from the District of Columbia.) In almost all cases I have cited and excerpted news articles; in some places I have also provided examples that have been relayed to me by media law practitioners.

<sup>4</sup> 45 C.F.R. § 164.512(a)(1).

## I. The basics of HIPAA and the Privacy Rule

### A. What is HIPAA?

Enacted in 1996, HIPAA is a broad statute that introduced a variety of requirements affecting health care and health insurance. Spread across five Titles, the law’s provisions had many objectives – among them, “improv[ing] portability and continuity of health insurance coverage in group and individual markets,” “combat[ing] waste, fraud, and abuse in health insurance and health care delivery,” and “simplify[ing] the administration of health insurance.”<sup>5</sup>

The statute itself did not create restrictions on the disclosure of individual health information. Instead, the law directed the Department of Health and Human Services (HHS) to do so, in the event that Congress did not pass comprehensive privacy legislation within three years of HIPAA’s enactment.<sup>6</sup> That deadline passed, and in 2000 HHS published a set of privacy regulations, collectively known as the Privacy Rule.<sup>7</sup> These regulations are what HIPAA is most closely associated with today.

### B. The Privacy Rule

The Privacy Rule can seem (and sometimes is) technical and arcane. The essence of the Rule, though, is simple: it places limits on whether and how certain entities can use and disclose individual health information without the individual’s consent. These entities are known as either “covered entities” (defined as health plans, most health care providers, and certain other entities that translate protected health information from one electronic format to another) or “business associates” (the individuals and entities that obtain the information when helping covered entities perform their function).<sup>8</sup>

The category of information covered by the Privacy Rule, known as “protected health information” or PHI, is broad. Any information that relates to an individual’s health and that identifies, or could reasonably be used to identify, that individual, is subject to the Privacy Rule.<sup>9</sup> A covered entity may determine that health information is not individually identifiable – and therefore not subject to the Rule’s restrictions on disclosure – in one of two ways: (i) by having a statistician or other expert certify that the risk of individual identification from disclosure of the information is “very small” (known as the “expert determination” method) or (ii) by ensuring that

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<sup>5</sup> HIPAA preamble, 100 Stat. at 1936.

<sup>6</sup> See Stacey A. Tovino, *A Timely Right to Privacy*, 104 IOWA L. REV. 1361, 1368 (2019).

<sup>7</sup> The Privacy Rule is codified at 45 C.F.R. §§ 160 and 164.

<sup>8</sup> 45 C.F.R. § 160.103.

<sup>9</sup> *Id.* To be more precise, the Privacy Rule defines “individually identifiable health information” as “a subset of health information, including demographic information collected from an individual,” that “(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.” *Id.* PHI, in turn, is generally defined as individually identifiable health information that is “[t]ransmitted by electronic media,” “[m]aintained in electronic media,” or “[t]ransmitted or maintained in any other form or medium.” *Id.*

18 specific “identifiers,” including names, telephone numbers, and birthdates, are removed from the information before it is disclosed (known as the “safe harbor” method).<sup>10</sup>

### C. Exceptions in the Privacy Rule

In certain enumerated circumstances, the Privacy Rule permits covered entities to use and disclose PHI without an individual’s authorization. For our purposes, the most important is the “required by law” exception: “A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.”<sup>11</sup>

The preamble to the Privacy Rule speaks to the intent behind this exception and its interaction with the federal Freedom of Information Act (FOIA).<sup>12</sup> The purpose of the “required by law” exception, according to the preamble, was “to preserve access to information considered important enough by state or federal authorities to require its disclosure by law.”<sup>13</sup> As the drafters of the Privacy Rule saw it, FOIA is one example of a law that mandates disclosure:

“Uses and disclosures required by FOIA come within § 164.512(a) of the privacy regulation that permits uses or disclosures required by law if the uses or disclosures meet the relevant requirements of the law. Thus, a federal agency must determine whether it may apply an exemption or exclusion to redact the protected health information when responding to a FOIA request. When a FOIA request asks for documents that include protected health information, we believe the agency, when appropriate, must apply Exemption 6 [for personal privacy] to preclude the release of medical files or otherwise redact identifying details before disclosing the remaining information. ... Covered entities subject to FOIA must evaluate each disclosure on a case-by-case basis, as they do now under current FOIA procedures.”<sup>14</sup>

Thus, although the Privacy Rule’s drafters believed that PHI in the hands of a covered entity subject to FOIA would generally fall within Exemption 6, they also recognized that the Rule did not alter the standard legal analysis under FOIA. The covered entity would be required to evaluate every request “on a case-by-case basis.”

Of the Privacy Rule’s other exceptions, one more is potentially relevant here: that for disclosures made to avert threats to health and safety. Specifically, a covered entity may use or disclose PHI if it believes, in good faith, that the disclosure “[i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public” and is made “to a person or persons reasonably able to prevent or lessen the threat.”<sup>15</sup>

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<sup>10</sup> *Id.* § 164.514(b); see U.S. Dep’t of Health and Human Services, *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, <https://bit.ly/2P6Kzpe>.

<sup>11</sup> 45 C.F.R. § 164.512(a)(1).

<sup>12</sup> 5 U.S.C. § 552.

<sup>13</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,667 (Dec. 28, 2000).

<sup>14</sup> *Id.* at 82, 482.

<sup>15</sup> 45 C.F.R. § 164.512(j)(1)(i).



## II. HIPAA's impact on government transparency about COVID-19

It is perhaps not surprising that a law restricting disclosure of health information has been widely cited by government officials and agencies as a basis for denying access to coronavirus-related data. What is striking, though, is the kind of information that has sometimes been withheld on the basis of HIPAA, and the inconsistency with which the law has been interpreted and applied – sometimes by officials in different parts of the same state.

At this point, government officials in every state have invoked HIPAA in withholding coronavirus-related information from the public.<sup>16</sup> That itself is not a reason to be troubled. In many cases, the law has been cited as a basis for keeping confidential truly personal information about patients, like names and street addresses.<sup>17</sup> Needless to say, such disclosures would raise obvious privacy concerns, and in the typical case serve the public interest only minimally, if at all.

But in many other cases, HIPAA has been used to stifle access where the opposite is true: the information is of serious public interest and implicates far weaker privacy concerns. In a number of states, for example, officials have disclosed the number of coronavirus cases only at the county level, claiming that providing more geographically detailed information – including by city or town – would violate HIPAA's de-identification provisions.<sup>18</sup> On the same reasoning, some officials have declined to identify places – nursing homes, meatpacking plants, and others – where community outbreaks have occurred.<sup>19</sup> As a practical matter, the risk of re-identification in these situations is often small, while the harm – forcing residents to rely on rumor and speculation to assess the state of the pandemic in their communities – tends to be comparatively much greater.

The other striking fact is how inconsistently officials across and even within states have interpreted and applied the Privacy Rule in deciding how much information to disclose. As one investigation found, the “little guidance [in HIPAA] on what types of information ... health officials can release to the public, even during epidemics,” has left it to “local health departments to decide how much data about COVID-19 cases they ought to share with the public.”<sup>20</sup> A separate analysis done in April found that only about two-thirds of states reported some level of data about coronavirus cases and deaths in long-term facilities, and that among those states there was wide variation in the types of data reported.<sup>21</sup>

In some states, the extent of public disclosure varies by county. In California, for instance, at least one county reports little more than the number of verified and active coronavirus cases, while others may disclose the number of people in quarantine and where they contracted the virus, or provide a breakdown of cases by location, or data by age and gender.<sup>22</sup> The cause of this inconsistency, according to the report: differing “[i]nterpretations of federal patient privacy laws.”<sup>23</sup>

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<sup>16</sup> See generally Appendix.

<sup>17</sup> See *id.* (citing examples from Kentucky, Louisiana, Maine, and New Jersey).

<sup>18</sup> See *id.* (citing examples from Arkansas, California, Delaware, Minnesota, Ohio, Oklahoma, and Vermont).

<sup>19</sup> See *id.* (citing examples from Arizona, California, Florida, Maryland, Massachusetts, Mississippi, Nevada, South Dakota, Texas, and Washington).

<sup>20</sup> Christian Sheckler, *Details on Coronavirus Cases Often Scant as Midwest Health Officials Point to Privacy Laws*, SOUTH BEND TRIB. (April 6, 2020), <https://bit.ly/3fZRjkZ>.

<sup>21</sup> Priya Chidambaram, *State Reporting of Cases and Deaths Due to COVID-19 in Long-Term Care Facilities*, KFF (April 23, 2020), <https://bit.ly/2CP4U0h>.

<sup>22</sup> Barry Kaye, *How Much COVID-19 Information Does the Public Need? Counties Decide*, MTSHASTANEWS.COM (June 23, 2020), <https://bit.ly/2Ed0oJd>.

<sup>23</sup> *Id.*

### III. What the Privacy Rule actually requires from governments during the pandemic (or, ‘How to fight HIPAA-based denials’)

So, does HIPAA’s Privacy Rule actually require state and local officials to withhold coronavirus-related information from the public? And if so, how broadly does the law sweep?

#### A. The ‘Required by Law’ exception

When the information has been sought under a public records law, the answer is actually fairly straightforward. As nearly every state court faced with the question has found, the import of the “required by law” exception is that the Privacy Rule does not exempt information whose disclosure is mandated by state law. Put another way, HIPAA has no independent exemptive force beyond state law.

The first court to squarely hold that, it appears, was the Ohio Supreme Court in its 2006 decision, *State ex rel. Cincinnati Enquirer v. Daniels*.<sup>24</sup> In that case, *The Cincinnati Enquirer* sued the local health department after it declined to disclose lead-contamination notices issued to residential property owners.<sup>25</sup> The department, which issued these notices upon concluding that children inhabiting the property had elevated levels of lead in their blood, claimed the records were made exempt by the Privacy Rule.<sup>26</sup>

The court rejected that argument on several grounds. Most importantly, it held that HIPAA did not apply because disclosure of the notices was “required by law.”<sup>27</sup> That is because the Ohio Public Records Act, like virtually any public records law, presumes that public records will be made available to the public.<sup>28</sup> In reaching this conclusion, the court wrestled with a complication created by the Ohio statute, which itself contains an exception for disclosures prohibited by federal law.<sup>29</sup> The result is “a problem of circular reference”: “the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law.”<sup>30</sup>

The court resolved that problem by looking to the preamble of the Privacy Rule, which (as noted above) clarifies that the Rule is not intended to exempt information otherwise subject to disclosure under the federal FOIA.<sup>31</sup> The same was true under state law, the court found: “By analogy, an entity like the Cincinnati Health Department, faced with an Ohio Public Records Act request, need determine only whether the requested disclosure is required by Ohio law to avoid violating HIPAA’s privacy rule.”<sup>32</sup>

In the years since *Daniels*, courts in at least four other states (including two state supreme courts) have found that their respective public records laws fall within the Privacy Rule’s required by law exception. These courts rejected agency invocations of HIPAA – including by agencies that were indisputably “covered entities” within the meaning of the Privacy Rule – to withhold a

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<sup>24</sup> 844 N.E.2d 1181 (Ohio 2006).

<sup>25</sup> *Id.* at 1183.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1186-87.

<sup>28</sup> *Id.* at 1187.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

wide range of information from public records requesters, such as statistical information about allegations of abuse and sexual assault at state mental health facilities,<sup>33</sup> the names of nearly a thousand people buried in a cemetery adjoining a former asylum,<sup>34</sup> and records concerning arrests and other allegations of misconduct for attorneys in a public defender's office.<sup>35</sup>

To be clear, the above does not resolve the question of whether individual health information is subject to disclosure; it just means that the answer is provided by state law, rather than HIPAA. And, there are certainly provisions in state public records laws that will apply to at least some kinds of COVID-related data.

For instance, most state public records laws contain an exemption for personal privacy. Often these exemptions are patterned on Exemption 6 of the federal FOIA statute, which permits information to be withheld if its disclosure “would constitute a clearly unwarranted invasion of personal privacy.”<sup>36</sup> The courts have interpreted that to mean that release is required if the privacy interest at stake is *de minimis* or outweighed by the public interest in disclosure.<sup>37</sup>

Thus, depending on the circumstances and specific information at issue, a requester may persuasively argue that this balance tips in favor of disclosure. If the requested information could plausibly be linked back to an identifiable person, the case for disclosure may be challenging – but not necessary insurmountable. The strength of the privacy interest, which turns on the “likely stigma from disclosure,”<sup>38</sup> is arguably tempered by the easily transmissible and now-widespread nature of the coronavirus disease. At the same time, the public interest in access to coronavirus data is significant.<sup>39</sup> Disclosure permits the public to assess whether their elected officials are downplaying the seriousness of the pandemic and to judge the success of their efforts to combat it. All of that may make a compelling case for disclosure.

In some states, though, more restrictive exemptions specific to health information will make the path to disclosure more difficult. In Arizona, for instance, the state recently defeated an effort by media organizations to obtain information about the spread of COVID-19 in nursing homes, thanks to state statutes barring disclosure of “communicable disease-related information.”

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<sup>33</sup> *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648, 664 (Tex. Ct. App. 2006).

<sup>34</sup> *State ex rel. Adams County Historical Soc'y v. Kinyoun*, 765 N.W.2d 212, 218 (Neb. 2009).

<sup>35</sup> *Flores v. Freedom of Info. Comm'n*, 2014 Conn. Super. LEXIS 831, \*5-7, 20 (Conn. Sup. Ct. Apr. 7, 2014); *see also Or. Health & Sci. Univ. v. Oregonian Publ. Co., LLC*, 403 P.3d 732, 742 (Or. 2017) (“Following the guidance provided in the Privacy Rule commentary, a covered entity responding to a public records request often could comply with both HIPAA and a law requiring disclosure of public records. In particular, under HIPAA’s ‘required by law’ exception, a covered entity might be required by a law such as ORS 192.420(1) to disclose protected health information, thus complying with both laws.”); *A.G. Miss. Op. 2005-0595*, 2005 Miss. AG LEXIS 347, \*3-4 (Dec. 16, 2005) (emphasizing that “the HIPAA privacy rule permits a covered entity to use and disclose protected health information as required by other law,” including the Mississippi Public Records Act) (citations omitted). In a decision that pre-dates *Daniels*, a Louisiana appellate court denied access to 911 tapes partly on the ground that disclosure was barred by HIPAA. *Hill v. E. Baton Rouge Parish Dep't of Emergency Med. Servs.*, 925 So. 2d 17, 23 (La. Ct. App. 2005). The court did not, however, consider or even mention the “required by law” exception.

<sup>36</sup> 5 U.S.C. § 552(b)(6).

<sup>37</sup> *E.g., Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). Importantly, the “public interest” comes into play only to the extent it relates to FOIA’s “core purpose” of “shed[ding] light on an agency’s performance of its statutory duties.” *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773, 775 (1989).

<sup>38</sup> *Rosenfeld v. U.S. Dep't of Justice*, 2012 U.S. Dist. LEXIS 28768, \*15 (N.D. Cal. Mar. 5, 2012).

