

INNOCENCE PROJECT

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National Landscape: Public Access to Criminal Investigative Records

Summary

- **A majority of states (32) and the federal Freedom of Information Act presume public access to criminal investigative records**, unless the custodian can prove that release would interfere with ongoing law enforcement investigations or proceedings.
- **12 states use the federal standard for public access to criminal investigative records.** (*Alaska, Idaho, Maine, Maryland, Michigan, Nevada, New Hampshire, Oregon, Rhode Island, South Carolina, Utah, Vermont*). The federal law sets forth seven exemptions for disclosure of law enforcement records/information: interference with law enforcement proceedings; deprivation of the right to a fair trial; unwarranted invasion of personal privacy; disclosure of a confidential source; disclosure of law enforcement techniques or procedures; endangering life or safety of an individual.
- **18 states presume that criminal investigative files are closed.** However, Virginia is one of only four states (others are Colorado, Indiana and Mississippi) that leaves disclosure to the discretion of the law enforcement agency.

Federal Statute

5 U.S.C.A. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings [Statutory Text & Notes of Decisions subdivisions I, II] This section does not apply to:

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication.

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

Federal Case Law Defining “Ongoing investigation.” an ongoing criminal investigation typically triggers Exemption 7(A): “[S]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of that evidence, Exemption 7(A) applies.”

Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice, 746 F.3d 1082, 1098 (D.C. Cir. 2014)

States with Open Criminal Investigative Files

A total of 32 states presume that criminal investigative files are publicly accessible, unless the custodian proves that release would interfere with an ongoing law enforcement investigation, privacy or other interests.

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- 1. Alaska:** Presumed accessible unless agency demonstrates to court that disclosure "could reasonably be expected" to interfere w/law enforcement proceedings. *Public Records Act. AS 40.25.120(6)(A). Basey v. State, Department of Public Safety.*
- 2. Arizona.** Presumed accessible unless agency demonstrates in court that disclosure would violate confidentiality/privacy or be detrimental to best interests of the state. *Cox Arizona Publications Inc. v. Collins, 175 Ariz. 11, 14, 852 P.2d 1194, 1998 (1993)*
- 3. Arkansas:** Only records of "ongoing criminal investigations" are exempt. *Martin v. Musteen, 303 Ark. 656, 799 S.W.2d 540 (1990).* Cases are "closed" when police close case by administrative action or prosecutor decides not to pursue criminal charges. Court can hold hearing to determine if agency is taking action for further investigation. *Dep't of Ark. State Police v. Keech Law Firm, P.A., 2017 Ark. 143, 516 S.W.3d 265 (2017).*
- 4. Connecticut:** Investigative records must be disclosed "absent evidentiary showing that the records were to be used in a prospective law enforcement action and that the disclosure of the records would be prejudicial to such action." *Department of Public Safety, Div. of State Police v. Freedom of Information Com'n (1998) 720 A.2d 268, 51 Conn.App. 100.*
- 5. Florida:** Active investigative information is exempt. Investigative information is considered active "as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future." Fla. Stat. § 119.011(3)(d)(2) (2008).
- 6. Georgia.** Law enforcement/prosecution records in any pending investigation or prosecution of criminal or unlawful activity are exempt. An investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving such investigation and prosecution has become final or otherwise terminated. *Ga. Code Ann. § 50-18-72 (West)*
- 7. Idaho.** Exemption from disclosure for investigatory records "applies only to the extent that the production of such records would interfere with enforcement proceedings"... "the court shall order the officer or person charged with withholding the records to disclose the investigative record or show cause why he should not do so." *Idaho Code § 74-105*
- 8. Illinois.** Presumed disclosure "unless release of the records would compromise an ongoing or reasonably contemplated investigation." *5 ILCS 140/7(1)(d)*
- 9. Kentucky.** Exemption for law enforcement agency records "disclosure of the information would harm the agency...by premature release of information to be used in a prospective law enforcement action or administrative adjudication." Public records exempted...shall be open after enforcement action is completed or a decision is made to take no action. *KY ST § 61.878*
- 10. Louisiana.** Records of closed investigations are public records only after pending or reasonably anticipated litigation is finally adjudicated or settled. Determination of whether criminal litigation is "reasonably anticipated" must be made on case-by-case basis in contradictory hearing with opportunity to present evidence and examine witnesses. *La. Rev. Stat. Ann. § 44:3(A)(l), (4)*
- 11. Maine.** Presumption of disclosure unless reasonable possibility that release would "Interfere w/criminal law enforcement proceedings," or with civil proceedings conducted by district attorney or AG." ME ST T. 16 § 804
- 12. Maryland.** Custodian may deny access to a person in interest only to the extent that disclosure would interfere with a valid and proper law enforcement proceeding... Because of a person in interest's favored status, a custodian must point out precisely which of the seven grounds enumerated in § 4-351(b) justify withholding of an investigatory record and explain precisely why it would do so. *Blythe v. State, 161 Md. App. 492, 531, 870 A.2d 1246, cert. granted, 388 Md. 97, 879 A.2d 42 (2005)); see also PIA Manual, at 3-36.*
- 13. Massachusetts.** Exemption if disclosure would interfere with law enforcement proceedings. To show that disclosure of investigation records would interfere with the enforcement proceedings, "the government must

