

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

ALABAMA

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



OPEN GOVERNMENT GUIDE  
OPEN RECORDS AND MEETINGS LAWS IN  
**ALABAMA**

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## **ALABAMA**

**SIXTH EDITION  
2011**

Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.





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**FOREWORD**

Before the enactment of section 2695 of the Alabama Code of 1923, there was no statutorily protected right of access to public records in Alabama. See *Excise Comm'r of Citronelle v. State ex rel. Skinner*, 179 Ala. 654, 60 So. 812 (Ala. 1912). At common law, however, the records of judicial proceedings were open to inspection by any citizen, and there was a qualified common law right of access to nonjudicial records. 60 So. at 813. The Supreme Court of Alabama described the qualified right of access to nonjudicial public records as follows:

With respect to records other than judicial, no statute to the contrary intervening, the public generally have no absolute right of access or inspection. And one who demands that right can be properly required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose. But, for the public and for individuals showing such a right, the custodian of official documents is a trustee; and while he may and should preserve them against impertinent intrusion, he should allow ready access to those who have an interest in them, and who claim access for the purpose of promoting or protecting it.

60 So. at 813. Furthermore, the court defined “interest” broadly, as follows:

[I]f the document may furnish evidence or information relative to any action or proceeding which [the requester] is qualified to bring, or which he may be called upon to defend, whether actually pending or not, he is entitled to such inspection. And “it is not necessary that the interest be private, capable of sustaining a suit or defense on the personal behalf of the party desiring the inspection; but he has the right of inspection whenever, by reason of his relation to the common interest, he may act in such a suit as the representative of a common or public right.”

60 So. at 813-14 (citations omitted). See also *Brewer v. Watson [Brewer III]*, 71 Ala. 299, 303 (1882) (“We regard it as settled, that the book kept by the auditor, in obedience to the requirement of the statute, in which he enters the accounts of tax collectors with the State, is a public writing or record, subject to the inspection of any citizen having a legitimate interest, which an inspection will subserve.”).

When the Alabama Code of 1923 was adopted, the State’s first open records statute provided as follows: “Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.” Ala. Code § 2695 (1923). This provision continued unchanged until 1983, when the Alabama Legislature added a proviso exempting from public access the registration and circulation records of public, public school, and college and university libraries. Another change came in 2004, when the law (hereinafter “the Public Records Law”) was amended to exempt records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation, information concerning critical infrastructure and critical energy infrastructure information,

the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public. Ala. Code § 36-12-40 (Supp. 2005).

When compared to other states’ public records statutes, section 36-12-40 is a sweeping statement of public policy concerning the right of citizens to inspect public records. Because of its breadth, however, the law regarding access to public records in Alabama has received substantial gloss by judicial decision, with the Alabama Supreme Court recognizing a number of possible grounds for denying access even where there is no express statutory provision for doing so. See *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (1981) (establishing the basic grounds for possible withholding of records absent an express statutory basis for doing so). The Court also has insisted that these possible grounds of exclusion be narrowly construed, however, so that the Public Records Law will continue to be liberally applied in favor of public access. See *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989).

The right of access to public meetings in Alabama was first guaranteed by legislative enactment in 1915 and became sections 5254 and 5255 of the Alabama Code of 1923. Section 5254 provided that

[n]o executive or secret session shall be held by any of the following named boards, commissions or courts of Alabama, namely: The Alabama public service commission, school commissions of Alabama, the state board of administration, board of compromise of Alabama, state or county tax commissions of Alabama, any court of county commissioners or board of revenue, any city commission or municipal council, or any other body, board or commission in the state charged with the duty of disbursing any funds belonging to the state, county or municipality, or board, body or commission to which is delegated any legislative or judicial function; except that executive or secret sessions may be held by any of the above named boards or commissions when the character or good name of a woman or man is involved.

Section 5255 provided that persons who violated section 5254 would be guilty of a misdemeanor and would be fined not less than \$10 nor more than \$500. The 1923 statutes were combined into a single statute in 1975, Ala. Code § 13-5-1 (1975), and the provisions of the 1923 Code remained, almost verbatim, at § 13A-14-2 (1994) of the Alabama Code until 2005.

In March 2005, the Alabama Legislature passed the Alabama Open Meetings Act, which took effect on Oct. 1, 2005, and repealed § 13A-14-2. See Ala. Code § 36-25A-1 *et seq.* (Supp. 2005). The Alabama Open Meetings Act provides a much higher level of detail than the former open meetings law, and while it provides more exceptions than the former law, it has also tightened judicially created loopholes in the former law. By setting out the law in more detail, the Alabama Open Meetings Act reduces the need for court interpretation and, therefore, should avoid court rulings similar to those that rendered the former law less effective.

Alabama’s Public Records Law and the Alabama Open Meetings Act are reproduced in their entirety in the appendix to this Alabama outline. In addition to these general statutes, the Alabama Code, Constitution, and Administrative Code contain specific provisions regarding access to particular records and meetings. Most of the specific provisions that call for public access are redundant (since the meetings and records in question would be open under the general statutes) or are circular. See, e.g., 10 Ala. Admin. Code r. 450-1-1-.09 (Supp. June 30, 1991) (“All public records of the Highway Department shall be available for public inspection except those specifically exempted by Alabama statute.”). The specific provisions that call for confidentiality, and many of the specific provisions that call for public access, are noted in the applicable categories of the Alabama outlines below.

# Open Records

## I. STATUTE — BASIC APPLICATION

The primary legislative statement regarding the right of individuals to inspect and copy public records of the State of Alabama is contained in Alabama Code § 36-12-40 (Supp. 2005), as follows:

Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute. Provided, however, registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state shall be exempted from this section. Provided further, any parent of a minor child shall have the right to inspect the registration and circulation records of any school or public library that pertain to his or her child. Notwithstanding the foregoing, records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation information concerning critical infrastructure (as defined at 42 U.S.C. § 5195c(e) as amended) and critical energy infrastructure information (as defined at 18 C.F.R. § 388.113(c)(1) as amended), the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section. Any public officer who receives a request for records that may appear to relate to critical infrastructure or critical energy infrastructure information, shall notify the owner of such infrastructure in writing of the request and provide the owner an opportunity to comment on the request and on the threats to public safety or welfare that could reasonably be expected from the public disclosure of the records.