<sup>39</sup> *Cf. Golub v. Enquirer/Star Grp.*, 89 N.Y.2d 1074, 1077 (1997) (concluding in defamation case that “[c]ancer does not fall into the category of a loathsome disease since it ‘is neither contagious nor attributed in any way to socially repugnant conduct’”) (quoting *Chuy v Phila. Eagles Football Club*, 595 F.2d 1265, 1281 (3d Cir. 1979)).

<sup>40</sup> And in the state of Illinois, the legislature has enacted a statute forbidding disclosure of “mental health or developmental disabilities service records and communications.”<sup>41</sup> As an appellate court recently found, the law actually incorporates and “relies on HIPAA to establish what constitutes private health information” – effectively making the Privacy Rule a matter of state law.<sup>42</sup> In these and other states, therefore, defeating a HIPAA-based argument will not itself yield complete victory.

## B. Other potential paths to disclosure

Let us put that last point aside and assume we are in a situation where HIPAA is the main impediment to disclosure. And let us assume that we are not making any headway with a state authority with the “required by law” exception. Perhaps the state concedes that the exception applies to requests made under public records laws, but maintains that the Privacy Rule nonetheless forbids certain proactive disclosures to the press and public. How else might one argue for disclosure?

One option is to disclaim desire to obtain information subject to the Privacy Rule – *i.e.*, PHI. As noted, information that neither identifies nor could reasonably be used to identify an individual is beyond the Privacy Rule’s scope.

The difficulty with this argument is that the Privacy Rule’s de-identification standards are fairly stringent. Under the law’s “safe harbor” provision, which is more commonly used as the method of de-identification,<sup>43</sup> a covered entity cannot release health information unless it removes 18 specific identifiers of “the individual or of relatives, employers, or household members of the individual.”<sup>44</sup>

Those identifiers include not just names and telephone numbers, but also geographic information. In particular, a covered entity must remove “[a] geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes.”<sup>45</sup> The first three digits of a zip code may be released only if “[t]he geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people.”<sup>46</sup> This is the provision that state and local officials often have in mind when they claim that the Privacy Rule forbids disclosure of, for instance, anything more detailed than county-level data, or the names of meatpacking plants (“employers” whose identifiers are also protected) with confirmed cases of coronavirus.

A requester might be better served by going back to another threshold criterion in the Privacy Rule: that the body holding the information be a “covered entity” (or one of its “business associates”). Because this category includes health plans and health care providers, government agencies and programs that discharge those functions (*e.g.*, Medicare and Medicaid) can claim to

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<sup>40</sup> Craig Harris, *Judge Rules Ducey Administration Does Not Have to Release COVID-19 Nursing Home Records*, ARIZ. REPUBLIC (May 29, 2020), <https://bit.ly/333fATG>.

<sup>41</sup> Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq.*

<sup>42</sup> King v. Cook Cty. Health & Hosps. Sys., 2020 IL App (1st) 190925, P33, 2020 Ill. App. LEXIS 385, \*22 (Ill. Ct. App. June 18, 2020).

<sup>43</sup> This point was conveyed to the author by a colleague, attorney Edward I. Leeds, a HIPAA expert.

<sup>44</sup> 45 C.F.R. § 164.514(b)(2).

<sup>45</sup> *Id.* § 164.514(b)(2)(i)(B).

<sup>46</sup> *Id.* § 164.514(b)(2)(i)(B)(2).

be bound by HIPAA. Some agencies, like correctional departments, may argue that they are “hybrid entities” that have covered components.<sup>47</sup>

But it is also possible that a requester or journalist is seeking the information from an entity that is not “covered” and is therefore entirely beyond the reach of the Privacy Rule – for example, a governmental department gathering data or tracking the spread of the virus on a statewide basis.<sup>48</sup> That may seem like a technical distinction, but being strategic about the agency from whom the information is sought – a government agency that is a covered entity or one that is not – could make all the difference.

A requester might also get mileage out of the other exception to the Privacy Rule noted above – *i.e.*, where disclosure “[i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.”<sup>49</sup> That can certainly be true in the pandemic, at least for some kinds of information. How can residents make educated decisions about their health and safety if they are left in the dark about basic matters like the number of coronavirus cases in their community or the places where outbreaks are occurring?

## IV. Conclusion

The frequent lack of transparency about coronavirus data should be counted among the major failures of our governments’ response to the pandemic. Much of the responsibility for this failure rests with state and local agencies that have, among other things, taken an overly restrictive interpretation of HIPAA’s Privacy Rule. But the federal government had a role to play, too: it could have stepped up at any point and issued guidance about the proper application of HIPAA to COVID-related information. This collective failure has impeded public scrutiny and accountability of governments, almost certainly produced bad policy, and likely cost human lives.

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<sup>47</sup> *See, e.g.*, Warren v. Corcoran, 2011 U.S. Dist. LEXIS 135012, \*21 n.17 (N.D.N.Y. Oct. 20, 2011) (explaining that the New York State Department of Correctional Services is a “hybrid entity” under HIPAA) (citing, *inter alia*, 45 C.F.R. §§164.103, 164.105(a)(2)(ii), (iii)).

<sup>48</sup> *See, e.g.*, Abbott, 212 S.W.3d at 664 n.11 (“Our conclusion that the information requested in this case is not confidential under the Public Information Act is buttressed by the fact that the reporter was able to obtain the requested information from another agency, the Texas Department of Protective and Regulatory Services, which is not a covered entity under HIPAA.”).

<sup>49</sup> 45 C.F.R. §164.512(j)(1)(i)(A); *see, e.g.*, Lawson v. Halpern-Reiss, 212 A.3d 1213, 1226 (Vt. 2019) (relying on §164.512(j) to grant summary judgment to defendant in privacy lawsuit).

## Appendix

Examples of records closed under the auspices of HIPAA, in each state:

### Alaska

Adelyn Baxter, *Majority of Juneau's COVID-19 Cases Traced to Lemon Creek Correctional Center*, KTOO (May 19, 2020), <https://www.ktoo.org/2020/05/19/state-officials-says-theyre-working-to-contain-juneaus-correctional-facility-outbreak/>:

Daryl Webster is the facility's assistant superintendent. He told the Assembly that they understand people in the community would like to know where individuals who tested positive have been recently and who they came into contact with, but medical privacy laws like HIPAA prevent them from sharing too much.

### Alabama

Leada Gore, *Alabama Infant, Teenager Among Coronavirus Deaths, ADPH Says*, AL.COM (June 10, 2020), <https://www.al.com/news/2020/06/alabama-infant-teenager-among-coronavirus-deaths-adph-says.html>:

The Alabama Department of Public Health is reporting the death of an infant and a teenager, both attributed to coronavirus.

The statistics were included in the daily update by ADPH and later confirmed by the agency. Both patients tested positive for COVID-19 and the infant death is under review for underlying health conditions.

Neither patient had Multisystem Inflammatory Syndrome-Children, the coronavirus-linked syndrome that's been reported.

"Due to respect for the families of these patients and HIPAA guidelines, ADPH cannot release further details of these investigations," ADPH said in a statement.

### Arkansas

Megan Wilson, *ADH Not Releasing COVID-19 Numbers Within Cities*, KNWA (July 16, 2020), <https://www.nwahomepage.com/news/adh-not-releasing-covid-19-numbers-within-cities/>:

The Arkansas Department of Health will not be releasing COVID-19 case numbers within a city at this time.

Dr. Jose Romero with the Health Department said releasing city-level data poses an issue with HIPAA.

(Separately, an attorney in Arkansas, Alec Gaines, informed me that the Arkansas Health Department has withheld COVID-related information from one of his media clients on HIPAA grounds. I do not know the nature of the information.)

### Arizona

Kevin Stone, *Glendale Care Facility Posts COVID-19 Data, Reports Nearly 100 Cases*, KTAR NEWS (May 18, 2020), <https://ktar.com/story/3166645/glendale-care-facility-posts-covid-19-data-reports-nearly-100-cases/>:

State officials have cited Health Insurance Portability and Accountability (HIPAA) regulations as a reason they can't reveal which long-term care facilities have COVID-19 cases.

## California

Thomas Fuller, *How Much Information Should the Public Know About the Coronavirus?* N.Y. TIMES (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/us/coronavirus-data-privacy.html>:

In Santa Clara, health officials say they cannot disclose how many cases are found in each city because of the nation's strict medical privacy law, the Health Insurance Portability and Accountability Act, or HIPAA, signed by President Bill Clinton in 1996.

Angela Ruggiero, *Bay Area News Group Sues Alameda County for Nursing Home Coronavirus Records*, MERCURY NEWS (June 4, 2020), <https://www.mercurynews.com/2020/06/04/bay-area-news-group-sues-alameda-county-for-nursing-home-coronavirus-records/>:

The county released limited death and infection data for the Gateway and East Bay Post Acute only after those facilities already had released their own numbers.

But that practice “abruptly stopped” after April 20, and the county rejected a request for similar data for all nursing homes and long-term health care facilities in the county, according to the lawsuit. The county cited privacy laws that prevent disclosure of individual patient information (the federal Health Insurance Portability and Accountability Act, known as HIPAA).

## Colorado

*Second COVID-19 Patient Dies in Garfield County: Information Made Public Doesn't Include Day of Death*, POST INDEPENDENT (Apr. 9, 2020), <https://www.postindependent.com/news/second-covid-19-patient-dies-in-garfield-county/>:

A man in his 80s with COVID-19 has died in Garfield County, according to a news release from Garfield County Public Health.

The day the death occurred is unclear – Garfield County Public Health Specialist Carrie Godes said in a follow-up email that the county is releasing just “the county, patient's gender, approximate age and if underlying conditions were present.”

Godes cited preserving patient privacy as the underlying reason for not making more information publicly available, although both Eagle and Pitkin counties have in some cases made more information available, including the day a person with COVID-19 died.

However, Colorado Freedom of Information Coalition Executive Director Jeff Roberts wrote in an email that HIPAA only protects information that would personally identify an individual.

“It limits disclosure about an ‘an identifiable patient.’ The patient who died hasn't been identified. How would disclosing the date of death identify the patient?” Roberts asked.

## Connecticut

*First Connecticut Prison Inmate Tests Positive for Coronavirus*, NBC NEWS (Mar. 30, 2020), <https://www.nbcconnecticut.com/news/coronavirus/first-connecticut-prison-inmate-tests-positive-for-coronavirus/2247401/>:

An inmate at the Corrigan-Radgowski Correctional Center in Uncasville has tested positive for coronavirus, according to the Department of Correction.

The 32-year-old man is the first inmate in the Department of Correction prison system to have a confirmed case of COVID-19, the agency said.

The inmate is not being identified due to HIPAA regulations.

## Delaware

Meredith Newman, *Here's What Delaware Can (and Can't) Say About its COVID-19 Cases*, DELAWARE NEWS JOURNAL (Mar. 27, 2020), <https://www.delawareonline.com/story/news/health/2020/03/27/heres-what-delaware-can-and-cant-say-its-covid-19-cases/5076877002/>:

Due to HIPAA restrictions, state officials say they can't release any personal information on any individual case, including: name, address, city, underlying health condition, or dates of medical care, including date of death.

Specifically, Rattay said the state can't identify patients' towns due to HIPAA restricting information for populations less than 20,000.

## Florida

Carol Marbin Miller, *Florida Governor Won't Reveal Which Elder Homes Have Coronavirus*, MIAMI HERALD (Mar. 26, 2020), <https://www.govtech.com/em/safety/Florida-Governor-Wont-Reveal-Which-Elder-Homes-Have-the-Coronavirus-.html>

The DeSantis administration has based its refusal, so far, to name [elder] homes with positive results on its desire to protect the confidentiality of residents. While he has not named the law, DeSantis appears to be invoking the federal Health Insurance Portability and Accountability Act, or HIPAA, which protects patient medical records and privacy.

## Georgia

Max Blau and Joshua Sharpe, *3 Georgia Prison Inmates Test Positive for COVID-19, Others Monitored*, ATLANTA JOURNAL-CONSTITUTION (Mar. 21, 2020), <https://www.ajc.com/news/local/breaking-georgia-prison-inmate-tests-positive-for-covid/2U3hE09fRS6WG9SMHOYZ7I/>:

After the department announced an employee had tested positive this week, Georgia Department of Corrections Commissioner Timothy Ward said in a statement that the department would respond with "all available resources to help prevent the potential introduction and spread of Coronavirus (COVID-19) into our facilities." But corrections officials declined to reveal which prison the employee worked at, citing "security and HIPAA."

HIPAA, the federal medical privacy law, does not apply to employers and shouldn't keep the prison system from saying the name of the prison where the infected employee works, experts said.

## Hawaii

Sabrina Bodon, *Kaua'i COVID-19 Q&A: Can We Have More Information?*, GARDEN ISLAND (Apr. 21, 2020), <https://www.thegardenisland.com/2020/04/21/hawaii-news/kauai-covid-19-qa-can-we-have-more-information/>:

Q: I don't understand why they do not release the demographic information of COVID-19 cases such as location, age, etc.

A: The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule prohibits discussing or sharing information that can be used to identify a patient.

But, the state's Health Department does release some information, including general geographic locations where confirmed cases on the island are, race to state population, exposure curve and age range. This information is released in such a way that does not directly identify a patient.



## Idaho

Jeannette Boner, *Do We Have Community Spread in Teton County, Idaho?*, TETON VALLEY NEWS (Mar. 31, 2020), [https://www.tetonvalleynews.net/coronavirus/do-we-have-community-spread-in-teton-county-idaho/article\\_0d2ee915-2c01-50fb-87ed-b3682e5d6358.html](https://www.tetonvalleynews.net/coronavirus/do-we-have-community-spread-in-teton-county-idaho/article_0d2ee915-2c01-50fb-87ed-b3682e5d6358.html):

Gnagey wrote in an email Saturday to the TVN, “Unfortunately, given the small number of people being tested under the CDC and EIPH rules, and the long and sometimes unknown times to get results from commercial labs, the number of tests is not a good indicator of COVID activity in the valley. Using those testing numbers to plan would be ill advised. What we are concerned about is the increasing number of respiratory cases being seen in the (emergency department), that is probably more indicative of COVID in the valley than any testing numbers.”

Gnagey said that he couldn't release emergency department numbers because of HIPPA [sic]. Eastern Idaho Public Health told the TVN that they have not had time to gather a clear picture of respiratory cases in the region at this time.

## Illinois

Nic F. Anderson, *Mayor Suggests Low-Income Households, More Testing As Causes For High COVID Rate In MP*, JOURNAL & TOPICS (May 21, 2020), <https://www.journal-topics.com/articles/mayor-suggests-low-income-households-more-testing-as-causes-for-high-covid-rate-in-mp/>:

“Despite our best efforts to obtain info on the nature and location of the positive tests, the county refuses to give us that information due to federal HIPPA [sic] laws,” Juracek said.

