

Public Records Law

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Introduction/Agenda

- Disclaimer
 - No legal advice
 - Broad overview
 - Personal thoughts
- Agenda
 - Overview
 - Purpose
 - Mechanics
 - LPRL 101
 - When does the LPRL apply?
 - What is required of a custodian?
 - How do we enforce the LPRL?
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 - Exceptions and Exemptions
 - Accessing Records and Fees
 - Large Requests
 - Databases
 - Records Management



Overview

Louisiana Department of Justice



Purpose

No person shall be denied the right to observe the deliberations of public bodies and *examine public documents*, except in cases established by law.

La. Const. Art. XII, § 3



Mechanics

- La. Const. Art. XII, § 3: “except in cases established by law.”
- Title 44: Public Records and Recorders
- Chapter 1: Public Records
- La. R.S. 44:1.1: Chapter 1 = Public Records Law
- La. R.S. 44:4.1— “In order to foster the people’s awareness, the legislature declares that all exceptions, exemptions, and limitations to the laws pertaining to public records **shall be provided for in this Chapter or the Constitution of Louisiana**. Any exception, exemption, and limitation to the laws pertaining to public records not provided for in this Chapter or in the Constitution of Louisiana **shall have no effect**.”
- Interpretive Canon: Exemptions must be narrowly construed, with any doubt resolved in favor of the public’s right of access. *Landis v. Moreau*, 779 So.2d 691 (La. 2001).

When in doubt, let it out!



Public Records Law 101

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When does the LPRL kick in?

- **When a requestor**

- La. R.S. 44:31(B)(1) age requirement; *Lewis v. Morrell* person requirement, 215 So.3d 737, 742 (La.App. 4 Cir. 4/5/17).

- **Makes a request**

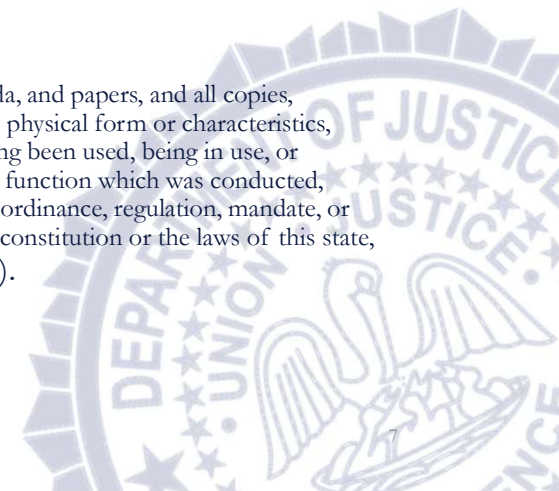
- Nothing in the law requires a writing, but a writing is necessary for legal action. *See* La. Atty. Gen. Op. 17-0056.
- Note about inquiries*

- **To a custodian**

- “[T]he public official or head of any public body having custody or control of a public record” or his written designee. La. R.S. 44:1(A)(3).
- Public bodies include any instrumentality of state, parish, or municipal government, such as agencies, boards, commissions, districts, subcommittees, task forces, etc. La. R.S. 44:1(A)(1).

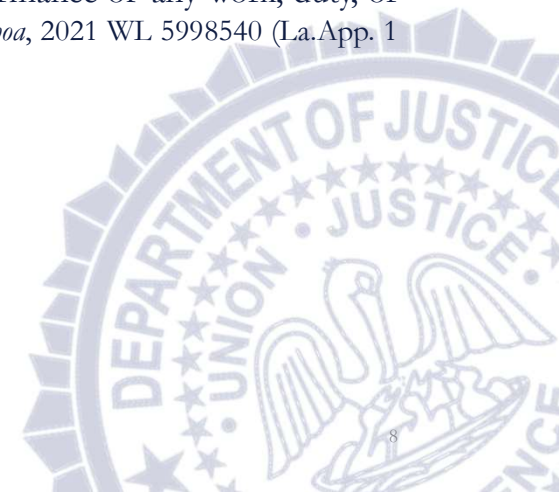
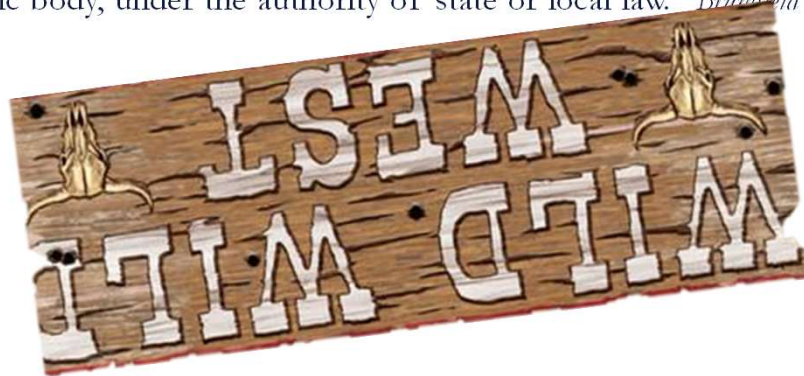
- **For a public record**

- All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including electronically stored information or information contained in databases or electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are “public records”, except as otherwise provided in this Chapter or the Constitution of Louisiana. La. R.S. 44:1(A)(2)(a).