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show, by more than a conclusory statement, how the particular kinds of records would interfere with a pending enforcement investigation.” *Evening News Ass'n v. City of Troy*, 417 Mich. 481, 497 (1983); see also Mich. Comp. Laws § 15.231.

14. **Michigan.** Exemption for “(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following: (i) Interfere with law enforcement proceedings.” To show that disclosure of investigation records would interfere with the enforcement proceedings, “the government must show, by more than a conclusory statement, how the particular kinds of records would interfere with a pending enforcement investigation.” *Evening News Ass'n v. City of Troy*, 417 Mich. 481, 497 (1983) MI ST 15.243
15. **Minnesota.** Inactive case files accessible unless it would interfere with ongoing law enforcement proceeding. Cases are inactive if (a) prosecutor decision not to pursue the case; (b) expiration of time to bring a charge/file a complaint under statute of limitations or 30 years from criminal offense; (c) exhaustion of expiration of all rights of appeal by convicted person. MN ST § 13.82
16. **Missouri.** Notwithstanding any other provision of law other than the provisions of subsections 4, 5 and 6 of this section or section 320.083, mobile video recordings and investigative reports of all law enforcement agencies and any reports or records...are closed records until the investigation becomes inactive. Inactive”, an investigation in which no further action will be taken by a law enforcement agency or officer for any of the following reasons: (a) A decision by the law enforcement agency not to pursue the case; (b) Expiration of the time to file criminal charges pursuant to the applicable statute of limitations, or ten years after the commission of the offense; whichever date earliest occurs; (c) Finality of the convictions of all persons convicted on the basis of the information contained in the investigative report, by exhaustion of or expiration of all rights of appeal of such persons. Mo. Ann. Stat. § 610.100
17. **Nevada.** Provides for disclosure law enforcement records, unless privacy or law enforcement policy justifications meaning...pending/anticipated criminal proceedings. N.R.S. 239.010.11 *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990)
18. **New Hampshire.** Agency may exempt from disclosure records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...could reasonably be expected to interfere with enforcement proceedings. *Murray v. New Hampshire Division of State Police*, 913 A.2d 737, 740 (N.H. 2006)
19. **New Mexico.** Statute states exemptions apply to inactive matters or closed investigations to the extent that they contain the information listed in this subsection; N.M. Stat. Ann. § 14-2-1.
20. **New York.** An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. N.Y. Pub. Off. Law § 87(2)(e)(i) (*McKinney 1988*).
21. **North Carolina.** The law enforcement agency shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. N.C. Gen. Stat. Ann. § 132-1.4
22. **North Dakota.** Active criminal intelligence information and active criminal investigative information are not subject to public release Criminal investigative information must be considered “active” as long as it is related to an ongoing investigation that is continuing with a reasonable good-faith anticipation of securing an arrest or prosecution in the foreseeable future. N.D. Cent. Code Ann. § 44-04-18.7 (*West*)
23. **Ohio.** Investigatory work product is exempt from disclosure in active law enforcement investigations. The exemption for specific investigatory work-product ceases to apply to investigatory records once the trial for which the records were generated is over. *State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 89 N.E.3d 598, 2016-Ohio-8394)OH ST § 149.43