## Indiana

*Four new COVID-19 cases reported in Dubois County*, DUBOIS COUNTY FREE PRESS (Apr. 29, 2020), <https://www.duboiscountypress.com/four-new-covid-19-cases-reported-in-dubois-county/>:

To remain in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), we will not be able to disclose any information specific to the patient for each case. HIPAA is intended to protect INDIVIDUAL medical and health information. However, as we continue to review Dubois County resident positive cases, a report will be released weekly on Fridays.

## Iowa

Taylor Holt, *Area Health Officials Address HIPAA, Patient Privacy Regarding COVID-19 Cases*, KCRG (Apr. 3, 2020) <https://www.kcrg.com/content/news/Area-health-officials-address-patient-privacy-concerns-regarding-covid-19-cases-569370791.html>:

The Iowa Department of Public Health reports hospitalization rates for COVID-19. However, other health departments don't release that information and aren't able to alert businesses if an employee has the virus, citing HIPPA [sic] and patient privacy protections.

## Kansas

*First Kansas COVID-19 Death Linked to Care Facility in Seattle Where More Than 20 Died from Virus*, CT POST (Mar. 13, 2020), <https://www.ctpost.com/news/article/First-Kansas-COVID-19-death-linked-to-care-15130164.php>:

The facility released a statement and a timeline involving the patient who died: . . .  
“HIPAA privacy guidelines prevent the sharing of personal patient information.”

### **Kentucky**

Andrew Wolfson, *A Second Inmate in Kentucky Dies of the Coronavirus*, LOUISVILLE COURIER JOURNAL (Apr. 24, 2020), <https://www.courier-journal.com/story/news/2020/04/24/another-kentucky-inmates-dies-of-covid-19-er-kentucky-inmates-dies-covid-19/3023263001/>:

Spokeswoman Lisa Lamb said the family of the man, who was serving a 15-year sentence, has been notified but that out of respect for their privacy and HIPAA, the federal privacy law, his name was not being released.

### **Louisiana**

*Two DOC Employees Test Positive for COVID-19*, KATC (Mar. 26, 2020), <https://www.katc.com/news/covering-louisiana/two-doc-employees-test-positive-for-covid-19/>:

The Louisiana Department of Corrections (LDOC) has been notified that two employees at different state prisons tested positive for COVID-19. These are the first confirmed staff cases within the LDOC.

Due to HIPAA restrictions and security concerns, the LDOC will not release the names of the individuals or the facilities at which they work.

### **Maine**

Chance Viles, *Westbrook Resident Dies of COVID-19*, AMERICAN JOURNAL (Apr. 1, 2020), <https://www.pressherald.com/2020/04/01/westbrook-resident-dies-of-covid-19/>:

One Westbrook resident has died from COVID-19 and there are now 11 documented coronavirus cases among residents and city employees, Mayor Mike Foley said Wednesday.

“We have taken appropriate actions within each department to quarantine exposed employees and disinfect the facilities,” Foley said.

The name of the deceased resident and those of the people infected are not being disclosed due to HIPAA – Health Insurance Portability and Accountability Act – regulations.

### **Maryland**

David A. Plymyer, *Maryland Must Start Disclosing Infections and Deaths at Nursing Homes*, BALTIMORE BREW (Apr. 20, 2020), <https://baltimorebrew.com/2020/04/20/maryland-must-start-disclosing-infections-and-deaths-at-nursing-homes/>:

An MDH spokesman told The Brew last week that the agency “cannot release a detailed list of nursing homes and other long-term care facilities affected by Covid-19 due to HIPAA [the Health Insurance Portability and Accountability Act] and state laws surrounding confidentiality.”

### **Massachusetts**

*An Open Letter to Gov. Baker from AARP Massachusetts*, BARNSTABLE PATRIOT (Apr. 16, 2020), <https://www.barnstablepatriot.com/news/20200416/open-letter-to-gov-baker-from-aarp-massachusetts/>:

We urge Massachusetts’ Department of Public Health to release publicly the names of nursing facilities with confirmed COVID-19 cases. Contrary to concerns that such disclosures would violate a patient’s health privacy, we do not believe HIPAA precludes a state health agency from releasing the names of facilities because a facility is not a covered entity as defined by federal law.

## Michigan

*Detroit Metro Airport Worker Tests Positive for Coronavirus, Officials Say*, CLICK ON DETROIT (Mar. 18, 2020), <https://www.clickondetroit.com/news/local/2020/03/18/detroit-metro-airport-worker-tests-positive-for-coronavirus-officials-say/>:

An employee at Detroit Metro Airport has tested positive for coronavirus, according to the Wayne County Airport Authority.

The positive case is in a ramp employee who works for a service provider of a carrier in the North Terminal, officials said.

Due to HIPAA and privacy issues, no additional information could be released, according to WCAA.

## Minnesota

Pat Kessler, *Coronavirus in Minnesota: Why The State Won't Tell Us Who Has COVID-19, And Where They Are*, CBS MINNESOTA (Apr. 1, 2020), <https://minnesota.cbslocal.com/2020/04/01/coronavirus-in-minnesota-why-the-state-wont-tell-us-who-has-covid-19-and-where-they-are/>:

The Minnesota Department of Health credibly reports every day on counties with COVID-19 cases, but not cities. It will not name nursing homes where the virus was found. It will provide the numbers of people, but it won't say where they live.

Providing that kind of detail about COVID-19 is against the law, according to MDH officials, because of the strict medical privacy law called the Health Insurance Portability and Accountability Act, or HIPAA.

## Mississippi

Tim Kalich, *COVID-19 Outbreak Escalates at Greenwood Nursing Home*, GREENWOOD COMMONWEALTH (Apr. 22, 2020), [https://www.gwcommonwealth.com/news/article\\_ce77b460-84fc-11ea-a90a-5bcc41fb879a.html](https://www.gwcommonwealth.com/news/article_ce77b460-84fc-11ea-a90a-5bcc41fb879a.html):

Last week, a representative of the Department of Health said that the federal Health Insurance Portability and Accountability Act, which protects patient privacy, bars the agency from naming the long-term care facilities with outbreaks.

## Missouri

Lauren Trager, *Should Leaders Release More Information About COVID-19 Patients?* KMOV4 (Mar. 19, 2020), [https://www.kmov.com/news/should-leaders-release-more-information-about-covid-19-patients/article\\_9b1d45a6-6a32-11ea-b9b8-4325aa8584d7.html](https://www.kmov.com/news/should-leaders-release-more-information-about-covid-19-patients/article_9b1d45a6-6a32-11ea-b9b8-4325aa8584d7.html):

As the number of coronavirus cases grow in the St. Louis area, people are wondering why they can't get more information on those who test positive.

So far, officials on both sides of the river have released very little information, often only providing an age range and a county in which the person resides.

"I am not going to be the first elected official to break HIPPA," St. Louis City Mayor Lyda Krewson said.

Krewson cited a federal law known as the Health Insurance Portability and Accountability Act (HIPAA) which is intended to protect an individual's privacy. Krewson said the law is why more information can't be given about people testing positive for COVID-19 in the St. Louis area.

## Montana

David Sherman, *City-County Health Department Explains Privacy Laws*, KRTV (June 16, 2020), <https://www.krtv.com/news/coronavirus/city-county-health-department-explains-privacy-laws>:

The City-County Health Department strictly adheres to the privacy rules laid out in the Health Insurance Portability and Accountability Act (commonly referred to as HIPAA). Montana has its own set of privacy laws, the Government Health Care Information Act, which are even more restrictive about what health departments are able to share. These laws are determined at state and federal levels and prevent us from disclosing any of our patients' personally identifiable information to the public.

## Nebraska

Makayla Hogenson, *COVID-19 Related Death in Custer County*, ABC 8 (Apr. 6, 2020), <https://www.klknv.com/covid-19-related-death-in-custer-county/>:

Loup Basin Public Health Departments (LBPHD) has identified an additional positive COVID-19 case in Custer County that resulted in death.

The male, in his 80s, was in contact with a known positive case. Patient information is considered protected health information under the Health Insurance Portability and Accountability Act (HIPAA) and will not be provided to protect the patient's privacy.

## Nevada

Brad Streicher, *'It's nonsense' | City and State officials Still Won't Name Nursing Homes with Coronavirus Outbreaks*, KVUE (Apr. 20, 2020): <https://www.kvue.com/article/news/health/coronavirus/coronavirus-austin-and-texas-officials-still-wont-name-nursing-homes-with-covid19-outbreaks/269-ed9d1d71-e4d3-4b70-a906-68027f350178>:

But still, the City and State refuse to tell people where those nursing homes are and how many cases and deaths each one has.

Both agencies cite State and federal personal health privacy laws, like HIPAA, as the reason they won't disclose that information.

Separately, the in-house counsel of the Las Vegas Review-Journal, Benjamin Lipman, informed me that his reporters have filed public records requests with the City of North Las Vegas for COVID-19 related information that have been denied on the basis of HIPAA. I have reviewed correspondence related to these requests, but have been asked not to discuss their details.

## New Hampshire

Paul Cuno-Booth, *Unlike Vermont, NH Tight-Lipped About Facilities with COVID-19 Cases*, KEENE SENTINEL (Apr. 3, 2020), <https://www.concordmonitor.com/Unlike-Vermont-NH-tight-lipped-on-facilities-with-COVID-cases-33693572>:

After the news conference, The Sentinel asked the state's Joint Information Center—which is handling all coronavirus-related media questions—what types of facilities, and how many, have had cases.

In an emailed response, a state spokesperson declined to answer. "All official information regarding individuals and COVID-19 in New Hampshire that is available under HIPAA restrictions is being provided through the updates provided at [www.nh.gov/covid19](http://www.nh.gov/covid19)," the spokesperson wrote. HIPAA is a federal law that includes privacy protections for patients.

### **New Jersey**

Amanda Valentovic, *COVID-19 Touches Down in West Orange*, ESSEX NEWS DAILY (Mar. 19, 2020), <https://essexnewsdaily.com/headline-news/88124>:

In a press conference that was livestreamed on Facebook the evening of March 16, Mayor Robert Parisi repeated that there are two confirmed cases in town, and that the health department is following the necessary steps to protect other residents. HIPAA privacy laws prevent the town from releasing the names, addresses or any other information about the people who tested positive for the virus.

### **New Mexico**

Donovan Quintero, *McKinley County Confirms First Coronavirus Case*, NAVAJO TIMES (Mar. 20, 2020), <https://navajotimes.com/coronavirus-updates/mckinley-county-confirms-first-coronavirus-case/>:

McKinley County has its first confirmed COVID-19 case.

McKinley County Manager Anthony Dimas Jr. said the New Mexico Department of Health notified the county and only said the person was a “male in (his) thirties.” Dimas said because of HIPAA laws, no other information was provided.

### **New York**

In April 2020, a personal friend of mine who lives in the state of New York requested “COVID-19 infection numbers by town of residence” from the Schoharie County Department of Health. The agency denied the request, noting that these numbers were contained in patient records that could not be released because of “HIPAA confidentiality requirements.”

### **North Carolina**

Sharon Myers, *Davidson County Reports 99 New Cases of COVID-19 and Two Deaths Over the Weekend*, THE DISPATCH (June 15, 2020), <https://www.the-dispatch.com/news/20200615/davidson-county-reports-99-new-cases-of-covid-19-and-two-deaths-over-weekend>:

There have been two additional deaths reported, bringing the overall number of deaths to 14 people. According to health department officials, one victim was in their 80s with underlying health conditions and the other victim was in their 60s also with health problems.

Due to HIPPA [sic] laws, and to maintain the privacy of relatives, no other information is available about the two residents who have died.

### **North Dakota**

Renée Jean, *State Hitting New Highs for Coronavirus, Amid Increased Testing, Reopening*, WILLISTON HERALD (July 21, 2020), [https://www.willistonherald.com/news/coronavirus/state-hitting-new-highs-for-coronavirus-amid-increased-testing-reopening/article\\_64d391c0-cad7-11ea-a817-a79e5aa9c221.html](https://www.willistonherald.com/news/coronavirus/state-hitting-new-highs-for-coronavirus-amid-increased-testing-reopening/article_64d391c0-cad7-11ea-a817-a79e5aa9c221.html):

North Dakota is hitting new highs for coronavirus cases, even as Williams County itself is seeing a spike in coronavirus numbers.

It remains uncertain, however, how many out-of-state cases are present in the west, where a two-week on, two-week off schedule is common, and construction crews for the summer may often include an out-of-state component.

People who list an out-of-state address are not counted in the daily count, Gov. Doug Burgum has said.

The recent outbreak in Tioga involving eight workers for Hess contractor Ohmstede, for example, were all out-of-state workers. It is not known if any of those cases counted in the state's daily total. The state has refused to say whether those individuals were counted, saying it would violate HIPAA [sic] laws to clarify that point.

## Ohio

Camryn Justice, *Why COVID-19 Testing Information at the Zip Code Level Can be Both Helpful and Harmful*, ABC NEWS 5 (Apr. 3, 2020), <https://www.news5cleveland.com/news/continuing-coverage/coronavirus/why-covid-19-testing-information-at-the-zip-code-level-can-be-both-helpful-and-harmful/>:

Acton said that some zip codes in the state of Ohio may have fewer than 100 people, so to share testing information at the zip code level in those places could expose a person's identity, which could be a violation of the rights issued under the Health Insurance Portability and Accountability Act (HIPAA).

## Oklahoma

Sean Murphy, *Oklahoma Health Department to No Longer Release Detailed Data About COVID-19*, ASSOCIATED PRESS (June 1, 2020), <https://journalrecord.com/2020/06/01/oklahoma-health-department-to-no-longer-release-detailed-data-about-covid-19/>:

The Oklahoma State Department of Health announced Monday it will no longer release specific information about COVID-19 infections and deaths in nursing homes, cities or by ZIP code.

“Now that the emergency declaration has expired, the governor no longer has the authority to waive state statute,” Harder said. “We are being instructed that we have to reverse course on these particular data points due to the interpretation of the state’s (Health Insurance Portability & Accountability Act) laws.”

## Oregon

Justin Werner, *Lincoln County to Resume COVID-19 Daily Updates*, LINCOLN CITY NEWS (June 16, 2020), <https://lincolncityhomepage.com/lincoln-county-to-resume-covid-19-daily-updates/>:

Due to Oregon Health Authority rules and HIPAA laws, Public Health says they cannot name a business with an outbreak unless five workers test positive for COVID-19 and the business has more than 30 employees.

## Pennsylvania

I was informed by a lawyer at the Pennsylvania NewsMedia Association that “our legal hotline had seen numerous examples agencies denying access to various COVID-related records on the basis of HIPAA.” As she told me:

On the local level, a journalist requested access to de-identified data about nursing home deaths from COVID in Bucks County, PA. The county outright denied the request citing HIPAA, among other bases for denial. The case is currently on appeal to the Pennsylvania Office of Open Records for administrative review.

In separate cases involving the same journalist, Bucks County and the Bucks County Coroner denied access to name, cause and manner of death records related to COVID on the basis of HIPAA as well as state law. I should note that name, cause and manner of death records are expressly public under Pennsylvania's open records law (Right to Know Law). The county also denied access to long-term care facilities' emergency preparedness plans based on HIPAA, among other denial grounds. These cases are also on appeal to Office of Open Records for administrative review.