In *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981), the Supreme Court of Alabama defined “public writing” to include both

- a. “all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business and shall also include any record authorized to be made by any law of this state belonging or pertaining to any court of record or any other public record authorized by law or any paper, pleading, exhibit or other writing filed with, in or by any such court, office or officer,” Ala. Code § 41-13-1 (2000), and
- b. “such a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens.” 404 So. 2d 678, 680-81 (Ala. 1981) (emphasis in original). See also *Walsh v. Barnes*, 541 So. 2d 33, 35 (Ala. Civ. App. 1989) (referring to and applying the two *Stone* standards — the stricter standard (“required by law to be kept”) and the lesser standard (“reasonably necessary”).

Two additional statutes specifically require public officers and servants to make and keep records and to produce those records upon request, as follows:

- a. “All public officers and servants shall correctly make and accurately keep in and for their respective offices or places of business all such books or sets of books, documents, files, papers, letters and copies of letters as at all times shall afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant and from which the actual status and condition of such activities and business can be ascertained without extraneous information . . .,” Ala. Code § 36-12-2 (2001); and

- b. “Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor . . .,” Ala. Code § 36-12-41 (2001).

The Supreme Court of Alabama also established the following rules of statutory construction, presumptions, and burden of proof for the Public Records Law:

- a. “It is clear from the wording of § 36-12-40 that the legislature intended that the statute be liberally construed,” *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856 (Ala. 1989);
- b. “There is a presumption in favor of public disclosure of public writings and records expressed in the language of § 36-12-40,” 552 So. 2d at 856; and
- c. “[B]ecause there is a presumption of required disclosure, the party refusing disclosure shall have the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them,” 552 So. 2d at 856-57.

### A. Who can request records?

#### 1. Status of requestor.

By the express terms of the Alabama Public Records Law, the right to inspect and take a copy of public writings of the State of Alabama inures to the benefit of every citizen. See *Scott v. Culpepper*, 220 Ala. 393, 393-94, 125 So. 643, 644 (1930) (The law “gives every citizen a right to inspect and take a copy” of public records.). Although the statute does not contain a definition of the term “citizen,” that term probably indicates that the statute was intended to apply to United States citizens, since the Alabama Legislature could easily have limited the statute to citizens of Alabama by express language but did not do so. However, there is no reported case in Alabama in which a citizen of another state has sought to invoke the provisions of the statute. Because the statute expressly provides for right of access of “citizens,” by standard rules of statutory construction foreign nationals would not have a right of access under the statute.

In *Person v. State Dep’t of Forensic Sciences*, 721 So. 2d 203 (Ala. Civ. App. 1998), the Court of Civil Appeals held that although § 36-12-40 gives every citizen the right to inspect and to copy public records, it does not require that state agencies make copies of the records and mail them to prisoners who have asked to review them. Furthermore, the Court held, the Department of Forensic Sciences can require an inmate to give reasonable grounds for wanting to inspect public records relating to protocols for drug testing to ensure that the inmate wants the information for a legitimate or proper purpose. *Id.* at 205.

The “news media” have a right of access under Alabama’s Public Records Law, whether the requester is a company or corporation or other business form. See *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981) (by implication). A professional organization has standing to bring suit for access to public records under the law, *Birmingham Education Ass’n v. Birmingham City Bd. of Educ.*, CV 4-637 at 2-3 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995) (“BEA, and any other citizen, is a proper plaintiff with standing to seek [records under Alabama’s Public Records Law].”), as does a requester who seeks access to public records for “a commercial purpose,” *Walsh v. Barnes*, 541 So. 2d 33, 35 (Ala. Civ. App. 1989) (Alabama’s Public Records Law “makes no distinction between disclosure for profit or otherwise.”).

#### 2. Purpose of request.

The Alabama Public Records Law contains no provision with respect to whether a requester’s purpose can affect the right of access to public writings. In *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941), the Alabama Supreme Court ruled that although the public has the right of a reasonable and free examination of public records, this privilege does not exist where “the purpose is purely speculative or from idle curiosity.” *Holcombe*, 200 So. at 746. The *Holcombe*

court expressly recognized the legitimacy of media interest in public records, however, as follows:

[P]ersons engaged in the publication of newspapers have such an interest in the public records of public officers as to entitle them to a due or reasonable inspection of such public records. The function of the press in gathering information for the public to enable public affairs to be intelligently discussed is of great importance.

240 Ala. at 597, 200 So. at 746.

Alabama courts have also recognized the legitimacy of commercial purpose in a request for access to public records. The Alabama Court of Civil Appeals has noted that § 36-12-40 “makes no distinction between disclosure for profit or otherwise,” and that court refused to create a distinction where the statute had not. *Walsh v. Barnes*, 541 So. 2d 33, 35 (Ala. Civ. App. 1989) (“[t]here is no exception under § 36-12-40 disallowing one to inspect or copy public writings simply because one desires to use such for personal gain;” insurance agent entitled to copy of retirement system’s actuarial tables).

A 1991 decision of the Supreme Court of Alabama affirmed the right of the custodian of public records in the City of Hoover to require the requester to complete a written request form that includes (1) specification of the documents sought and (2) the reasons for the document request. *Blankenship v. City of Hoover*, 590 So. 2d 245 (Ala. 1991). As a concurring/dissenting justice pointed out in a separate opinion in that case, the mere fact of asking for a reason for the request could have a chilling effect on the right of access to public records. 590 So. 2d at 251-52 (Adams, J., concurring in part and dissenting in part). Members of the news media have been granted access to public records routinely, however, since the City of Hoover began requiring the written request form, simply by identifying their reason as “public records request pursuant to Alabama law” or some similar statement.