FAQs about Electronic Records and “Public” Records

- Questions and requests for information
- Email
 - Personal communications unrelated to public business are not public even if sent on a public email account. La. Atty. Gen. Op. No. 10-0272.
 - Public business communications conducted on private email accounts and devices are public record. La. Atty. Gen. Op. No. 01-155.
- Text messages
 - “[A] ‘public record’ would also include a text message, if that text message is used in the performance of any work, duty, or function of a public body, under the authority of state or local law.” *Brunfeld v. Village of Tangipahoa*, 2021 WL 5998540 (La.App. 1 Cir. 12/20/2021).



What are custodian's duties after receiving a request?

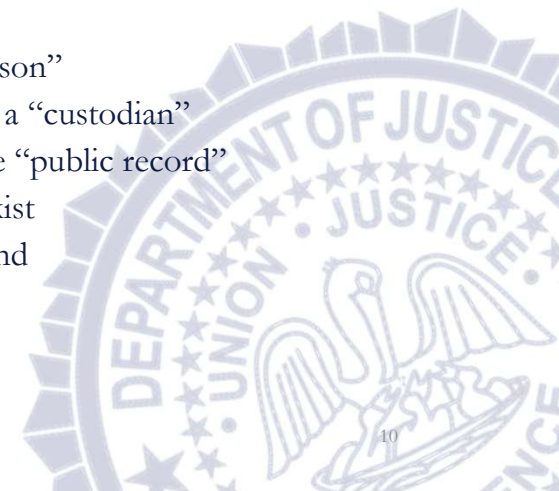
- **Respond** to the request with :
 - The record
 - If applicable, a written response
- **Within the timeframe:**
 - Within five working days from receipt of request (La. R.S. 44:35)
 - If applicable, immediately

Always
write!



Enforcement

- La. R.S. 44:35
 - Grounds:
 - Denied access to records by custodian's final determination
 - Denied access to records by custodian's failure to respond
 - Method (always summary):
 - **Writ of mandamus**
 - Injunctive relief
 - Declaratory relief
 - Financial recoupment:
 - Attorneys fees and costs
 - Damages
 - Unreasonable, arbitrary or capricious standard
 - Penalties
 - Unreasonably or arbitrarily fails to respond
- La. R.S. 44:37
 - Grounds:
 - Person violates Chapter
 - Person conspires to hinder right to access
 - Arbitrary or Capricious Standard
 - First Conviction includes fines up to \$1,000 and 6 months imprisonment
- *Lewis v. Morrell* requirements
 1. Request must be made
 2. Requestor must be a "person"
 3. Request must be made to a "custodian"
 4. Record requested must be "public record"
 5. Record requested must exist
 6. Custodian failed to respond



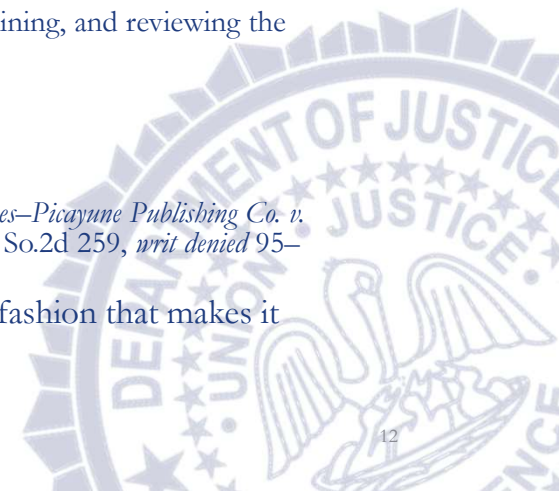
Public Records Law 102

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Major Duty: Responding to Requests

- Timeframe:
 - Within five working days from receipt of request (La. R.S. 44:35)
 - If applicable, immediately
- Deliverables:
 - The record
 - If applicable, a written response
- Written response needed:
 - **When withholding an exempt record** (La. R.S. 44:32(D))
 - You must provide a citation to the exception, exemption, or limitation
 - **When processing the request will take longer than five days** (La. R.S. 44:35(A))
 - You must provide a reasonable estimate of completion of work (collecting, segregating, redacting, examining, and reviewing the records)
 - When a record is not immediately available because it's in active use (La. R.S. 44:33(B)(1))
 - You must fix a day and hour within three days to have the requestor's right exercised
 - When a record is absent (not in your custody or control) (La. R.S. 44:34)
 - You must provide answers, to the best of your knowledge, to help the requestor find the record. *See Times–Picayune Publishing Co. v. Johnson*, 94–0790 (La.App. 4 Cir. 10/3/94), 645 So.2d 1174, *writ not considered* 95–0212 (La.3/17/95), 651 So.2d 259, *writ denied* 95–0083 (La.3/17/95), 651 So.2d 260.
 - When segregating a record is unreasonably burdensome or expensive, or if it is maintained in a fashion that makes it readily identifiable and renders further segregation unnecessary (La. R.S. 44:33(A)(2))
 - You must state the location of the record.