### **Rhode Island**

Sean Flynn, *Two More Newport firefighters Test Positive for Coronavirus*, NEWPORT DAILY NEWS (Apr. 15, 2020), <https://www.newportri.com/news/20200415/two-more-newport-firefighters-test-positive-for-coronavirus>:

There have been two cases of COVID-19 reported in Newport nursing homes, according to Dugan and City Manager Joseph J. Nicholson Jr., who moderated the meeting and went through a series of updates.

Councilwoman Kathryn Leonard asked whether those nursing homes could be identified.

"We are going to be asked," she said.

Under the federal Health Insurance Portability and Accountability Act, often referred to as "HIPAA," and under even stronger Rhode Island statutes, health information is confidential and anything that could result in patients being identified is not allowed, Nicholson said.

### **South Carolina**

Elizabeth LaFleur, *Here's Why We Don't Have More Details on South Carolina's COVID-19 Patients*, GREENVILLE NEWS (Mar. 23, 2020), <https://www.greenvilleonline.com/story/news/health/2020/03/23/coronavirus-south-carolina-patient-details-positive-tests-dhec/2897082001/>:

The state Department of Health and Environmental Control reports 31 of those cases are in Greenville County, though few other details are known about them.

Patient privacy laws (HIPAA) restrict the personal information that can be shared about specific patients. In many cases, this includes limitations on sharing things like where those people live and work.

The law is meant to protect patient privacy, but readers of The Greenville News have asked if they are being kept from crucial information about local cases because of the geographical size and population size of Greenville County.

### **South Dakota**

Dean Welte and Matt Breen, *Gov. Ricketts: Nebraska Won't Release specific COVID-19 Numbers at Meatpacking Plants*, KTIV (May 6, 2020), <https://ktiv.com/2020/05/06/watch-live-gov-ricketts-provides-daily-update-on-covid-19-in-nebraska-11/>:

Nebraska Gov. Pete Ricketts says the state won't release specific numbers of cases at meatpacking plants, like Tyson's facilities in Dakota City, or Madison.

During his daily news conference Wednesday, Ricketts said its a matter of privacy, and the Health Insurance Portability and Accountability Act, also known as HIPAA.

## Tennessee

Jeremy Finley, *State Health Department Criticized Over Not Releasing County Location of Coronavirus Patients*, WSMV (Mar. 10, 2020), [https://www.wsmv.com/news/state-health-department-criticized-over-not-releasing-county-location-of-coronavirus-patients/article\\_e92a9026-6318-11ea-b5fb-d786694bac3a.html](https://www.wsmv.com/news/state-health-department-criticized-over-not-releasing-county-location-of-coronavirus-patients/article_e92a9026-6318-11ea-b5fb-d786694bac3a.html):

The internet is not pleased with the state department of health.

As the agency posts information on social media about new cases of coronavirus across the state, people are responding with a resounding question: why not release the county where the patient lives?

Yet the state refuses to release the locations, citing HIPAA privacy laws.

## Texas

Francisco E. Jimenez, *Hidalgo County Cites HIPAA for Being Light on Case Details*, THE MONITOR (Apr. 16, 2020), <https://www.themonitor.com/2020/04/16/hidalgo-county-cites-hipaa-light-case-details/>:

Meanwhile, county spokesman Carlos Sanchez said even so much as confirming that a coronavirus patient resides at the facility is something the county is barred from doing for legal reasons. He also said he is not privy to that information.

“I can’t confirm whether anybody is from any assisted living facility,” Sanchez said. “I’m happy to try to help, but I’m very limited in my knowledge because of HIPAA (Health Insurance Portability and Accountability Act).”

## Utah

Sydney Glenn, *Expert: Utah County Should Identify Businesses Involved in COVID-19 Outbreaks*, FOX 13 (May 7, 2020), <https://www.fox13now.com/news/coronavirus/local-coronavirus-news/lawyer-utah-county-health-departments-reasoning-not-to-release-names-of-businesses-accused-of-defying-restrictions-doesnt-apply>:

The Utah County Department of Health is not identifying two Utah County businesses accused of defying COVID-19 restrictions, resulting in 68 people testing positive for the virus.

Business leaders told employees not to follow quarantine guidelines after being exposed to a confirmed COVID-19 case, and required employees who tested positive to still report to work, Utah County leaders said.

The health department, as well as the Utah County Commission Chair have stood by the decision to not identify the businesses, citing medical privacy laws known as HIPAA, Utah Statute 26-6-27, as well as their assertion that the businesses are not “public facing.”

## Vermont

John Flowers and Andy Kirkaldy, *Officials Differ on Sharing Local COVID-19 Info*, ADDISON COUNTY INDEPENDENT (Apr. 23, 2020), <https://addisonindependent.com/news/officials-differ-sharing-local-covid-19-info>:

“At this time, Vermont will continue to report data on county- and state-based levels,” Department of Health spokesman Ben Truman told the Independent via email. “COVID-19 is spreading throughout Vermont’s communities, and many people may have it and be contagious days before they show symptoms. So whether a county is reporting one case or 100 cases, Vermonters should presume the virus is in their town, and act to protect themselves and others.”



Truman said the federal Health Insurance Portability and Accountability Act, or HIPAA, “protects information that is potentially identifiable. Factors that might make some person identifiable include gender, age, race, health condition, travel history and the like, all within the context of a given geographic and population bound.”

He argued that while a patient living within Burlington (45,000-plus people) might not be identifiable, a hypothetical patient living in Victory (population 87) might be.

“The Department has determined that disclosing cases by county sufficiently protects potentially identifiable information, whereas (by) town may not,” Truman concluded.

### **Virginia**

Sarah Fearing, *VB Correctional Center Inmate Tests Positive for COVID-19*, WAVY (June 16, 2020), <https://www.wavy.com/news/crime/vb-correctional-center-inmate-tests-positive-for-covid-19/>:

The Virginia Beach Sheriff’s Office says one inmate has tested positive for coronavirus.

The sheriff’s office isn’t identifying the inmate per the Health Insurance Portability and Accountability Act (HIPAA).

### **Washington**

Simone Del, *61% of State’s Coronavirus Deaths Linked to Long-Term Care Facilities*, Q13 FOX (May 6, 2020), <https://www.q13fox.com/news/61-of-states-coronavirus-deaths-linked-to-long-term-care-facilities/>:

The state said it left off [a list of facilities connected to COVID-19 cases] the names of some adult family homes and supported living facilities that are so small that naming the facility could be a HIPAA violation.

### **West Virginia**

*Health Department Reports 4th COVID-19 Case in McDowell County*, WVNS, <https://www.wvns.com/dhhr-health-coronavirus-mcdowell-4th-positive-case/>:

A fourth case of COVID-19 is reported in McDowell County, West Virginia. The announcement was made by the local health department.

Due to Federal HIPAA guidelines, no other information about this case will be given. As always, they recommend everyone comply with the West Virginia Stay-At-Home order and follow all guidelines from the Centers for Disease Control and Prevention.

### **Wisconsin**

*UPDATE: 6 Positive Cases of Coronavirus Confirmed in Clark County*, WEAU (Mar. 31, 2020), <https://www.weau.com/content/news/Clark-County--569254051.html>:

In accordance with the Health Insurance Portability and Accountability Act (HIPAA), and by the guidance of the Clark County Attorney, the Clark County Health Department will not be releasing the locations, ages, or genders of any confirmed or pending COVID-19 cases.

### **Wyoming**

*Editorial Board: Informing the Public Should be the First Consideration*, STAR-TRIBUNE (May 31, 2020), [https://trib.com/opinion/editorial/editorial-board-informing-the-public-should-be-the-first-consideration/article\\_05712050-6d2f-5754-a885-8000549446db.html](https://trib.com/opinion/editorial/editorial-board-informing-the-public-should-be-the-first-consideration/article_05712050-6d2f-5754-a885-8000549446db.html):

Our concerns over the release of information date back farther. In mid-April, we learned that the roommate of an employee at the Wyoming Behavioral Institute, which was home to a significant coronavirus outbreak, attended multiple house parties before testing positive themselves.

This roommate was also a health care worker. Where exactly? We don't know. The health department claimed revealing that would somehow violate HIPPA, a federal law concerning the privacy of an individual's health care information.



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## Secrecy in Death Records: A Call to Action

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### Abstract

Legal access to death certificates varies widely from state to state. Because death records are crucial to in-depth journalistic reporting, we examined laws related to data access across the United States to determine how possible such reporting would be in each state under current laws. In addition to conducting a survey of state legislation on death certificates, we also conducted a meta-analysis of state legislative history related to these records, sought stories that have relied on death records, and interviewed the reporters who wrote some of those stories. We found that state laws could be categorized in three ways: open access, partial access and closed or very limited access. Only 12 of 50 states were found to have laws that could be considered “open.” We propose solutions and call for actions from key stakeholders to change these laws.

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## Introduction

As fallout from the current global pandemic dominates headlines and chyrons around the world, one thing is clear: The public needs better, more accurate information, not only about death tolls, but also about the individuals who died.

A lack of access to death records has created a clear public accountability problem: dozens of uncounted deaths from the Flint water crisis (Childress, 2019), possibly hundreds of thousands of unidentified COVID-19 deaths nationally (Pappas, 2020), and hundreds of hurricane-related deaths that went uncounted (Mayo, 2018). These deaths – and likely thousands of others – were only linked to a public health crisis when journalists were allowed access to death records.

In the current COVID-19 crisis, deaths are inconsistently counted from state to state and county to county (Jones and Kamp, 2020), making accurate numbers elusive. The resulting chaos has stymied public health responses to the crisis and has hindered media efforts to combat politicized and largely false narratives about the pandemic. And as protests against racism and police brutality sweep the nation, questions about official accounts of police killings have highlighted the need for public access to death records (Crawford-Roberts et al., 2020).

Death records are crucial to reporting on these urgent crises. But they are also key data sources for journalists covering a wide range of issues, from maternal deaths (Kelly, Schnaars, & Young, 2019) to elder suicide (Bailey & Aleccia, 2019). With the help of these records, journalists have discovered a correlation between gun ownership and suicide rates (Duff-Brown, 2020), uncovered large-scale medical error at major hospitals (Gabler, 2019), and pointed out missing data in states' COVID-19 death tallies (Jones & Kamp, 2020).

Despite the usefulness of death records for studying public health and holding governments accountable, most states have laws restricting public access to death certificates. Proponents of closed laws often argue that releasing such data could compromise individual privacy or lead to identity theft (Boles, 2012). Recently, the leader of the National Association for Public Health Statistics and Information Systems, an organization that previously crafted laws seeking to restrict access to death records, said that she did not believe such a risk existed. Still, even in states with open death records laws, journalists often run into practical problems, such as inaccessible paper records or prohibitive costs. And in many states, records are not public until 10 to 75 years after the person's death.

What are the history and current status of, and potential solutions to, the issue of death records availability? In this research, we will examine the problem by evaluating who can access death records and how those records can be used for stories.

## Methodology

In gathering information for this study, we conducted an in-depth survey of state legislation on death certificates, including who is (and who is not) able to access death certificates and death records databases in each of the 50 United States. We determined whether state laws were written to require certain researcher criteria, thereby stopping journalists from accessing the information, and which states used standardized model acts to craft laws. We also conducted a meta-analysis of state legislative history related to these records to determine how they had changed over time, and more importantly, why those changes were enacted. We also sought to identify stakeholders pushing for either increased or decreased access. After examining all this, we categorized state laws into three groups: open access, partial access and closed or very limited access.

Rather than relying solely on the laws as written, we also wanted to know how these laws practically affect journalism in each state. We found stories in states with all different kinds of laws and, through those stories, were more easily able to determine whether access to records or lack thereof made journalistic research in those states possible or impossible – or, at least, more or less complete. We also interviewed several investigative journalists who have worked with death records data either in specific states or across the country to gain insight into their experiences.

## History of state legislation

Beginning mostly in the 1960s and '70s, states have introduced ever-more restrictive legislation on public access to death records in the name of protecting privacy and safeguarding citizens against identity fraud (Boles, 2012). Many of these laws extended the wait period after a death before the certificate became public and limited accessibility to certain family members or legal representatives. Genealogical societies and journalists have fought to reduce hold periods on death records, reduce restrictions on who can access these records, and urge states to release more detailed information (Meisels Allen, Alpert, & Laxer, 2014). Those in favor of increased access argue that public access to death records can, among other things, prevent identity theft, enable relatives to access information about their loved ones, and increase government transparency and accountability.

There are three general categories of state laws regarding death certificates, identified by Boles in his 2012 paper on the topic, in which he also calls death records laws “haphazardly formed, significantly overbroad, and loaded with unintended consequences” (Boles, 2012). Twelve states have open laws, allowing virtually any member of the public to request death certificates without a holding period after the death. Five states have partially open records. In some cases, this means that death certificates are public but that some information, such as cause of death, may be withheld. In other cases, death certificates may be closed but other records based on death certificates, such as a list of names, dates, and places of death, may be public. The remaining 33 states have closed death certificate laws. In many of these states, records become available after a certain holding period, ranging from 10 to 75 years after the date of death. Of course, this renders the records of little use to journalists, who almost always rely on recent data. Some states with partially closed or closed records allow for research agreements, which the state can approve, but which usually require conditions (such as confidentiality and a limited research team) that may hinder journalists.

### Open access states

Twelve states have open access laws related to death records:

California	Minnesota
Connecticut	Montana
Georgia	Nebraska
North Carolina	Ohio
Massachusetts	South Dakota
Michigan	Vermont

These states allow any member of the public to request death certificates, although some require proof of direct interest – such as a familial or legal relationship with the deceased – to access a certified copy of the document.

Journalists have used records in these states to report on a variety of topics of interest to the public, including the potential for rushed procurement of donor organs to upend death investigations (Petersen, 2019) and increased inmate deaths in county jails because of poor medical care (Hargarten, 2019).

*Wall Street Journal* reporters Coulter Jones and Jon Kamp used death records in Michigan to determine that the state was likely missing early coronavirus deaths (2020). Jones said he had to sign a “user agreement” with the state’s vital records department but was able to get all the information he requested very quickly. But his initial story idea – to do a similar report for COVID-19 cases across the country – was stymied by his inability to obtain records in dozens of states with closed access laws. He said relying on CDC data can only take a reporter so far, which is why he chose to focus his story on a state that was willing to give him records. He likened daily counts from the CDC to “exit polls” and death records as “the actual ballot counts” (C. Jones, personal communication, July 13, 2020).

“Once you have those records, you can ask people on the ground – real people who are being affected and may see things that we’re not seeing,” Jones said. “Without the death certificates, it’s hard to talk with any specificity about what’s happening.”

Likewise, in a PBS *Frontline* investigation of drinkable water issues in Flint, Michigan, reporter Sarah Childress used death records in conjunction with an independent analysis by epidemiologists to hold the government accountable for having underreported cases of Legionnaire’s disease (2019) in the now-infamous city.