More recently, the Supreme Court of Alabama has held “a requester is not required to demonstrate good cause before he or she is entitled to inspect public writings.” *Ex parte Perch*, 17 So. 3d 649, 651 (Ala. 2009) (holding that an inmate did not have prove that his requests for public records were relevant or necessary for him to challenge the validity of his conviction).

**Rule 33** of the Alabama Rules of Judicial Administration provides that a requester of computer-based information that is maintained by the Administrative Office of Courts (“AOC”) must supply the following information, which will be used in evaluating the request:

- (1) Identifying information concerning the applicant;
- (2) Statement of the exact information requested;
- (3) Statement of the reasons the information is sought;
- (4) Statement of the intended use; and
- (5) Statement as to whom the information will be distributed or disclosed.

Computer-based information about pending cases is available online, however, through the State’s ALALINC system, for an annual user fee, with no inquiry as to the purpose of the request for ALALINC service.

### 3. Use of records.

The Alabama Public Records Law does not restrict the manner in which the information obtained from public records may be used. Rule 33 of the Alabama Rules of Judicial Administration requires a requester to state, among other things, “the intended use” of the requested information when a requester seeks access to computer-based information that is maintained by the Administrative Office of Courts (“AOC”). “Intended use” is also a factor used by the AOC in evaluating the request and thus might be grounds for refusing the request. Computer-based information about pending cases is available online,

however, through the State’s ALALINC system, for an annual user fee, with no inquiry as to the purpose of the request for ALALINC service.

### B. Whose records are and are not subject to the act?

The Alabama Public Records Law does not classify or list those of officers and entities that are or are not subject to its provisions. Other statutes, however, require “[a]ll public officers and servants” to make and keep such records “as at all times shall afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant and from which the actual status and condition of such activities and business can be ascertained without extraneous information,” Ala. Code § 36-12-2 (2001), and “[e]very public officer having custody of a public writing which a citizen has a right to inspect” to make a certified copy available on demand “on payment of the legal fees therefor,” Ala. Code § 36-12-41 (2001).

Furthermore, section 36-12-1 defines “public officer or servant” broadly as including, “in addition to the ordinary public offices, departments, commissions, bureaus and boards of the state and the public officers and servants of counties and municipalities, all persons whatsoever occupying positions in state institutions.” See also *Scott v. Culpepper*, 220 Ala. 393, 393, 125 So. 643, 643 (1930) (“[E]very one who is appointed to discharge a public duty and receives compensation therefor, in whatever shape, is a ‘public officer’;” applying Public Records Law). The Public Records Law, or its predecessor, has been applied to the entities and officers listed by category below.

#### 1. Executive branch.

##### a. Records of the executives themselves.

Records of the executives themselves (governor, mayor, etc.) are presumptively subject to the Public Records Law, although the Law itself is silent on this point.

##### b. Records of certain but not all functions.

Records of all functions of the executive branch are presumptively subject to the Public Records Law, although the Law itself is silent on this point.

1. All executive bodies are presumptively subject to the Law, although the Law itself is silent on this point. Court decisions have applied the Law, or common law prior to enactment of the 1923 Public Records Law, to the following executive bodies or officers, among others:

a. *City*: Expense vouchers and related records. *Burnham Broad. Co. v. City of Mobile*, CV 92-2752 (Cir. Ct. of Mobile County, Ala., Aug. 4, 1992).

b. *County commission and county personnel department*: Applications for water and sewer commissioner. *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989).

c. *County registrar of births and deaths*: Death certificate. *Scott v. Culpepper*, 220 Ala. 393, 125 So. 643 (1930).

d. *County sheriff*: Jail docket and blotter. *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941); incident/offense reports, *Washington County Publications Inc. v. Wheat*, No. CV-99-94M (Cir. Ct. of Washington County, Ala., May 1, 2000); pistol licenses, *TV Alabama Inc. v. Woodward*, Civil Action No. 9707688, Dec. 17, 1997) (order by consent).

e. *Mayor and civil service board*: Civil service board minutes and records of business. *International Ass’n of Firefighters v. City of Sylacauga*, 436 F. Supp. 482, 487-88, 491-92 (N.D. Ala. 1977)

f. *Municipal chief of police*: Arrest reports. *Birmingham News Co. v. Deutch*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986) (by implication).



See also *Birmingham News Co. v. Watkins*, CV 38389 (Cir. Ct. of Jefferson County, Ala., Oct. 30, 1974) (rejecting Public Records Law as basis for access, but finding First Amendment newsgathering right of access).

g. *Municipal excise commission*: Recommendation for an applicant for a liquor license. *Excise Commission of Citronelle v. State ex rel. Skinner*, 179 Ala. 654, 657-58, 60 So. 812, 813 (1912) (nonjudicial records open only to those with interest in them).

h. *Municipal finance department*: Internal audit reports. *Beddingfield v. Birmingham News Co.*, 595 So. 2d 1379 (Ala. 1992) (affirming *Birmingham News Co. v. Beddingfield*, CV 91-1803 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., May 2, 1991)).

i. *State Auditor*: Tax ledger. *Brewer v. Watson [Brewer I]*, 61 Ala. 310, 311 (1878) (books in executive department open only to those who have interest in them and when the disclosure sought would not be detrimental to the public interest).

j. *State Board for Registration of Architects*: Registration examinations of successful candidates. *Munger v. State Board for Registration of Architects*, 607 So. 2d 280 (Ala. Civ. App. 1992).

k. *State Department of Corrections*: Prison incident reports. *Allen v. Barksdale*, 32 So. 3d 1264 (Ala. 2009).

l. *State Department of Forensic Science*: Equipment records. *Ex parte State of Alabama*, 985 So. 2d 446 (Ala. 2007).