Exceptions and Exemptions

Know your exceptions!

- Statutory Exceptions
 - 44:2: Records involved in legislative investigations
 - Records in the custody/control of the legislature [either house, committee, or officer]. 44:2(A)(1).
 - Case, cause, charge or investigation **until final disposition**. 44:2(A)(3).
 - Exceptions
 - Confidential source of information – only upon court order for due process or constitutional law. 44:2(A)(2).
 - Confidential or privileged information regarding nominations or appointments. 44:2(B)(1).
 - Does not apply to information relevant to the education, employment history, or work experience of an appointee or nominee. 44:2(B)(2).
- Privilege
 - La. R.S. 44:4.1(C)
 - L.C.E. Art. 506
 - Deliberative Process Privilege
 - “Confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government.” *La. Dep’t of Ins. v. Theriot*, 64 So. 3d 854 (La. App. 1 Cir. 5/3/11).
 - *Janvey v. Adams & Reese, LLP*, 2015 WL 2453730, at *2 (M.D.La. May 22, 2015).

Exceptions and Exemptions

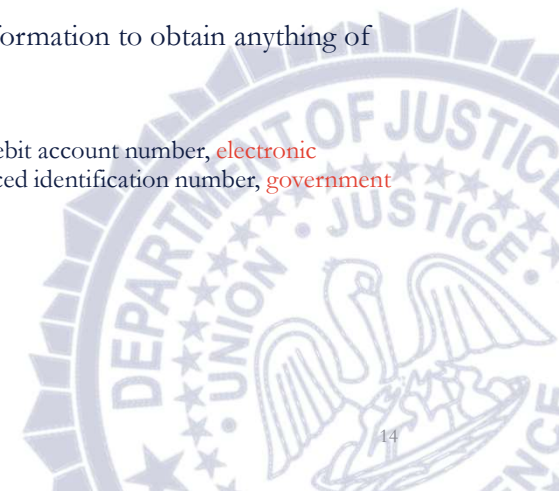
- Constitutional Privacy Right (La. Const. Art. I, § 5)

- Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or **invasions of privacy**...
- Three things to consider
 - Does the individual have a subjective expectation of privacy in this information?
 - Is this expectation of privacy one that society at large is prepared to recognize as reasonable (objective)?
 - Does this privacy interest get outweighed by the public's constitutional interest in access to that information?

Capital City Press v. East Baton Rouge Metro. Council, 696 So.2d 562, 566.

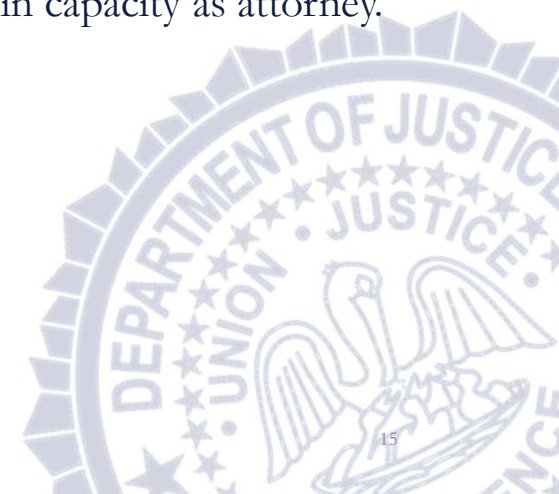
- Constitutional Privacy Right in Practice:

- La. R.S. 14:67.16(B): Identity theft is the intentional use with fraudulent intent of any personal identifying information to obtain anything of value without the other person's consent.
- La. R.S. 14:67.16(A)(4): Personal identifying information includes but is not limited to a person's:
 - Social security number, drivers license number, checking account number, savings account number, credit card number, debit account number, **electronic identification number, digital signature number, birth certificate number, date of birth, mother's maiden name**, armed forced identification number, **government issued identification number**, financial institution account number



A note on privacy: La. R.S. 44:42

- Provides for custodian's immunity from suit for invasion of privacy
- Comes in after custodian releases "private" information about individual
- Immunity gives custodian presumption of innocence
- Requires:
 - Custodian to act on advice of counsel.
 - If custodian is an attorney, upon the custodian's own diligent determination in capacity as attorney.