But laws, no matter how openly written, do not guarantee access to records. In North Carolina, a state lauded for offering free access to its death records, WRAL-TV reporter Tyler Dukes ran into an old-fashioned problem while looking for COVID-related deaths: The state keeps all its records on paper, meaning the information is only available months after a death has occurred (T. Dukes, personal communication, July 22, 2020).

“Accessing this data is a bit of a problem in North Carolina because we’re still in the dark ages when it comes to filing death data to health authorities,” Dukes said. Dukes’ station partnered with news organizations across the state to send reporters in person to every county records office in an attempt to get the most updated information possible, resulting in a watchdog story showing that many people in the state were dying with symptoms like those present in COVID-19 cases (NC Watchdog Reporting Network, 2020).

Connecticut, too, processes death records using a paper system that makes obtaining a comprehensive dataset in a timely fashion more difficult (and sometimes impossible) for journalists.

Dukes also said coroners in some counties were less cooperative than in others: “These are public records in North Carolina, it’s a well-established law, but some registers of deeds are really cautious about how they release those records” (T. Dukes, personal communications, July 22, 2020). He said some counties released records only in person at a public office, a particular issue during a pandemic response that relies on limited face-to-face interaction. In the end, Dukes’ collaborative story was published with a note questioning the complete veracity of the records and pointing to denial of access.

## Partial access states

Five states offer partial public access to death certificates or data derived from the certificates:

- Florida
- Indiana
- North Dakota
- Tennessee
- Wisconsin

Florida, for instance, offers public access to death certificates, but the cause of death portion is considered confidential (Florida Senate, 2015). In Wisconsin, individuals who are not deemed to have a direct familial or legal relationship to the deceased can order a “Fact of Death” certificate that contains demographic information, but not manner of death, cause of death, or final disposition (Wisconsin Department of Health Services, 2020).

In these states, some reporters concentrate their stories on what they can access, rather than trying to fight for what they can’t access. In Florida, where cause of death is confidential, *Tampa Bay Times* reporter Paul Guzzo has used death records for stories on historical grave locations. Through death records searches and working with archaeologists, he was able to show that hundreds of black former Tampa Bay residents were buried in a long-forgotten, segregation-era cemetery that had since been built over with businesses and public housing (Guzzo, 2019). Because he didn’t need to rely on cause of death information, the death records available were of great use to him. He said he found the death records to be very easily accessible through an online database (P. Guzzo, personal communications, July 13, 2020).

Again, in these states, more seems to depend on the laws’ interpretation by officials than on the text of the laws themselves. *New York Times* investigative reporter Ellen Gabler, who previously worked for the *Milwaukee Journal Sentinel*, said she had difficulty getting information from a medical examiner in one Wisconsin county, while a medical examiner’s office in another county was known to routinely hand over public records (E. Gabler, personal communications, July 14, 2020).

## Closed access states

The remaining 33 states have heavy restrictions on access to death certificates, including Washington, in which death certificate access will be increasingly restricted because of new legislation effective as of January 2021 (Washington Department of Health, 2020). Many closed-access states institute hold periods (in which records become public for a certain period following the date of death) and/or direct-interest laws that only permit death certificates to be released to people with a direct interest in the information – usually certain family members, legal representatives, or individuals who need the records to claim property.

Hold periods are generally justified through concerns over identity theft and privacy (as well as loss of revenue for vital records departments). A 50-year hold period for death certificates is written into the current version of the Model State Vital Statistics Act drafted by the Department of Health and Human Services (Centers for Disease Control and Prevention, 2011), which is used as a template for many states’ legislation on vital records. Hold periods range in length from 10 years in Maryland to 75 years in Iowa but are clustered around 50 years. When states have

attempted to extend their hold periods, genealogical societies and press societies have fought back, arguing that these restrictions hinder timely access to public health data and investigative information and that access to these documents actually impedes identity theft (Boles, 2012).

Most states that have instituted hold periods for death certificates also impose direct-interest laws to govern access to the records prior to the end of the hold period. Direct-interest laws restrict access to death certificates to specific classes of people. Often, this includes individuals who can prove a particular relationship to the deceased (such as spouses, children, siblings, and parents), legal representatives of the deceased's relatives, funeral home directors, and/or members of an accredited genealogical society. In some cases, these laws specify a seemingly arbitrary list of individuals who can claim a direct interest. For example, prior to the expiration of the state's 25-year hold period, Maine grants death certificate requests to "that person's spouse, registered domestic partner, descendant, parent or guardian, grandparent, sibling, stepparent, stepchild, aunt, uncle, niece, nephew, mother-in-law, father-in-law, personal representative or that person's duly designated attorney or agent or attorney for an agent designated by that person or by a court having jurisdiction over that person" (22 M.R.S.A. § 2706). Others are vaguer and give state officials greater discretion. For instance, Mississippi allows access by individuals with a "legitimate and tangible interest" (Miss. Code Ann. § 41-57-2). Many states with restrictive vital records laws allow the state to approve research agreements that grant access to certain death certificates, but these generally require confidentiality clauses that would be incompatible with journalistic endeavors and are also up to the state's discretion.

Some news outlets in closed states have found workarounds. An article in the *Texas Tribune* linking an increase in people dying at home to coronavirus deaths relied heavily on available response data from the Houston Fire Department (Ornstein & Hixenbaugh, 2020). Another Texas paper, the *Victoria Advocate*, relied on jail records and "custodial death reports" to hold the government accountable when jail inmates suffering from withdrawal began dying at an alarming rate (Venable, 2019). A public fight on Facebook and some key interviews helped the *Pittsburgh Post-Gazette* illuminate discrepancies in the number of COVID-19-related deaths in the area despite lack of access to actual death records (Hamill, 2020). And a series by the *Bucks County Courier Times* about unclaimed remains costing local Pennsylvania governments money included repeated calls for help from the public. The paper, part of the USA TODAY Network, was able to fill in gaps where public information laws prohibited reporters' ability to identify the dead. In states with extremely limited or no access to death records, stories including any kind of detail about COVID-19 are almost impossible to complete, Dukes said (T. Dukes, personal communications, July 22, 2020).

"So many people are dying of this disease, and we cannot see them. Death records are the only window we have into identifying these people in most cases," he said. "I think that's one reason some people were so slow to take this (pandemic) seriously – not seeing the people's real stories on the news."

## Conclusion

The value of information obtainable only through death records can't be overstated: "This is hands-down the most valuable data set in our possession," said data journalist MaryJo Webster, adding that her team at the *Star Tribune* in Minneapolis does large-scale investigations relying on death records every year (M. Webster, personal communications, July 15, 2020).



But even in some states with openly written laws, journalists find themselves unable to easily access information that should be publicly available.

“One of the challenges, when you have a system set up where the information is public but you have to come in person to get it – some of this is cost-prohibitive,” Dukes said of his issues in North Carolina (T. Dukes, personal communications, July 22, 2020). “Right now, when we say we need to get these electronically, it’s not because we’re lazy. We really can’t go in person. It’s a public health issue.”

In the case of COVID-19, stories in some of the hardest-hit places, including New York, “didn’t get the same level of attention” because of prohibitive laws, Jones said (C. Jones, personal communications, July 13, 2020). He had to focus his largest stories about the virus on open states like Michigan because the information simply wasn’t available to him in other states.

With such an obvious disadvantage to the public in closed-access states, what causes a state to implement laws prohibiting access to this important information? Interestingly, the states with the most open death records laws seem to have little in common. The list of places with open laws includes some of the country’s largest populations and some of its smallest; historically liberal, conservative and swing states; those with large cities and those that are mostly rural. That brings forward the question: What shapes the creation of these laws? Are they based on the whims of those lawmakers in power at the time the laws were written?

Some opponents of open records laws point to privacy concerns. The National Association for Public Health Statistics and Information Systems has previously fought against the open release of death records under the guise of protecting personal privacy, creating model laws restricting access to death certificates. But in a September 2019 meeting of the Federation of Genealogy Societies, the director of the NAPHSIS said its new model law is poised to open access to the records as much as possible.

“There is really no data that supports that privacy issues and/or fraud is inhibited more in a state that has closed records or huge embargo dates than in states that have open records,” said Shawna Webster, NAPHSIS director. She said her goal, and the goal of the group’s board, would be to eliminate the privacy restrictions on death records in particular, eliminating the embargo on the records that the group had written into its 2011 model law, which has been adopted by many states.

This reversal, the authors hope, is only a first step forward to more open laws across the country.

Indeed, now is the time for journalists and open government advocates to come together and propose solutions to the secrecy surrounding death records. Some work they could and should do includes:

- Work with states that have research agreements to come up with a model research agreement for journalists that might be acceptable even in closed death records states.
- Work with trade associations and other stakeholders to come up with model legislation that would include journalists’ access to death records as well as improvements to/digitization of records across state governments.
- Publicize our research to state press associations to add to their lobbying agendas, especially while legislatures are open to improving the information being disseminated to the public.

Only by working to make these improvements can we ensure that necessary stories are being told, allowing the public access to the information and context it deserves in serious situations.

Reporters like Dukes lamented their inability to convey the full impact of the COVID-19 pandemic, adding to the burden of the public health crisis rather than easing it (T. Dukes, personal communications, July 22, 2020). Dukes recalled that after terrorist attacks, some natural disasters and mass shootings, when names of the victims were released to journalists and the public, the nation was given a chance to mourn and come together around a common grief. He hasn't seen the same reaction to the pandemic, an issue he attributes to lack of access to records of those who have died.

“It strikes me that given so much death (with COVID-19), we're not a nation in mourning,” Dukes said. “It's kind of a leap to go back to the importance of public records, but that's the key to understanding the scale and the scope of this situation.”

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## Open Budgetary Meetings Amid a Pandemic: Assessing Connecticut's Various Pathways to Public Engagement During COVID-19

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### Abstract

This qualitative analysis of public participation in Connecticut open meetings highlights how Connecticut communities adjusted when the state's open meeting law was temporarily revised under emergency order during COVID-19. A survey of officials in 95 municipalities found a majority had the same or more participation in budget deliberations during that time. Only about a quarter saw decreased public participation. A closer look at four communities highlights specific challenges and successes during the sudden shift in public meetings. Connecticut's varied forms of government give multiple perspectives, which can provide insight for other communities looking to expand virtual access to open meetings.

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## Introduction

In April 2020, when Connecticut's death count from COVID-19 hovered around 2,000 (Connecticut Department of Public Health, 2020) and public gatherings of greater than five people were banned, about 100 registered voters in Vernon, Connecticut, lined their cars up in the high school parking lot and cast votes on the town's \$94 million budget proposal in drive-by fashion. It was one of the few Connecticut municipalities to have direct public participation in the budget approval process in 2020, when the coronavirus pandemic was hitting the northeastern states especially hard; other communities held votes before a statewide shutdown. With a simple thumbs up, or thumbs down, Vernon residents indicated their votes without leaving their cars. The budget passed – 106 in favor, and 4 opposed (Town of Vernon, 2020). Though the question later arose about whether the vote actually was allowed under the governor's emergency response orders (Branciforte, 2020), the action is just one example of how Connecticut public officials adjusted to an unprecedented situation.

While states have long grappled with how to incorporate electronic participation in public meetings, public health restrictions during COVID-19 accelerated the adoption of virtual access for both board members and the public. This study seeks to delve into that shift to virtual open meetings, specifically analyzing how municipalities included the public in the process of approving community budgets – a beloved tradition in Connecticut's many small towns. That right was removed in March 2020, when Gov. Ned Lamont issued executive orders that limited in-person meetings, requiring a shift to virtual municipal meetings. Connecticut's varied forms of local government resulted in a patchwork of approaches to virtual meetings during COVID-19, providing multiple examples to study. The state's 169 municipalities had the same set of guidelines from Lamont's orders, yet approached their virtual open meetings in different ways, leading to robust examples to compare.

Using a survey and case study method, this qualitative analysis provides insights for other states as officials continue to adjust to changes required by the public health response to the pandemic, and seeks new avenues for transparency and public participation. Focusing on just budget approvals helped this study provide some consistency amid an inconsistent sample: In other words, the towns had different approaches to the same goal of approving local budgets, which allowed us to pull best practices from the group. The study sheds light on how municipalities found new ways to involve the public in their work, and overcame obstacles. The findings reinforce standards of government transparency – the public was more likely to comment when invited and given multiple pathways to participate, for example, and proactive disclosure of materials was well received. The study recommendations encourage a continuation of these practices, and provide suggestions for encouraging government transparency while incorporating virtual meetings into future public sessions. These findings can be applied to other public agencies seeking to continue some form of virtual meeting access after the COVID-19 pandemic ends.

## Connecticut's local governments

A significant aspect to consider for this analysis is that Connecticut's state and local governments are unique. Like other New England states, Connecticut has various elements that make it democratic, where elected officials and residents jointly engage in policy-making. Unlike Massachusetts, for example, where there is more uniformity among towns making budgetary decisions especially through open town meetings (Zimmerman, 1999), Connecticut has a

patchwork of varied governance models and few towns mimic each other. Some towns have annual town meetings, while others have local referendum measures decided by voters, and still others have both. Of Connecticut's 169 municipalities, 106 have a selectpersons-town-meeting board of finance format and 50 towns utilize the town meeting format by Australian ballot. Seven towns have a representative town meeting (RTM) format – including Fairfield, examined later in this study (Zimmerman, 1999).

As a state, Connecticut modernized the constitutional model of representative democracy in the 17<sup>th</sup> century prior to America's constitutional convention nearly a century later. The Fundamental Orders, an early document proclaiming civil officials reporting to the electorate and *not* to the English king, is one historical example of Connecticut's democracy (Horton, 1993; Satter, 2009). It effectively established an independent government ahead of the American Revolution. Additional democratic reform eras included Connecticut's 1662 Charter that allowed for the legislative General Assembly members to be elected by landowners and the 1818 Constitution establishing the separation of powers among three equal branches (Satter, 2009, pp. 20-26).

Beyond Connecticut's early democratic history, it's essentially at the local level where the state's cities and towns operate under strong home rule as separate entities. Local autonomy is a significant feature since county government remains only in the court system. During the late 1950s, officials debated and ultimately approved abolishing county governance as municipalities sought local control. At the same time, political party leadership was handled through smaller and more local committees as opposed to regional or county committees. While these reforms led to decentralizing strong-arming party bosses and political leaders, it also allowed for 169 municipalities to operate differently and separately (Satter, 2009). In other words, little regionalization and resource sharing have remained ongoing dynamics among so many municipalities. Most importantly, these mid-century reforms allowed for entrenching home rule authority in Connecticut.