m. *State Department of Industrial Relations*: Internal regulations, procedures, and deadlines. *Shoemaker Pal v. Ala. Dept. of Indus. Relations v. Kennedy*, CV 07-900154 (Cir. Ct. of Montgomery County, Alabama June 28, 2007). H2-B visas. *Southern Poverty Law Ctr. v. Kennedy*, CV 06-787 (Cir. Ct. of Montgomery County, Sept. 26, 2006).

n. *State Director of Finance*: Remote access telephone records for State Legislature. *Birmingham News Co. v. Swift*, CV 88-1390 G (Cir. Ct. of Montgomery County, Ala., Sept. 7, 1988).

o. *State teachers' retirement system*: Actuarial tables used in calculating teachers' retirement benefits. *Walsh v. Barnes*, 541 So. 2d 33 (Ala. Civ. App. 1989).

p. *State Personnel Department*: Records relating to hiring and training. *Graham v. Ala. State Employees Ass'n*, 991 So. 2d 710 (Ala. Civ. App. 2007).

2. Alabama Attorney General opinions have applied the Public Records Law to the following executive entities and officers, among others:

a. *City fire departments*: National Incident Reporting Systems forms. Op. Att'y Gen. Ala. No. 2006-134, 2006 Ala. AG LEXIS 97 (Aug. 17, 2006).

b. *City/county school board*: County public school system letters, documents, etc., 170 Op. Att'y Gen. Ala. 20 (Feb. 1, 1978); names and letters of reference for construction project bidders, 237 Op. Att'y Gen. Ala. 18 (Oct. 11, 1994); employee information, including salary, race, etc., Op. Att'y Gen. Ala. No. 1996-003, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995).

c. *County board of education*: Lists of teachers and other school personnel. 212 Op. Att'y Gen. Ala. 26 (Aug. 1, 1988).

d. *County board of equalization*: Documents regarding a taxpayer's protest of property valuation. 215 Op. Att'y Gen. Ala. 39 (June 14, 1989).

e. *County commission*: Names, titles and compensation of county employees, 210 Op. Att'y Gen. Ala. 20 (Jan. 13, 1988); resumes of applicants for County Administrator, 221 Op. Att'y Gen. Ala. 24 (Oct. 24, 1990); county jobs, payroll and salary ranges, 227 Op. Att'y Gen. Ala. 60 (June 11, 1992).

f. *County sheriff's office*: Computer print-out of prisoner information, 197 Op. Att'y Gen. Ala. 21 (Nov. 16, 1984); computer print-out of executions and orders of sale, 217 Op. Att'y Gen. Ala. 29 (Nov. 17, 1989); pistol permits, 223 Op. Att'y Gen. Ala. 16 (Apr. 18, 1991); front side of incident/offense reports, Op. Att'y Gen. Ala. No. 2000-004, 1999 Ala. AG LEXIS 89 (Oct. 7, 1999); Op. Att'y Gen. Ala. No. 2000-197, 2000 Ala. AG LEXIS 112 (July 19, 2000).

g. *County tax assessor's office*: Computerized data regarding real estate. 209 Op. Att'y Gen. Ala. 29 (Nov. 4, 1987).

h. *State Board of Nursing*: Names of nurses' license revocations. 167 Op. Att'y Gen. Ala. 28 (May 4, 1977).

i. *State Bureau of Tourism and Travel*: Records pertaining to the award of a contract. Op. Att'y Gen. Ala. No. 2002-205, 2002 Ala. AG LEXIS 107 (Apr. 8, 2002).

j. *State Department of Archives and History*: Depositories for public records. 223 Op. Att'y Gen. Ala. 25 (May 22, 1991).

k. *State Department of Banking*: Deferred Presentment licenses. Op. Att'y Gen. Ala. No. 2007-001, 2006 Ala. AG LEXIS 119 (Oct. 2, 2006).

l. *State Department of Corrections*: Department records, including work release rosters. 200 Op. Att'y Gen. Ala. 25 (Aug. 20, 1985).

m. *State Department of Forensic Sciences*: Autopsy reports. Op. Att'y Gen. Ala. No. 2007-015, 2006 Ala. AG LEXIS 142 (Dec. 4, 2006).

n. *State Department of Industrial Relations*: Certain information on forms filed with the department indicating that an employer has secured workers' compensation insurance, including names and mailing addresses of the insured, the name of the insurer and its policy number, and the policy period, but not the insured's risk classification or codes, premiums, rates, and merit-rating. Op. Att'y Gen. Ala. No. 2001-137, 2001 Ala. AG LEXIS 58 (Mar. 30, 2001).

o. *State Department of Postsecondary Education*: Data regarding teachers and administrative employees. Op. Att'y Gen. Ala. No. 1988-00079 (Dec. 16, 1987). Correspondence received by a public official acting in the scope of their employment. Op. Att'y Gen. Ala. No. 2007-031, 2007 Ala. AG LEXIS 4 (Jan. 9, 2007).

p. *State Department of Public Records*: non-identifying driver license information. Op. Att'y Gen. Ala. No. 2007-117, 2007 Ala. AG LEXIS 90 (July 25, 2007).

q. *State Home Builders Licensure Board*: All files on unlicensed builders, including completed consent agreements between the Board and unlicensed builders or entities. Op. Att'y Gen. Ala. No. 2001-136, 2001 Ala. AG LEXIS 59 (Mar. 29, 2001).

r. *State Medicaid Agency*: Uniform cost reports filed by providers, 184 Op. Att'y Gen. Ala. 27 (Aug. 15, 1981); contract between agency and its fiscal agent, 200 Op. Att'y Gen. Ala. 23 (Aug. 19, 1985); documents and agendas used by Medicaid committees, Op. Att'y Gen. Ala. No. 2000-252, 2000 Ala. AG LEXIS 140 (Sept. 29, 2000).

s. *State Nursing Home Administrators Board of Examiners*: Nursing home administrators' license applications. 226 Op. Att'y Gen. Ala. 15 (Jan. 15, 1992).

t. *State Plumbers and Gas Fitters Examining Board*: Names and mailing addresses of applicants. Op. Att'y Gen. Ala. No. 2001-107, 2001 Ala. AG LEXIS 31 (March 1, 2001).

u. *State Secretary of State*: Complaint file's final order. Op. Att'y Gen. Ala. No. 2010-050, 2010 Ala. AG LEXIS 23 (Mar. 17, 2010).

v. *State Tenure Commission*: Records of appeals to commission and minutes of commission. 224 Op. Att'y Gen. Ala. 109 (July 25, 1991).