LPRL 103

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Large Requests

- 44:33(A)(2)
 - Segregating the record is unreasonably burdensome or expensive
 - Given the particular facts and circumstances of that case, the volume of the records requested and the manner in which the files were categorized, the city was able to demonstrate that segregating ten years of internal investigative files would be unreasonably burdensome. *Beckett v. Serpas*, 112 So. 3d 348, 353 (La. App. 4 Cir. 3/20/13).
- 44:32(A)(2)
 - Act 770- “substantially disrupt required government operations”
 - After reasonable attempts to narrow or specify

Determine your disruption threshold



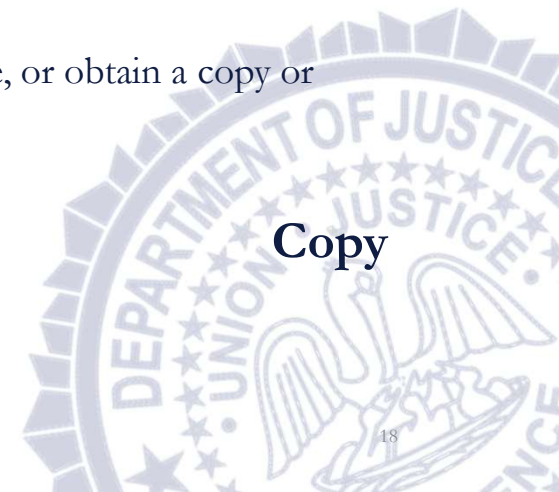
Exercising the Right to “Examine Public Documents”

- La. Const. Art. XII, section 3: “No person shall be denied the right...to examine public documents...”
- La. R.S. 44:31(B)(1): “...any person of the age of majority may inspect, copy, or reproduce any public record.”
- La. R.S. 44:31(B)(2): “...any person may obtain a copy or reproduction of any public record.”
- La. R.S. 44:35(A): “Any person who has been denied the right to inspect, copy, reproduce, or obtain a copy or reproduction of a record...”

Inspect

Reproduce

Copy



Inspecting Records

- Custodian must extend “all reasonable comfort and facility.”
- Custodian may do what is necessary to prevent alteration of any record
- Requestor is limited to regular office or working hours
- Custodian may offer examination outside hours, and is entitled to reasonable compensation



Reproducing or Copying records

- See next slide



Fees (44:32)

- Providing public records is a duty and service you offer
- Can't charge for the time to process the request
- Can't charge people to examine or review records
- Can't charge someone for bringing their own scanner
- CAN charge for copying
 - State agencies (Administrative Code)
 - Non-state agencies (reasonable)
- CAN charge for the transmission of electronic copies of public records (non-state agencies)
 - **Need fee schedule posted (Acts 2023, No. 247)
- Timing of payment



Electronic Records

• Database Information

- **1996**—*Brown v. Nungesser*, 667 So.2d 1036 (La. 1996).
 - “Nungesser requested a list which did not exist. Brown was not required to produce a list which did not exist and properly refused Nungesser’s request.” *Id.* at 1037.
- **2004**—*Williams Law Firm v. Board of Sup’rs of LSU*, 878 So.2d 557 (La.App. 1 Cir. 4/2/04).
 - IT expert testified that data could be retrieved “using just ‘four click of a mouse.’ Once in those formats, simple queries would produce the information...” *Id.* at 569.
 - “If it did not have that information, it could not use it to compile the annual report for the Office of Public Health...” *Id.* at 571.
- **2014**—*Cox v. Bello*, 2014 WL 7332041, 2014-0759 (La.App. 1 Cir. 12/23/14).
- **2022-2023**—FIVE Zillow appeals
 - Production is mandated, not the format.
 - Custody and control issues



Records Management

Louisiana Department of Justice



Minor Duties

- Make contact information available to the public (La. R.S. 44:33.1)
- **Preserve records** (La. R.S. 44:36)



Records Management

1. Attend Louisiana Secretary of State's Records Management Training program
2. Appoint a records officer
3. Designate coordinators
4. Submit a retention schedule
5. Submit a disposal request
6. After approval, dispose of records

*Use a records management inventory

*Submit an electronic records survey



Other Records Management Tips

- General awareness as to creating records
- Develop policies from that awareness
 - Professionalism
 - Records management
 - Responses to public records requests
 - Handling confidential information



Lagniappe: SCOTUS

Louisiana Department of Justice



In Re Grand Jury (2022 case)

Is a communication involving both legal and non-legal advice protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication?



O'Connor-Ratcliff v. Garnier and Lindke v. Freed

Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.

Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.



Questions or concerns

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Louisiana Department of Justice