Understanding, then, state and local government reform is key to recognizing why and how representative government operates in Connecticut. It is not a typical state and its municipalities vary significantly. This is why several case studies are examined in this analysis since New Haven, Seymour, Fairfield and Guilford are uniquely different. New Haven was actually an early theocracy and eventually became a significant regional city by the twentieth century. Nearby Guilford, like most settlements along the Long Island shoreline, thrived as an early farm town. Similarly, Fairfield prospered as an agricultural hub and developed significantly in the 20<sup>th</sup> century, as it's adjacent to the state's largest city of Bridgeport and a New York City tri-state area suburb. But Seymour stands out, as it's situated in Naugatuck Valley, geographically in the middle of two former booming manufacturing urban hubs – Waterbury and Bridgeport. Still, these four municipalities share some elements of participation politics at the local level through referendum voting or constituent-involved meetings.

## Participatory government

Unlike most regions, New England has relied on voter engagement approaches for generations. Through referenda and initiative voting measures to annual budgetary town hall meetings, states and municipalities in this northeast region vary. A number of academic studies cover much of these town hall dynamics that allow residents to engage in actual decision-making. From Frank Bryan's study on Vermont town hall meetings (2004) to Donald Robinson's

Massachusetts local town meetings study (2011), there are various sources to consider New England's participatory models. In fact, Joseph Zimmerman's work is likely the most comprehensive and comparative study on the region (1999). In it, he reminds readers that the six states allow for annual open town meetings to be a "de facto representative legislative body..." (Zimmerman, 1999, p. 11).

As this study seeks to determine if members of the public became more engaged in virtual budget meetings, it is helpful to understand the trends and motivations in participatory government on the local level. Connecticut's budget approval process is an interesting case study, as the majority of residents have some direct say in budget approvals through referenda or town forums. Connecticut's municipalities shared participatory engagement challenges in the 2020 coronavirus era. Most town hall and budgetary meetings were forced to go online. Some towns were already prepared to do so (Fairfield) while many others and especially cities were forced to adapt (New Haven). Discussing these learning curves with officials proved beneficial for this research, as they shared best practices with other officials, especially from nearby towns. For example, New Haven's board of alders' chief of staff Al Lucas (personal communication, Aug. 28, 2020) said initial online meetings in New Haven and nearby suburban Hamden were hacked or "Zoom-bombed." But Lucas offered several protective pathways for officials and constituents, like utilizing password access and limiting chat box features on Zoom. Guilford, a town that has a traditionally early budget vote among residents, became a litmus test for other towns in the area (M. Ayles, personal communication, Sept. 9, 2020).

At the same time, constituents and reporters adapted to online modalities. In some instances, more – or different – members of the public attended online meetings than in-person, partly because of scheduling conflicts. Lucas said that many New Haveners were previously unable to attend alders' meetings because of childcare concerns and work schedules. Suddenly, online meetings saw a tremendous increase of public participation. This should not be surprising since political scientists like Frank Bryan (2004) pointed out this observation years earlier in Vermont. In his study, Bryan reveals that many towns would see more participation if meetings were held at night than during the day, but fewer women would attend night meetings. Meanwhile, in Guilford, the switch to virtual meetings prompted town officials to reach out more intensely to voters to seek input on the budget, as individuals were losing their right to vote in a referendum. Those comments came in the form of emails – previously allowed by the Board of Finance, but never actively solicited as they were this year. That invitation prompted increased participation (M. Ayles, personal communication, Sept. 9, 2020).

Another participation concern remains generational gaps among local residents. Largely older residents, particularly those over 60 years old, not only vote significantly more than younger voters, they are also more than likely to serve as local government officials. Even in official local meetings, the generation gap is recognizable, as few younger residents attend local proceedings. This is hardly surprising since political scientists like Robert Putnam (1999) and Frank Bryan (2004) have stressed the generation gap between younger and older generations in a number of studies. But several Connecticut officials admitted they have been and remain concerned that generational differences will persist as an issue. Generational participation is especially apparent this year as many younger residents protested in area Black Lives Matter protests, but few attended local public meetings. New Haven Mayor Justin Elicker, for example, raised concerns that a generation of younger people not being aware of local government procedures can be problematic for the city's future. New Haveners of all ages, but especially younger generations, need to recognize how local institutions operate and how to participate within the system (J. Elicker,



personal communication, Sept. 21, 2020). Similarly, Fairfield First Selectwoman Kupchick noted the protest and local politics generation gap. She remains hopeful that a number of younger residents, especially teenagers, have been engaged in local board of education meetings, for example (B. Kupchick, personal communication, Sept. 23, 2020).

## Open meetings

While local budget approval processes are determined by municipal charter, the public's ability to participate in the meetings leading up to budget adoption is dictated by open records and open meetings laws. In Connecticut, both are outlined in the state's Freedom of Information Act, initially adopted in 1975. Three goals of open meetings statutes are to promote transparency among public agencies, to allow for public participation in the process, and to allow the agency to remain efficient in its work (Roeder, 2014). Transparency is often regarded as the top priority over technology and efficiency, and is directly connected to public participation. In other words, public participation in the process promotes transparency (Piotrowski & Borry, 2010). Yet, in their review of state open meetings laws from 2006, Piotrowski and Borry (2010) found only 10 states specifically granted the right for the public to comment during meetings.

Restrictions during the COVID-19 pandemic forced public agencies across the country to incorporate some form of virtual meetings, but the debate around electronic access to public meetings is not new. Open government scholars have discussed the need for, and potential downside of, virtual meetings for decades (Leonhirth, 1995; Ross, 1998; Piotrowski & Borry, 2010). Electronic meetings can refer to any teleconference or videoconference meeting, but also emails or other electronic messages conducted by a quorum of the board. (Reporters Committee, 2019). Roeder (2014) argues for increased technology use by public boards where it increases transparency, public participation and efficiency. She includes virtual access to meetings among the technology recommended, but suggests email and interactive online forums, such as bulletin boards, can actually limit public access to information.

Each state has a different open meetings law, making it challenging to compare how various states allow for electronic meetings. It may be listed in the law's definition of meetings, the general open meetings statute, or other state statutes. Additionally, some states may allow electronic meetings, but only in certain circumstances – for example under emergency, such as New Mexico's law – or for specific governmental bodies, such as Nebraska's law (Leonhirth, 1995; Piotrowski & Borry, 2010; Reporters Committee, 2019). A 1993 review of state open meeting laws found that only three states specifically prohibited electronic meetings, 22 expressly allowed electronic meetings, 18 allowed under some circumstances, and eight made no mention of electronic meetings (Leonhirth, 1995). By 2006, the number had increased to 25 states expressly allowing virtual meetings (Piotrowski, 2010). In many cases, the text of the law refers to electronic participation by board or committee members, but does not reference electronic access by the public. The allowance of electronic meetings hasn't typically included entirely virtual sessions. For example, Connecticut's FOI Act allows meetings "by means of electronic equipment," (Connecticut FOI Act. Section 1-200), but requires some central in-person meeting space that the public and board members can visit (C. Murphy, personal communication, Sept. 13, 2020).

More than 40 states, including Connecticut, made emergency changes to open meetings and open records laws amid the pandemic in March and April 2020, most suspending in-person requirements or allowing virtual meetings (Lipton, 2020; Piepgrass et al, 2020). Sections of Connecticut's FOI Act were suspended by Gov. Ned Lamont by executive order in March to allow

for virtual meetings and votes, and outline requirements for transparency and access. Lamont's executive orders suspended sections of the act "to the extent necessary to permit any public agency to meet and take such actions authorized by the law without permitting or requiring in-person public access to such meetings, and to hold such meetings or proceedings remotely by conference call, videoconference or other technology" (Lamont, Executive Order 7B, 2020). Connecticut's Executive Order 7B (2020) required all meetings to be virtually available in real time, produce a transcript or recording within seven days, and include agendas and documents online before the meeting. Lamont also suspended all municipal budget votes, leaving final decision-making power in the hands of the "budget-making authority," (Executive Order 7I, 2020) which varies by municipality.

This review of Connecticut budget meetings found a mixed practice regarding the public's ability to comment during virtual meetings, a key element in promoting transparency (Piotrowski & Borry, 2010). In several cases, public comments were allowed through email only and were read into the record by board members. New Haven disabled the chat function on its Zoom meetings to prevent hacking and distractions, but still allowed residents to speak during public commenting sessions (J. Elicker, personal communication, Sept. 21, 2020; A. Lucas, personal communication, Aug. 28, 2020). In Seymour, on the other hand, residents were not allowed to speak during the meeting, but could send messages through the chat, and a town official would respond either out loud or in the chat (K. Miller, personal communication, Sept. 4, 2020). Nothing in the state FOI act specifically refers to Zoom meeting chats, but commission officials interpret those as public documents under the law, assuming public officials are saving a record of those chats to include in the minutes (C. Murphy, personal communication, Sept. 13, 2020). As Kurt Miller, the Seymour first selectman, noted, everyone was trying to be as transparent as possible in a new terrain without clear FOI guidance: "I think FOI laws are getting broken every day by these meetings. If you're in the spirit of FOI and there's transparency about it, I think you're OK" (personal communication, Sept. 4, 2020). Joe DeLong, the executive director of the Connecticut Council of Municipalities, made similar observations. "I think there was the greatest effort I've ever seen to create transparency and accountability at the local level because these officials couldn't do what they've always done" (personal communication, Sept. 2, 2020).

Connecticut FOI Commission officials noted the commission may be forgiving for unavoidable violations that happened through municipalities' attempts to remain transparent. For example, many municipalities, including New Haven, required prior contact from residents looking to attend meetings, so that the Zoom call could include a password to prevent hacking. While this may technically violate the Connecticut FOI Act prohibition on requiring identification to attend a meeting (Connecticut FOI Act, Sect. 1-225e), it was necessary to conduct organized meetings during the pandemic restrictions. Connecticut FOI officials said no complaints had been filed regarding password access to virtual meetings. Complaints that did arise included a city switching meeting platforms in the middle of a meeting, and others that didn't communicate meeting links clearly enough to the public. None of the complaints about virtual meetings had gone before the commission as of early December (T. Hennick, personal communication, Sept. 13, 2020). Colleen Murphy, the executive director of the Connecticut FOI Commission, noted that during the budget approval process, many residents were still feeling a spirit of being "in this together," which might explain the small number of complaints (C. Murphy, personal communication, Sept. 13, 2020).

Lamont’s executive orders required budget materials be published on town websites in advance of the virtual meetings – a new, albeit temporary, requirement under the state’s FOI law. Some towns, such as Fairfield, previously provided documents associated with public meetings on the website, but the new requirement expanded access to documents much more broadly. This “proactive disclosure” is not required by the state’s open records law, but certainly aids in the mission of transparency and access (C. Murphy, personal communication, Sept. 13, 2020). In fact, Seymour officials found the prior access to be so helpful to members of the public that the town plans to continue the practice of sharing them electronically before and during the meeting. (K. Miller, personal communication, Sept. 4, 2020). The executive orders also suspended in-person budget votes, which occur in some form in most municipalities in the state. Some towns, including Vernon, interpreted Executive Order 7I to still allow in-person votes if done safely, but later communications from the governor’s office clarified that no other towns should conduct a similar vote without approval from their regional health district (J. DeLong, personal communication, Sept. 2, 2020).

This sudden and widespread change in both the open meetings law interpretation and the municipal approval of local budgets, prompted the following research questions:

*RQ1:* How did Connecticut municipalities adjust their budget process in response to open meetings law and municipal budget approval process changes, amid the COVID-19 pandemic in spring 2020?

*RQ2:* Did the switch to virtual meetings have an impact on public participation in the budget approval process?

## Method

To answer these questions, we sought input through a survey from public officials involved in the budget approval process. Additionally, a more in-depth look at a sample of towns can help better explain the unique situations in different parts of the state, as well as seek to confirm the impressions of public officials from the surveys. As such, this study combines a nine-question survey with a case study approach to answering these research questions.

The survey sample included anyone with an official role in a municipality’s budget approval, including the staff person in charge of finances, chair of the town’s budget authority, and chief executive officer. Three contacts were sought for each town, to help improve the survey rate of return and ensure representation from different people with direct roles in the budget approval process. Contact information for these individuals was gathered from each of 169 municipal websites. There was some overlap in roles – for example, a town whose chief elected official is also the chair of a budget authority. Additionally, many towns did not provide contact information for all three officials. In particular, contact information for chairs of budget authorities was hard to find in many cases, in part due to the volunteer nature of the role as opposed to paid staff in a finance department. Several towns provided no e-mail contact information online, prompting follow-up phone calls to the town halls. In one case, the town’s mayor was willing only to answer the survey questions over the phone; the responses were input by the authors.

A first round of surveys was emailed the week of Aug. 3, 2020, and a follow-up email was sent to non-responding towns on Aug. 18. Representatives had until Aug. 21 to complete the survey. The survey included closed-ended multiple choice questions (Do residents normally vote on the budget? How was public participation this year? Did your budget proposal include a tax

increase?), as well as open-ended prompts (Please estimate the amount of public participation this year compared to last year, or provide additional details about this participation).

The four towns outlined in more depth were selected to represent different forms of government and budget approval, as well as a variety of budget outcomes (both tax increases and steady tax rate proposals). The towns selected came from survey responses where officials indicated a willingness to communicate further about the process. In-depth interviews with officials were conducted using WebEx and Microsoft Teams video conferencing. Both authors were present during the interviews. In one case, two subjects were interviewed at the same time. In addition to municipal officials, the authors interviewed the executive director and public information officer for the Connecticut FOI Commission, the executive director of the Connecticut Council of Municipalities, and one reporter.

## Results

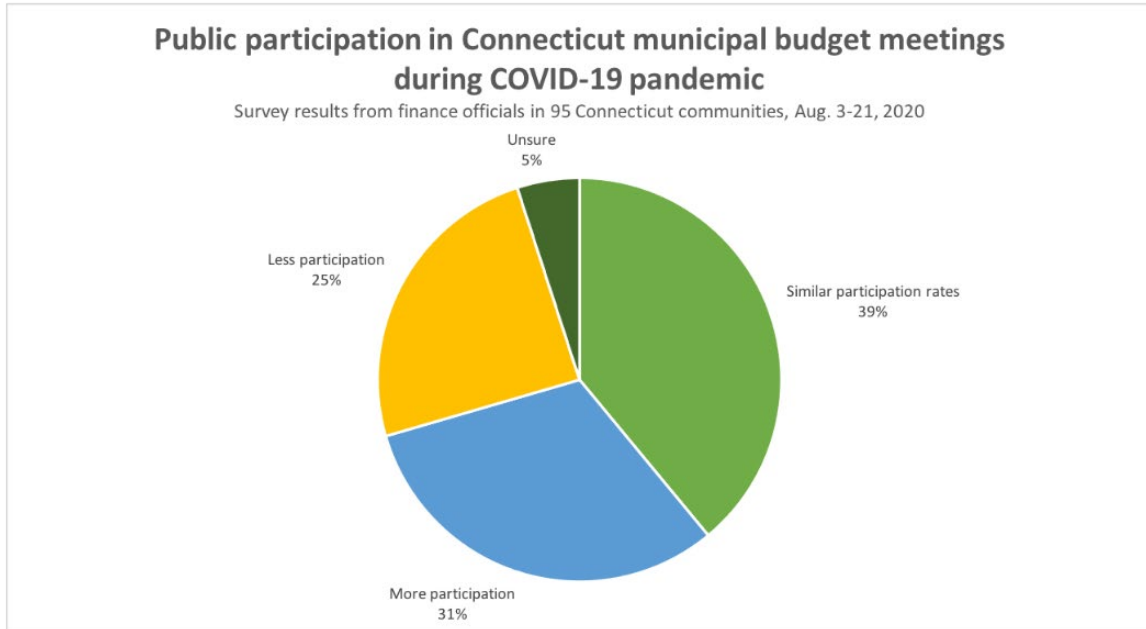
### Survey data

The survey resulted in 114 responses from 95 towns – a 56% town response rate. With a finite sample to draw from, we sought a response rate of at least 50% to be able to make a broad analysis (Draugalis et al., 2008). The breakdown of respondents is as follows: 29% were members of a budget authority in the community, 46% were municipal staff with some role in the process, and 25% were other elected or appointed officials with some role in the process, but no vote (for example a member of the Board of Selectmen in a town where Board of Finance handles the budget approval role).