## 2. Legislative bodies.

All legislative bodies are presumptively subject to the Public Records Law, although the Law itself is silent on this point. One trial court has applied the Law to the following legislative officers: *Clerk of the State House and Secretary of the State Senate*: Remote access telephone assignment records. *Birmingham News Co. v. Swift*, CV 88-1390 G (Cir. Ct. of Montgomery County, Ala., Aug. 31, 1988).

## 3. Courts.

1. All Alabama courts and judicial system bodies are presumptively subject to the Public Records Law, although the Law itself is silent on this point. Court decisions have applied the law, or common law prior to enactment of the 1923 Public Records Law, to the following judicial system entities or officers, among others:

a. *Circuit court clerk*: Subpoena docket of witnesses. *Jackson v. Mobley*, 157 Ala. 408, 47 So. 590 (1908). Case-action-summary sheets, indictments, plea agreements, explanation-of-rights forms, and sentencing orders. *Ex parte Perch*, 17 So. 3d 649 (Ala. 2009).

b. *County probate judge*: Petition for liquor referendum, *State ex rel. Kernells v. Ezell*, 291 Ala. 440, 282 So. 2d 266 (1973); license tags for state vehicles, *Birmingham News Co. v. Hobbie*, 12 Media L. Rep. (BNA) 1687 (Cir. Ct. of Montgomery County, Ala., Dec. 20, 1985).

c. *Municipal courts*: Judicial records, *Mobile Press Register, Inc. v. Lackey*, 938 So. 2d 398 (Ala. 2006).

d. *State courts*: Judicial records, *Byrd v. First Real Estate Corp.*, No. CV-95-N-3087-S (N.D. Ala. 1998) (action to open court record that included documents relating to a settlement agreement); *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993) (action to open court file sealed pursuant to settlement agreement); *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897 (Ala. 1995) (challenge to protective order sealing entire record in order to keep financial data submitted at post trial hearing confidential); *see also* the following First Amendment judicial records access cases: *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423 (Ala. 1992); *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993).

2. Alabama Attorney General opinions have applied the Public Records Law to the following judicial system entities or officers, among others:

a. *County circuit court*: Jury lists for criminal cases. 200 Op. Att'y Gen. Ala. 16 (July 22, 1985).

b. *County circuit court register's office*: Register's office records. 190 Op. Att'y Gen. Ala. 33 (Mar. 7, 1983); *see also* Ala. Code § 12-17-119 (1995) (registers' records open).

c. *County district court clerk's office*: Executed search warrants and arrest warrants. 197 Op. Att'y Gen. Ala. 13 (Oct. 10, 1984).

d. *Municipal court*: Municipal court records. 208 Op. Att'y Gen. Ala. 28 (Sept. 2, 1987). Executed arrest warrants. Op. Att'y Gen. Ala. No. 2008-030, 2007 Ala. AG LEXIS 97 (Dec. 28, 2007).

e. *Probate judge's office*: County voting lists and applications, 202 Op. Att'y Gen. Ala. 19 (Jan. 24, 1986); lists from which poll workers are appointed, 210 Op. Att'y Gen. Ala. 45 (June 3, 1988); military discharge certificates filed in probate court, Op. Att'y Gen. Ala. No. 2002-331, 2002 Ala. AG LEXIS 241 (Sept. 5, 2002).

## 4. Nongovernmental bodies.

### a. Bodies receiving public funds or benefits.

The Public Records Law is silent on this point, and we know of no decisions addressing the question.

### b. Bodies whose members include governmental officials.

The Public Records Law is silent on this point, and we know of no decisions addressing the question.

## 5. Multi-state or regional bodies.

The Public Records Law is silent on this point, and we know of no decisions addressing the question. Presumably, Alabama would adopt the records requirements, if any, of such bodies that it joins. *See, e.g.*, Ala. Code § 40-27-1, art. VIII(6) (2003): Multistate Tax Compact: "Information obtained by an audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States."

## 6. Advisory boards and commissions, quasi-governmental entities.

1. The Public Records Law is silent on this point, but court decisions have applied the Law to the following advisory boards, commissions, and quasi-governmental entities, among others:

a. *Birmingham Racing Commission*: Financial records. *Birmingham News Co. v. Birmingham Racing Commission*, CV 87-501-622 MC (Cir. Ct. of Jefferson County, Ala., Equity Div., June 16, 1987) ("[T]his court is not willing to so readily accept the proposition that The Commission is not some form of governmental body. Whether it is a state, county, or municipal agency, or some hybrid thereof, the Commission was created by the state and helps serve in a process designed to generate excess revenues for the benefit of the state. . . . As a public corporation of the state, charged with both legislative and judicial functions, The Commission falls within the purview of § 36-12-40.") (Some racing commission records were made confidential by statute after this decision; *see* Ala. Code §§ 11-65-10(10), -15, -18 (1994)).

b. *Health Care Authorities*: Sales contracts. *Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale County*, 2010 ALA. LEXIS 213 (Ala. Oct. 29, 2010).

c. *J.S.U. Reserve Public Relations Corporation*: Financial records. *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 680 (Ala. 1981) (trial court found corporation to be alter ego for public university; *see Consolidated Publishing Co. v. Stone*, 6 Media L. Rep. (BNA) 2273, 2273-74 (Cir. Ct. of Calhoun County, Ala., Dec. 1, 1980)).

d. *Water Works Board of the Town of Parrish*: Books and records. *Water Works Board of Town of Parrish v. White*, 281 Ala. 357, 202 So. 2d 721 (1967).

e. *Water Works & Sewer Board of the City of Talladega*: Records. *Water Works & Sewer Board of the City of Talladega v. Consolidated Publishing Inc.*, 892 So. 2d 859 (Ala. 2004).