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24. **Oregon.** Uses federal balancing test. Where there was no possibility that disclosure of certain report would interfere with law enforcement proceedings or deprive a person of a fair trial, where the report dealt primarily with the conduct of public servants in the performance of their duties, where there was no evidence that the report contained confidential information, where nothing in the report revealed other than routine investigative procedures already well known to the public, and where there was no indication in the report that disclosure would endanger law enforcement personnel, report of sheriff's department following investigation of city police department was not exempt from disclosure. *ORS 192.500(1)(c). Jensen v. Schiffman, 24 Or. App. 11, 544 P.2d 1048 (1976)*
25. **Rhode Island.** Records for criminal law enforcement including "all records relating to the investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency" are generally excluded from disclosure only to the extent that disclosure could interfere with criminal investigation or enforcement proceedings, would deprive a person of a fair trial or impartial proceedings, could reasonably be expected to disclose a confidential source, would disclose investigation or prosecution techniques or procedures, or could endanger the life or safety of an individual. *R.I. Gen. Laws § 38-2-2(4)(D).*
26. **South Carolina.** Exemption for "records, video, audio or other information compiled for law enforcement purposes, but only to the extent it would...interfere w/prospective law enforcement proceeding. *S.C. Code Ann. § 30-4-40(a)(3).*
27. **Texas.** (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;
28. **Tennessee.** Records related to active investigations are closed. Records related to closed investigations are open. *Memphis Publishing Co. v. Holt, 710 S.W.2d 513 (Tenn. 1986).*
29. **Utah.** Access to investigatory records may be restricted if release of such records (1) reasonably could be expected to interfere with the investigation. *Utah Code § 63G-2-305(10)*
30. **Vermont.** Records dealing with the detection and investigation of crime are exempt from disclosure, but only to the extent that the production of such records... could reasonably be expected to interfere with enforcement proceedings." *V.S.A. § 317(c)(5).*
31. **Washington.** Specific investigative records are exempt if nondisclosure is essential to law enforcement or to protect a person's right to privacy. The exemption covers only ongoing investigations, and once the investigation is complete, the records are open. *RCW 42.56.240(1). Ashley v. Public Disclosure Comm'n, 16 Wn. App. 830, 560 P.2d 1156, review denied, 89 Wn.2d 1010 (1977. Hearst, 90 Wn.2d 123.)*
32. **Wisconsin.** Non-disclosure may be justified under the balancing test, on a case-by-case basis, if the custodian can show "that disclosure would interfere with an ongoing investigation. When an investigation is closed and no prosecution or disciplinary action is either ongoing or contemplated, there is no risk that releasing a police report will interfere with an enforcement proceeding or jeopardize anyone's right to a fair trial. *Linzmeier v. Forcey, 2002 WI 84 ¶ 39, 254 Wis. 2d 306, 331, 646 N.W.2d 811, 821. Wis. Stat. § 48.396(1).*

States that Presume Criminal Investigative Files Are Closed to Public

1. Alabama Ala. Code § 12-21-3.1(b)
2. California Cal. Gov't Code § 6254(f).
3. Colorado Colo. Rev. Stat. § 24-72-304(1) **At agency discretion**
4. Delaware Del. Code Ann. tit. 29, § 1000

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5. Hawaii Haw. Rev. Stat. § 92F-14(b)(2)
6. Indiana Indiana Code Section 5-14-3-4(b)(1), **At agency discretion**
7. Iowa Iowa Code Ann. § 22.7
8. Kansas K.S.A. 45-221(a)(10).
9. Mississippi Miss. Code. Ann. § 25-61-12 (West) **At agency discretion**
10. Montana Mont. Code Ann. §§ 44-5-101 to -515
11. Nebraska Neb. Rev. Stat. Ann. § 84-712.05
12. New Jersey N.J.S.A. 47:1A-1.1
13. Oklahoma O.S. § 24A.12.
14. Pennsylvania 65 Pa. Stat. Ann. § 67.708(b)(16)(vi)
15. South Dakota SDCL §§1-27-1.5 (5) and 23-5
16. Virginia **At agency discretion**
17. West Virginia W. Va. Code Ann. § 29B-1-4
18. Wyoming Wyo. Stat. Ann. § 16-4-203