About 71% of the responses came from communities that typically allow direct votes from residents on the budget. About 68% said their budget proposal did not include any tax rate increase for residents. The majority of respondents (92%) had experience with previous budgets, as well as experience during the 2020 budget season, providing a framework for comparing participation.

The survey asked participants to estimate whether there was more, less or roughly the same public participation in the budget process as in previous years. Their answers were split, but the majority said there was the same or more participation: 39% said about the same, 31.5% said more, and 24.5% said less (5% were unsure how to answer the question). (See Chart 1, next page.)

Chart 1



The majority (91%) held budget meetings using a video conferencing application. One town (0.8%) used telephone conference calling. Five respondents said their communities took a mixed approach, with some in-person, some phone, some e-mail comments and some video sharing through cable TV and video conferencing apps. Four had passed budgets or held public participation before the governor’s executive order banning large gatherings.

The numbers give a broad look at the 2020 budget approval process in Connecticut. But with so many different situations and processes for adopting the budget across the state, the more interesting details come from the open-ended questions posed to participants. In general those comments can be summarized as the following four statements:

1. Participation is related to the budget, not the meeting format;
2. The definition of participation changed this budget season;
3. Technology simplified access for some, and complicated access for others;
4. Many residents disliked having their vote taken away.

The statements are augmented by quotes from the survey, included below. The respondents focused on their respective budget-approval processes, but their experiences apply to virtual open meetings in general, as we note in the summaries below.

#### Participation is related to the budget, not the meeting format

In survey responses and interviews, local officials mentioned that public participation is generally tied more closely to the specific budget proposal than to the format. These comments can be applied to other municipal meetings: Participation is tied to the meeting topic, not the meeting format. In Seymour, for example, no tax increase was proposed to help mitigate concerns about losing a direct vote, and therefore there were no controversial items for the public to debate (K. Miller, personal communication, Sept. 4, 2020). In New Haven, where a tax increase was

proposed, national conversations about defunding police were being localized as it related to the New Haven city budget. A city with normally high rates of public input saw levels of participation similar to past years, despite the change in forum. Many survey respondents had similar input. A sample of quotes from the survey follows:

- “Over my nearly 20 years on Town Council, I have seen varying levels of participation, depending on certain aspects of each budget. This year public participation was lower, but there were not any controversial elements either.”
- “This year there was a little controversy with the school budget and a threat of layoff of teachers. This resulted in more citizens actively participating in the public comment process.”
- “Last year and generally in the recent past, few citizens attended our budget hearings held for the public to comment. This year, because of anticipated revenue loss caused by COVID-19 and significant cuts to our operating budget, hundreds of people joined our Zoom meetings. To be clear, most of the participants were union members who were unhappy about our plan to have all city employees take a 0% salary increase to balance the budget and prevent all lay-offs. Average citizens, on the other hand, were very pleased that we did not raise their taxes and recognized their financial hardships.”

The definition of participation changed this budget season

Despite participation being linked more closely to the issues addressed in the meeting than the format of meetings, many officials noted how the public was more likely to participate in the process when given multiple streams of contact. Participation this year might have meant reading newly available digital budget documents, watching a recorded video of the budget hearing, writing an email with public comments, or calling in live to hear elected officials discuss local spending. All of these points of access were previously available to the public in person at governmental buildings, including listening to meeting recordings on cassette tape. However, this budget season some officials were more engaged trying to get the public to participate, in part because of the lost opportunity for residents to vote, and those communications highlighted the various ways the public could comment, perhaps for the first time. For example, in Guilford email comments have always been accepted and read into the record. But that fact was only actively publicized this season as part of the Board of Finance’s efforts to seek public input on the proposal (M. Ayles, personal communication, Sept. 9, 2020). Several survey respondents commented on this topic as well. Several officials noted that while they liked the new pathways for input from residents, they missed the feel of in-person comments and meetings. Some sample comments:

- “Constituents were able to dial in and listen to the process. Depending on the meeting, we would have 10-20 others listening in. We held approximately 15 meetings and three public hearings. In the past, except for the hearings, we would have only a handful of public attendees, so the engagement was much higher.”
- “We have a public comment time at the first meeting of the budget session. We typically have 10 or so people speak unless there is something controversial. More people submitted letters/emails this year and less spoke.”
- “I am conflicted because on the one hand, the number of people participating in the process is significantly higher than when we were meeting in person. On the flip side, it is far more impactful to have a person show up to our meeting than it is for me to dispassionately read a letter into the record.”

## Technology simplified access for some, and complicated access for others

Many officials noted that members of the public liked being able to participate from home, and more “attended” meetings even if they did not speak. In several cases, towns are trying to incorporate more virtual access to meetings when in-person meetings resume, though several officials said they still wanted to have some in-person component, a requirement under state law. Meanwhile, adapting to new technology made it harder for some communities to hold meetings, or otherwise complicated traditional processes, such as presentations. Some officials noted that internet access was not always stable, some board members faced technology barriers to fully participating in the meetings, and others simply preferred the in-person format. In some cases, after the initial learning curve, the meetings were easier to attend. A sample of survey answers on this topic is included below.

- “Most municipal boards are run or composed of older members of the community, as a result, integrating technology was difficult and painful at times trying to get elected officials logged into Zoom meetings and viewing emails instead of hard copy documents. The process this year was very painful, but we did have excellent response and participation from the public with the majority asking to keep the online format for future years so they can watch, listen and participate from home or wherever they are at the time of the meeting.”
- “While we had more people online this year, the people that did attend did not offer many comments. While I appreciate those that did view and listen to the presentations - the online ‘dynamic’ for the Board of Finance members was inferior in my opinion. It lacked the intangible quality of in-person advocacy that can't be gained online where each board member is limited to a 2" x 2" square on a screen - if you can even see all the members. How does one garner a ‘feel’ of a board member's comfort when one can't even see all the other board members? I found our membership to be more uncomfortable with the process and indecisive in this format as opposed to the traditional in-person meetings. I also found that the meetings ran much longer.”

## Many residents disliked losing their vote

About 71% of survey respondents were from communities that typically have some kind of direct resident vote on the budget. Several respondents noted the anger from residents at losing that right, and suggested increased meeting participation may have been linked to the that change. A sample of those comments is included below.

- “Many people in our town were upset they were not allowed to vote on the budget. This has created an underlying anger which will make it difficult to pass a budget next year when the people are allowed to vote again.”
- “A few are questioning the governor’s power to halt a budget referendum and refusing to pay ‘illegally levied’ taxes.”
- “The public wasn’t happy that they could not vote (the board of finance was empowered to adopt the budget) but fortunately the backlash was mild.”

## Case studies

We interviewed officials from four different municipalities to further explore the unique situations they faced this budget season. These communities – Fairfield, Guilford, New Haven and Seymour – represent different governmental structures and tax impact in 2020-21 to give a broad range of perspectives. Fairfield and New Haven have a representative body (RTM and Board of Alders) responsible for budget approval, while Guilford and Seymour allow resident votes. Meanwhile, New Haven and Guilford had proposed tax increases for 2020-21 budgets, while Fairfield and Seymour budgets held taxes steady. A comparison of key points from each town can be found in Table 1 in the appendix.

### *Fairfield*

The town of Fairfield may be a medium-sized suburb to Connecticut's largest city (Bridgeport), but it has remained a steadily growing New York City tri-state area bedroom community. With Metro North commuter train access to midtown Manhattan, this former farming town became a wealthy shoreline suburb by the middle of the twentieth century. This proximity to New York City made Fairfield and surrounding towns among the hardest hit in Connecticut for COVID-19 cases during March (CT Department of Public Health, 2020). As of October, Fairfield still was not allowing in-person municipal meetings, even as the state relaxed restrictions on the number of people who could gather inside together.

Fairfield has managed to keep its public participation roots, especially as it relates to local governance and budgetary processes. Fairfield has a board of selectmen as a legislative body and a first selectwoman as its executive. And unlike the majority of Connecticut's municipalities, Fairfield has a representative town meeting (RTM) process where budgetary decisions are decided through an open town council. As one of seven Connecticut towns that still has an RTM system, Fairfield is a standout. In fact, it has a relatively small RTM at 50 members and referendum challenges through voter signatures is a rare occurrence, but it happened in the 1990s. Constituents also reported their budgetary process as "fair" compared to other towns that were rated as "good" or "excellent" in one significant RTM study (Zimmerman, 1999, p. 157). So Fairfield has a layered budgetary process that includes the boards of finance and selectmen, as well as the RTM. But much of the debate took place before RTM online meetings this year (J. Labella, personal communication, Oct. 2, 2020).

At the same time, the local government has functioned online for years and was a virtual meeting trendsetter. For example, the town had previously updated its meeting room to have a projection screen and cameras, allowing various local boards and commissions to incorporate virtual components into meetings before the 2020 coronavirus era. Fairfield also consistently posts full budget documentation on its website, and sends out a weekly newsletter addressing current resident concerns. First Selectwoman Brenda Kupchick noted that having a qualified and dedicated IT staff member helped the community transition to virtual meetings during the pandemic (personal communication, Sept. 23, 2020).

"We have a very engaged community. They care a lot about a lot of different issues. We went out of our way to make sure people were able to be heard," Kupchick said. Still, she reported low public engagement during the 2020 budget season, something she attributed to residents feeling otherwise overwhelmed by the pandemic. Reducing the budget to keep taxes steady also helped. Kupchick's initial budget proposal called for a 2.46 percent tax increase, but town officials



adjusted the proposal once the pandemic became a larger concern. Fairfield ended with a level tax rate in the final approved budget. “Overall, I felt like the pandemic was sucking the life out of everything. No one cared,” Kupchick said (personal communication, Sept. 23, 2020).

Fairfield used WebEx for virtual meetings, a decision made after seeing reports of Zoom hacking in other Connecticut municipalities. The chat function in the meetings was limited to board members. The public could participate by sending email comments, and then calling in to listen to the WebEx meeting, or watching it streamed live on public access television.

### *Guilford*

At the eastern end of New Haven County is the town of Guilford, a wealthy shoreline and historic municipality. With a picturesque town green as a civic square and town hall in its center, Guilford has notable spaces for residents to participate in direct democracy. Like Fairfield, it also has a board of selectmen and first selectman as a legislative and executive body. But unlike Fairfield, Guilford residents have a direct vote on the budget proposal. Guilford has also been a largely farming community for generations but remains a wealthy suburb of New Haven. Much of the town is historically preserved and town officials often limit significant development and they have prevented commercial and residential growth unlike nearby shoreline towns. In recent years, NIMBYism (“Not In My Back Yard”) concerns are staple issues for many Guilford residents as overdevelopment, preservation and affordable housing are controversial problems (Rabe Thomas, 2020).

The Guilford Board of Finance was done with its review of the budget when the governor issued his executive order halting large gatherings and budget votes. At a March 16 meeting, the Board of Finance finalized its budget proposal, with a 1.44% tax increase (Town of Guilford, April 13, 2020) and scheduled the Annual Town Meeting and budget referendum for April 7 and April 21 respectively. By the end of that week, Gov. Ned Lamont banned public gatherings and shifted budget approval authority to the elected or appointed officials. Guilford essentially had to start its budget review over, as Board of Finance members sought to adjust the budget proposal to minimize the financial impact to residents. Board of Finance Chairman Michael Ayles said the board kept pushing back its vote to allow more time for public comments to come in. The board allowed the public to speak during Zoom meetings, but also actively solicited email input from residents. “A lot of people think when you contribute to a meeting, they think you have to do it in person and by voice, to stand up in front of people. The fact that they could submit comments like this helped encourage more” (M. Ayles, personal communication, Sept. 9, 2020).

Ayles, a 15-year veteran of the local tax board, estimated that the town normally gets 30 to 40 comments on the budget in an active year. In 2020, the board received 176 e-mails, and had about 10 to 15 people speak during meetings. Most asked the board to keep the budget proposal as is, while 28 requested a reduction in the budget and tax rate (Town of Guilford, April 27, 2020). The Guilford Board of Finance disabled its chat feature on Zoom meetings to ward off hacking, forcing residents to participate either in spoken word, or through email comments (M. Ayles, personal communication, Sept. 9, 2020).

On May 7, the Board of Finance approved the town’s final budget with a 0.87% tax increase. One member abstained from voting, citing concerns about taking away the residents’ rights to vote (Williams, 2020). Ayles noted that the decision weighed heavily on all board members, describing the process as “emotional chaos.” (M. Ayles, personal communication, Sept.

9, 2020). He attributed the rise in public comments to the perceived lack of input from residents who typically get a chance to vote on the budget.

### *New Haven*

New Haven Colony was initially founded as a theocratic entity in 1638 before Connecticut Colony's absorption in 1665. Although it was intended to be a religious Congregationalist colony, New Haven's early economy centered on shoreline trade because of its harbor access to Long Island Sound and it remains the second busiest shipping port in New England. It was also one of the annually rotating bi-capitals until Hartford became the state's single capital in 1875. Some manufacturing also took shape during the industrial revolution but education (with several colleges and universities) and medical institutions remain significant anchors to the local economy. In fact, Yale University is the city's largest employer followed by Yale New Haven Hospital. No surprise then New Haven is known for "meds and eds" (Wharton, 2017, pp. 190-191).

New Haven's political economy is historically unique and direct participation has remained a key factor in its local governance. The city has been studied by countless historians and political scientists and it is the most over-studied secondary-sized city, according to political scientist Doug Rae (2003). Most importantly, local unions (especially government, hospital and education unions) are significantly organized since the nonprofit sector rules the city's economy. "Vast portions of the city were tax-exempt – Yale, the hospitals, the churches, a remarkably extensive public housing stock – and the city received only partial compensation from the state government's PILOT program (payment in lieu of taxes). A majority of the city government's workers, including several of the union leaders, were living outside the city, paying taxes to our suburban competitors with their central city salaries" (Rae, 2003, p. xi).