2. Alabama Attorney General opinions have applied the Public Records Law to the following advisory boards, commissions, and quasi-governmental entities:

a. *Alabama Peace Officers' Annuity and Benefit Fund*: Records, including the names and mailing addresses of its members. Op. Att'y Gen. Ala. No. 2002-186, 2002 Ala. AG LEXIS 80 (Mar. 27, 2002).

b. *Cababa Heights Fire District*: Computer database, minutes, contracts and other records. 227 Op. Att'y Gen. Ala. 42 (June 3, 1992).

c. *City Water Boards*: Water board records. 197 Op. Att'y Gen. Ala. 24 (Nov. 27, 1984). Board member salaries. Op. Att'y Gen. Ala. No. 2006-076, 2006 Ala. AG LEXIS 39 (Mar. 27, 2006).

d. *East Alabama Water, Sewer, and Fire Protection District*: District records. Att'y Gen. Ala. No. 2007-016, 2007 Ala. AG LEXIS 143 (Dec. 4, 2006).

e. *Emergency Management Communications Districts*: Records. Op. Att'y Gen. Ala. No. 2001-086 (Jan. 26, 2001).

f. *Health Care Authorities*: Executive salaries. Op. Att'y Gen. Ala. No. 2008-004, 2007 Ala. AG LEXIS 118 (Oct. 2, 2007).

g. *Randolph County Hospital Board*: Board minutes. 217 Op. Att'y Gen. Ala. 26 (Nov. 16, 1989).

h. *Shoals Industrial Development Authority*: Names and resumes of applicants for executive director of Authority, 222 Op. Att'y Gen. Ala. 48 (Mar. 20, 1991); biographical information from consulting firm regarding applicants for executive director of Authority, 223 Op. Att'y Gen. Ala. 19 (May 17, 1991).

i. *State Universities*: Athletic coach contracts. Op. Att'y Gen. Ala. No. 2007-067, 2007 Ala. AG LEXIS 40 (Apr. 3, 2007).

j. *Wiregrass Mental Health Board Inc.*: Employee lists and salary schedules. 171 Op. Att'y Gen. Ala. 14 (Apr. 12, 1978).

A trial court found that an advisory search committee for selection of a state university president that did not narrow the list of candidates and that contained no university board members was not subject to the Public Records Law. *Birmingham News Co. v. Bartlett*, CV 88-504-403 MC (Cir. Ct. of Jefferson County, Ala., Equity Div., Nov. 15, 1988).

## 7. Others.

A recent trial-court decision has made clear that if documents are public records under the Public Records Law and a grand jury subpoenas the documents, those documents “remain. . . public records notwithstanding the empanelment of said Grand Jury.” *Burnham Broad. Co. v. City of Mobile*, CV 92-2752 (Cir. Ct. of Mobile County, Ala., Aug. 4, 1992) (emphasis in original) (records regarding reimbursement of city mayor, council members, and employees).

### C. What records are and are not subject to the act?

#### 1. What kind of records are covered?

The Alabama Public Records Law **does not define “public writing,”** which are the operative words in the Law. A statute in a different section of the Alabama Code purports to define the term “public records” as including

all written, typed or printed books, papers, letters, documents and maps *made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business* and shall also include any record

authorized to be made by any law of this state belonging or pertaining to any court of record or any other public record authorized by law or any paper, pleading, exhibit or other writing filed with, in or by any such court, office or officer.

Ala. Code § 41-13-1 (2000) (emphasis added). The definition of “public records” in section 41-13-1 is limited by its terms, however, to the article in which the definition appears.

In *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 680-81 (Ala. 1981), the Supreme Court of Alabama held that a “public writing” within the meaning of Alabama’s Public Records Law includes those documents that are within the definition of “public record” in section 41-13-1, but also includes any such “record as is *reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens.*” *Stone*, 404 So. 2d at 681 (emphasis in original).

The Alabama Public Records Law has been held to require disclosure of documents such as the following:

a. Actuarial tables used to calculate teacher retirement benefits, *Walsh v. Barnes*, 541 So. 2d 34 (Ala. Civ. App. 1989).

b. Arrest reports, *Birmingham News Co. v. Deutsh*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986).

c. Minutes, *International Ass’n of Firefighters v. City of Sylacauga*, 436 F. Supp. 482 (N.D. Ala. 1977).

d. Municipal internal audit reports, *Bedingfield v. Birmingham News Co.*, 595 So. 2d 1379 (Ala. 1992).

e. Petitions, *State ex rel. Kernells v. Ezell*, 291 Ala. 440, 282 So. 2d 266 (1973).

f. Preliminary report prepared at the request of a state university concerning the alleged misconduct of one of its employees, *Advertiser Co. v. Auburn Univ.*, 17 Media L. Rep. (BNA) 1907 (Cir. Ct. of Lee County, Ala., Mar. 29, 1990), *aff’d*, 579 So. 2d 645 (Ala. Civ. App. 1991) (denial of attorneys’ fee was only issue on appeal).

g. Resumes and employment applications, *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989).

h. State court records, *Holland v. Eads*, 614 So. 2d 1012, 1015 (Ala. 1993).

i. State vehicle license tag records, *Birmingham News Co. v. Hobbie*, 12 Media L. Rep. (BNA) 1687 (Cir. Ct. of Montgomery County, Ala., Dec. 20, 1985).

j. Well-bound books containing jail dockets, *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941).