No surprise then that the majority of New Haven's board of alders' members are union leaders and they often activate union members for various district causes. As a formal but strong mayor and large alder (legislative body) system, the city has 30 alder wards. Even though New Haven has a hyper-democratic representation body, election turnout ranges only 18 to 30 percent within the last decade (Wharton, 2020). Alders' meetings also limit direct participation since a public comment period is not allowed, unlike nearby municipalities. But constituents can directly participate in committee and "workshop" sessions, especially during the city's budgetary seasons. During springtime, alders have a public commenting period when residents and reporters inquire about the city's proposed budget in several workshop sessions around New Haven. Typically these public forums last an hour to several hours and have a few to hundreds in attendance. But during the 2020 coronavirus era, New Haven held one budgetary workshop in March and weeks later went online for several sessions and board of alders' meetings.

Al Lucas, the director of legislative services for the New Haven Board of Alders, helps coordinate budget hearings for the Board of Alders each year, and has direct contact with residents during the process. Lucas noted that more individuals participated in these online forums even if many of them called in due to internet limitations or technological issues. "We have a vibrant group of engaged citizenry. They were going to come regardless" (A. Lucas, personal communication, Aug. 28, 2020). One example was a March 31 Zoom public hearing that lasted six hours and hit the city's Zoom limit of 100 people, prompting city officials to request people leave the meeting after commenting, so additional people could join and speak. In fact, nearly 40 people spoke during this particular hearing (Breen, 2020a).

The city initially published a Zoom meeting ID and password, inviting residents to join and sign-up to speak. However, on April 20, the regular Board of Alders meeting was the victim of “Zoom-bombing,” hacking that became common in open Zoom meetings during the early months of the pandemic (Kroeker, 2020; O’Flaherty, 2020). In New Haven, a hacker joined the meeting and was able to display a video clip of child pornography. City officials kicked the hacker out within 10 seconds (Breen, 2020b), but the short exposure was “pretty traumatic” (A. Lucas, personal communication, Aug. 28, 2020). The hacking prompted security changes to the meetings. Anyone wishing to attend had to register in advance in order to get a password. The webinar ID was changed for each meeting to make it harder to find. Instead of sharing the original link, city officials shared alias links through Bitly and TinyURL to make it harder to search for a link to bomb. And the city eliminated the chat function in the meeting, forcing residents to speak in order to share their opinions (A. Lucas, personal communication, Aug. 28, 2020).

In addition to joining the meetings via video, residents could call in from a telephone, allowing access for those without wifi or computers. Initially, the long-distance number associated with Zoom meetings was a barrier for some residents, but eventually Zoom provided a toll-free number to meetings to help open access to all. Lucas said one change he noticed was that people tended to stay in the meetings longer when they were conducted via Zoom, than when they would be held in person. Noting that at the time, there was no other “live entertainment” going on, he suggested it may be connected to residents wanting something to watch in the background. But, he also thinks it was just more comfortable for them to be present from home. “It made it a lot easier for residents who have other things to do, to be heard. People with family obligations, elder care or child-care issues. You might have to sit here for four hours to speak for three minutes, and your child has to go to school the next day” (A. Lucas, personal communication, Aug. 28, 2020).

### *Seymour*

Tucked in the hilliest and farthest western part of New Haven County are several Naugatuck Valley towns. Seymour is centered among these small locales, but it is also situated between two larger post-industrial Waterbury and Bridgeport cities. Many residents also commute to work in nearby New Haven. These Valley towns are often attached to traditional models of participatory governance from referendum procedures to regionalized resource sharing. Even the area towns’ bi-partisan political nature is unique (Wharton, 2019). But Seymour is one of the smaller Valley towns with larger property lots and family farms. Its town governance has a board of selectmen for its legislative body and a first selectmen as its executive official. Seymour also has a finance board reviewing annual budgets with voters deciding its final approval. In other words, Seymour, like Guilford, is the epitome of small-town governance with actual voter participation.

First Selectman Kurt Miller said he appreciates that input from residents. “I like the fact that there is a referendum vote, that public participation. The people are validating the budget you’re putting forward” (personal communication, Sept. 4, 2020). In Seymour, the public can weigh in on the budget three times during the process: during public hearings, a Town Meeting, and finally, a day-long referendum vote. None of the public input sessions had happened yet when the governor’s meeting limitation orders were issued. Miller proposed a budget in December that called for a small tax increase. By the time the budget reached the Board of Finance for review, COVID-19 concerns were mounting, and officials began to realize they may not be able to allow residents to vote. “I didn’t want to have an increase in taxes and not have a referendum vote. That

was our biggest concern: What would be the reaction of the people that we were taking away their ability to vote?” (K. Miller, personal communication, Sept. 4, 2020). The Board of Finance ended up cutting the budget to result in no tax increase — the fifth year in a row for the town. Miller said he heard feedback from residents who are not typically politically active in town, upset that they wouldn’t get to vote.

Typically, the bulk of public participation is during the referendum, according to Miller. About 7% of registered voters turned out in 2019, 6.6% in 2018 and 8.4% in 2017 (Driscoll, 2019). Fewer people come to public hearings, and hardly anyone from the public attends the Town Meeting. Miller said in 2020, he saw a little bit more public participation in Board of Finance meetings at first, but then it leveled off as the process continued. In the past, he’d see residents show up to support different departments, such as the Fire Department or Police Department budgets, but there “was much less of that this year” (K. Miller, personal communication, Sept. 4, 2020). He attributed the lack of involvement to the level tax rate proposed.

Seymour budget meetings were conducted on Zoom calls. The public was not invited to speak during the meetings. All comments had to be in writing, sent before the meeting or posted in the meeting chat. The town typically allows two public comment sessions during each meeting – at the beginning and again at the end. Miller said if residents were watching the meeting and wanted to comment at the end, officials might allow them to turn on their microphone depending on the number of people in the meeting and town officials’ ability to confirm the person was a legitimate member of the Seymour community, as officials were worried about Zoom bombers. Residents were also welcome to comment in the chat function of Zoom during the meeting. An official would read those comments, and others submitted prior to the meeting, into the record to be included in meeting minutes.

The town plans to incorporate Zoom into future meetings even after large gatherings are approved by state officials. Seymour officials had installed a digital display screen into its meeting room, for showing documents and budget changes during meetings. Miller said he plans to incorporate a video stream as part of future meetings, so people can watch from home. They already record and publish videos on the town’s YouTube page, but hope to allow for more real-time participation from the public, and from board members who are unable to physically attend the meeting. These online methods could be helpful lessons for the future but also for nearby Valley municipalities since they often share various proposals and approaches with one another.

## Recommendations

This research provided a framework on how municipalities handled a sudden and dramatic shift in open meetings during Connecticut’s COVID-19 pandemic response. We focused mostly on how the public was able to engage with the process of local budget approvals in this new setting. A clear limitation to this study is that it approaches the analysis from the public official perspective, necessary to gain a broader, but consistent, understanding through the survey results. We sought to mitigate some of that potential bias by speaking to officials from the Connecticut Freedom of Information Commission, reading meeting minutes, and talking to a reporter covering one of the towns. Follow-up studies could seek to gain reactions from the residents who participated in meetings during the pandemic, and more reporters covering the virtual meetings, to compare their impressions to those of public officials across the state. There are multiple other avenues that could be explored around this topic, and leave room for future research. For example, future researchers could examine compliance with state freedom of information laws as it applies to both open

meetings and records collection. As previously noted, for example, a look at how agencies incorporate virtual meeting chats into public record would prove insightful. As the state Freedom of Information Commission has yet to review any complaints related to virtual meetings, that topic is also ripe for future study.

Despite these limitations, this study certainly provided several policy procedures and best practices about virtual meetings that public officials can adopt moving forward – though not all towns had similar experiences. As officials settle into these new means of access, we hope this research can help guide their decisions. As we continue to see limitations to in-person gatherings and as community leaders seek to retain some level of virtual meeting beyond COVID-19, we recommend public officials incorporate the following suggestions:

1. **Continue proactive disclosure** of meeting materials in advance of public meetings, as it promotes transparency and public engagement in the topic.
2. **Include virtual meeting chats in the minutes** of the meeting, either as an appendix or inserted into the relevant order the comments appeared.
3. **Continue to specifically invite the public to comment** on matters of public concern.
4. **Engage the public outside of meetings**, for example through social media accounts, to attract new voices to conversations about municipal actions.
5. **Develop consistent methods for notifying the public** and allowing access to virtual meetings, to avoid confusion from those trying to attend virtual meetings.

Three of these recommendations (minutes, public comment and notification) align with Piotrowski and Borry's policy recommendations for open meetings (2010). The four towns we examined in-depth seemed to balance Roeder's (2014) three tiers of open meetings – transparency, efficiency and public participation – based on the particular needs of that municipality. New Haven's password-protected meetings most readily served the goal of efficiency, while still allowing public access and transparency. Seymour's open chat function during virtual meetings served the goal of encouraging public participation, and reading those chat items into the record helps secure transparency of all parts of the meeting for future researchers, who may not have access to the meeting chat. It became apparent through multiple interviews that reminding residents how to participate and providing them with easier access improves participation. Guilford's large increase in public comments on the budget this year is an excellent example of this phenomenon. Residents could always email comments in the past, but no one ever invited them to do so before. Heightened concerns about finances and a loss of resident votes certainly played into this effect. But asking residents what they think without requiring them to attend a meeting was a major contributor to the influx of comments (M. Ayles personal communication, Sept. 9, 2020).

The participation of younger residents in recent protest movements indicates a desire to be part of decisions impacting their lives, a key component of local government. Officials could tap into that interest by continuing to provide multiple streams of access to public meetings, even after pandemic responses subside. Including civic education elements into local school curricula could also be impactful for future voters. As younger generations engage in online participatory practices, some municipalities will be more advanced in modern direct democracy than others. Seymour and Fairfield, where officials engage with constituents often on social media, provide two examples of where leaders are already facilitating this access.

Finally, public notification and public access are ongoing concerns facing officials, but also residents and the media. Municipalities have to be compliant with the Freedom of Information Act,

but at the same time, there is room to go beyond the requirements to help better engage the public – that proactive disclosure noted by Colleen Murphy, executive director of the Connecticut FOI Commission. Local government websites varied about virtual meeting information, links and access. While towns and cities are learning pathways and pitfalls surrounding online meetings, voters need to recognize inconsistencies and raise concerns to public officials. Similarly, the media need to work with local officials and vice versa about online meeting information. If municipalities plan to continue with virtual meetings or even consider hybrid approaches, then compliance, access and transparency will be ongoing concerns for the next fiscal year.

Despite these challenges, several interview subjects noted a true desire to be transparent during these new open meetings rules. Officials from the Connecticut Conference of Municipalities and Connecticut Freedom of Information Commission, who field questions and concerns from the public and local leaders, echoed this sentiment. “The bulk of the questions I get are aimed at doing it right,” said Tom Hennick, the public information officer for the Connecticut FOI Commission. “I really sensed that they tried to do the best they could” (personal communication, Sept. 13, 2020).

Were they legally complying with online public meetings? How do officials address residents’ participation through live discussion or online chat features? These were common issues that many municipalities faced with virtual meetings during the coronavirus era. There were few immediate answers. Connecticut Conference of Municipalities’ Joe DeLong stressed that some localities were ahead of the curve while others adapted quickly with best practices (personal communication, Sept. 2, 2020). Towns like Fairfield, for example, held effective online meetings. Their First Selectwoman admitted that residents demanded modernization and they hired savvy tech staff to plan virtual meetings before the pandemic. She also indicated that town hall lawyers were addressing legal pitfalls this year (B. Kupchick, personal communication, Sept. 23, 2020). Even local journalists noted Fairfield’s virtual online meeting abilities. “I was really impressed by the level of access in Fairfield,” notes *Fairfield Citizen*’s Joshua LaBella (personal communication, Oct. 2, 2020).

Sharing best practices and effective methods for online meetings among Connecticut’s municipalities is critical, then. With 169 local governments, there is little uniformity among so many municipalities, which prompted an opportunity here to study multiple approaches to virtual open meetings. Officials have to be prepared for compliant, but also effective, virtual meetings. There have been technical gaps among so many municipalities, and even municipalities near one another. As officials are learning the various ways of virtual democracy, hopefully they will also exchange best practices. This is especially concerning even when in-person meetings take place again, as most towns will likely adapt online meetings or consider hybrid approaches of in-person and online meetings. Connecticut FOI officials said a hybrid approach would be better than all-virtual access. “Some people say they want to do it because more people are participating. You don’t have to rush dinner to get out the door to attend a meeting. You have more people participating because they don’t need to leave the house,” said Tom Hennick. “But I think you want that in-person meeting because I think you should go face-to-face with your public officials” (personal communication, Sept. 13, 2020).

## Appendix

Table 1

### Case study town comparison

<b>Municipal details</b>	<b>Fairfield</b> is a town of about 62,000 people in Fairfield County with a Representative Town Meeting form of government, and a three-member Board of Selectmen to handle town administration.	<b>Guilford</b> is a town of about 22,000 people in New Haven County with a Board of Selectmen form of government, and a First Selectman as the chief executive officer.	<b>New Haven</b> is a city of about 130,000 people in New Haven County, with a strong mayor and Board of Alders form of government.	<b>Seymour</b> is a town of about 16,500 people in New Haven County with a Board of Selectmen form of government, and First Selectman as the chief executive officer.
<b>Budget approval process</b>	The budget is proposed by the Board of Selectmen, reviewed and revised by the Board of Finance, and finally adopted by the RTM at the Annual Town Meeting.	The budget is proposed by the Board of Selectmen and Board of Education, then reviewed and revised by the Board of Finance, and finally adopted by the public at a budget referendum.	The budget is proposed by the mayor in early March, and reviewed and finally adopted by the Board of Alders.	The budget is proposed by the First Selectman and Board of Education, reviewed by the Board of Finance, and finally presented to voters for final adoption at a referendum.
<b>Public participation</b>	The public is invited to participate during budget hearings and again as part of the RTM Annual Town Meeting.	Residents are invited to participate at several steps in the process: First at workshops by the Board of Education, followed by public hearings hosted by the Board of Finance, and then finally at the Annual Town Meeting and budget referendum.	Residents do not vote on the budget, but actively participate in the process during lively budget hearings before the Board of Alders.	In Seymour, the public can weigh in on the budget three times during the process: during public hearings, a Town Meeting, and finally, a day-long referendum vote.
<b>Key feedback</b>	Regular communication with constituents, through weekly newsletters, direct messages on social networks and calls, helped officials anticipate issues and concerns. Existing technical infrastructure and dedicated IT staff made transition to virtual meetings easier.	Actively reminding residents of the various ways they can weigh in on the budget can help increase participation in the process.	An already-engaged public won't be deterred by virtual meetings, and password protected access. Virtual meetings prompted longer engagement during public hearings. Too much open access can result in hacking.	Sharing documents with the public prior to meetings can help residents better participate in the process. Reading chat messages into record helps provide for full transparency.

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