#### 2. What physical form of records are covered?

In defining public writing to include “such a record as is *reasonably necessary to record the business and activities . . . [of] a public officer,*” *Stone*, 404 So. 2d at 681 (emphasis in original), the Supreme Court of Alabama’s interpretation of the State’s Public Records Law arguably extends to audio-visual materials and computerized information as well as traditional paper documents.

A 1984 State Attorney General’s opinion concluded that a computer printout bound in book form satisfied the requirement that **sheriffs keep a “well-bound book” in their offices to be subject to the inspection of the public during office hours pursuant to Alabama Code § 36-22-8 (1991).** 197 Op. Att’y Gen. Ala. 21 (Nov. 16, 1984). That opinion notes that “the Legislature when enacting a statute cannot take in account modern equipment which is not in existence when a statute is written. . . . [A]s long as the purpose of the statute is carried out, there



is no reason that the simplest method of achieving that purpose cannot be used.” *Id.* at 22.

At least one trial court in Alabama has found that when a public agency keeps its records on computer, the computer records themselves are “public writings” under Alabama law. *See Birmingham News Co. v. Peavy*, 21 Media L. Rep. (BNA) 2125, 2125-26 (Cir. Ct. of Montgomery County, Ala., July 22, 1993) (motor vehicle records [hereinafter “MVRs”] kept on computer) (as of Sept. 13, 1997, access to MVRs is governed by 18 U.S.C. § 2721). Some of the most recent legislation regarding public records explicitly permits access to public records in various forms. *See, e.g.*, Ala. Code § 22-9A-21(f) (1997): When records of birth and death become “nonrestricted public records,” “[t]he records may be made available for viewing in photographic, digital, electronic, or other suitable format as provided for by the rules of the [State Board of Health].” *See also* Alabama Rules of Judicial Administration 33 (dissemination of computer-based court information).

### 3. Are certain records available for inspection but not copying?

By the terms of the Public Records Law, public records in Alabama are available for inspection *and* copying. Ala. Code § 36-12-40 (Supp. 2005). The Public Records Law, however, does not require the state to research, inspect, identify, copy, assemble, or make arrangements to deliver the documents to the citizen. *Ex parte State of Alabama*, 985 So. 2d 446, 451 (Ala. 2007).

#### D. Fee provisions or practices.

##### 1. Levels or limitations on fees.

Alabama Code § 36-12-41 (2001) provides as follows: “Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor . . . .” The Alabama Public Records Law includes no schedule or level of fees for the copying of public records without certification; therefore, the custodian in question is at liberty to fix a reasonable fee to be charged, unless the fee is set by statute or rule. *See, e.g., Birmingham News Co. v. Peavy*, 21 Media L. Rep. (BNA) 2125, 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993) (statutory fee of \$5.75 per individual driver’s record requested, despite existence of computer database with all driving records) (as of Sept. 13, 1997, access to motor vehicle records is governed by 18 U.S.C. § 2721).

One Alabama Attorney General opinion states the following policy regarding fees:

If possible, a public agency should provide free copies of public records. However, if budgetary constraints prevent this, then a public agency may charge a nominal fee, if necessary, to cover its costs in providing copies of public records. One may inspect public records without paying a fee unless a substantial amount of an employee’s time is required.

251 Op. Att’y Gen. Ala. 38 (June 12, 1998); *see also* 184 Op. Att’y Gen. Ala. 27, 28 (Aug. 15, 1981); 200 Op. Att’y Gen. Ala. 25, 26 (Aug. 20, 1985 (agency “entitled to receive a nominal fee for the reproduction of any requested information”). A reasonable fee may be assessed for the actual cost of providing copies and for retrieving information. Op. Att’y Gen. Ala. No. 2007-067, 2007 Ala. AG LEXIS 40 (Apr. 3, 2007); *see also* 202 Op. Att’y Gen. Ala. 19, 20 (Jan. 24, 1986); 208 Op. Att’y Gen. Ala. 28, 30 (Sept. 2, 1987); 209 Op. Att’y Gen. Ala. 29 (Nov. 4, 1987); 212 Op. Att’y Gen. Ala. 26, 27 (Aug. 1, 1988).

The Alabama Attorney General has stated that the cost of seeking legal advice regarding a records request may not be included in the cost charged by the agency for providing access to or copying the requested records. Op. Att’y Gen. Ala. No. 2008-073, 2008 Ala. AG LEXIS 43 (Apr. 21, 2008).

## 2. Particular fee specifications or provisions.

### a. Search.

There are no particular fee provisions by rule or statute for searches of public records. Attorney General opinions have implied that a fee may be charged for a search if “a substantial amount of an employee’s time is required.” 184 Op. Att’y Gen. Ala. 27, 28 (Aug. 15, 1981); 251 Op. Att’y Gen. Ala. 38 (June 12, 1998); *see also* 2009 Ala. AG LEXIS 60 (June 10, 2009) (state agency may charge a retrieval fee).

### b. Duplication.

Particular fee provisions for duplication of public records are included in only a few Alabama statutes, rules and decisions, as follows:

1. *Alabama Criminal Justice Information Center (ACJIC)*: Fees not to exceed \$25. Ala. Code § 41-9-644 (2000).

2. *Appellate court records*: \$5.00 for one to ten pages; \$.50 per page for more than ten pages. Order Adopting Schedule of Fees for Photocopies (Oct. 29, 1991).

3. *Department of Public Safety records*: A fee not to exceed \$15 for each record or report, unless a different fee is otherwise prescribed by law. Ala. Code § 32-2-8 (Supp. 2005).

4. *Motor vehicle records*: \$5.75 for each individual driving record, Ala. Code § 32-7-4 (1999), and “the actual reasonable cost incurred by the Department [of Public Safety] to create any new computer program required to comply with any . . . request by the Plaintiff [for the Department’s computer database information],” *Birmingham News Co. v. Peavy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993) (effective Sept. 13, 1997, access to MVRs is governed by 18 U.S.C. 2721).

5. *Trial court records*: \$.25 per page. Alabama Rules of Judicial Administration 30(A).

### c. Other.

A public entity may not recover attorneys’ fees incurred in determining whether public writings are subject to an exception that would prevent their release to the public. 251 Op. Att’y Gen. Ala. 38 (June 12, 1998).

## 3. Provisions for fee waivers.

Neither the Public Records Law nor any other Alabama statute contains a provision for waiver of the cost of search for or duplication of public records for citizen requesters, and we know of no decision that has addressed this point. Rule 30(A) of the Alabama Rules of Judicial Administration provides, however, that “at the discretion of the clerk or register, copies of court records may be made at no charge for governmental agencies whether federal, state, county, or municipal.”

## 4. Requirements or prohibitions regarding advance payment.

Rule 33 of the Alabama Rules of Judicial Administration requires advance payment for computer-based information maintained by the Administrative Office of Courts (“AOC”), but we know of no other Alabama statute or rule that contains requirements or prohibitions regarding advance payment.

## 5. Have agencies imposed prohibitive fees to discourage requesters?

No such practices have been reported. Furthermore, the Attorney General has advised several government agencies that duplication of public records is subject to *reasonable fees*. *See, e.g.,* Op. Att’y Gen. Ala. No. 2007-067, 2007 Ala. AG LEXIS 40 (Apr. 3, 2007); 212 Op. Att’y Gen. Ala. 26 (Aug. 1, 1988); 208 Op. Att’y Gen. Ala. 28 (Sept. 2, 1987). A prohibitively and unreasonably high fee should be subject to attack as effectively undermining the statutory right of access.

### E. Who enforces the act?

The Public Records Law itself does not include any provision regarding enforcement of the Law, and Alabama has trailed other states in this area. Another section of the Alabama Code related to tampering with governmental records could be read to apply to violations of the Public Records Law:

A person commits the crime of tampering with governmental records if;

- (1) He knowingly makes a false entry in or falsely alters any governmental record; or
- (2) Knowing he lacks the authority to do so, he intentionally destroys, mutilates, conceals, removes or otherwise substantially impairs the verity or availability of any governmental record; or
- (3) Knowing he lacks the authority to retain a governmental record he refuses to deliver up the record in his possession upon proper request of a person lawfully entitled to receive such record for examination or other purposes.

Ala. Code § 13A-10-12(a) (1994). Violation of the tampering law is a Class A misdemeanor, punishable by up to one year in jail. Ala. Code § 13A-10-12(b) (1994). Although this statute can be read to apply to public requests for governmental records, it is rarely used to prosecute violators of the Public Records Law. *But see Deutch v. State*, 610 So. 2d 1212 (Ala. Crim. App. 1992) (reversing former Chief of Police of City of Birmingham's conviction under Section 13A-10-12(a)(1) and (2) for tampering with jail docket book, jail computer database, fingerprint card, and fingerprint log to conceal arrest of daughter of Mayor of Birmingham and remanding case for further proceedings).

The Public Records Law is primarily enforced through the filing of civil actions by citizens, the media and other interested parties.

#### 1. Attorney General's role.

The Public Records Law does not give the Attorney General a specific role in the enforcement of the act; however, the Attorney General could prosecute violators of the Public Records Law under the statute regarding tampering with governmental records discussed above.

The Attorney General does have the power to issue advisory opinions when specific questions are raised regarding the proper interpretation of the Public Records Law. *See e.g.*, Op. Att'y Gen. Ala. No. 2007-067, 2007 Ala. AG LEXIS 40 (Apr. 3, 2007; 212 Op. Att'y Gen. Ala. 26 (Aug. 1, 1988); 208 Op. Att'y Gen. Ala. 28 (Sept. 2, 1987).

#### 2. Availability of an ombudsman.

None.

#### 3. Commission or agency enforcement.

None.

### F. Are there sanctions for noncompliance?

Although the Public Records Law itself does not reference sanctions for noncompliance, attorneys' fees have been awarded in at least one public records case. *See Tuscaloosa News v. Garrison*, CV-99-408 (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001) (portion of fees granted; case involved both public records and open meetings issues).

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

#### 1. Character of exemptions.

##### a. General or specific?

Alabama's Public Records Law contains two general and two specific exemptions.

#### b. Mandatory or discretionary?

Both the general and the specific exemptions are mandatory.

#### c. Patterned after federal Freedom of Information Act?

Alabama's exemptions are not patterned on the federal Freedom of Information Act.

### 2. Discussion of each exemption.

The Public Records Law specifically exempts from disclosure: (1) "registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state"; and (2) "records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures . . . the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare." Ala. Code § 36-12-40 (Supp. 2005).

The Public Records Law generally exempts from disclosure: (1) records that are expressly made confidential or nonpublic by statute; and (2) "records the disclosure of which would . . . be detrimental to the best interests of the public." Ala. Code § 36-12-40 (Supp. 2005).

## B. Other statutory exclusions.

### 1. Accountants

a. *Accountants*: All records prepared by a CPA or public accountant in the performance of a practice monitoring program or peer review conducted by the Board of Public Accountancy, *except* pursuant to court proceedings, Board investigations, or ethical investigations conducted by private professional organizations. Ala. Code § 34-1-21 (Supp. 2005) (confidential records).

b. *Board of Public Accountancy*: Any records, information, or writings obtained or kept by the Board of Public Accountancy in connection with a practice review program or obtained or kept by the Board in connection with a disciplinary investigation, *except* pursuant to a disciplinary investigation, court order or litigation involving the Board. Ala. Code § 34-1-3(o) (Supp. 2005) (confidential records).

### 2. Agriculture

a. *Agricultural cooperative marketing associations*: Annual reports filed with the Alabama Commissioner of Agriculture and Industries. Ala. Code § 2-10-28 (1999) (confidential records). Report of investigation of associations by the Alabama Commissioner of Agriculture and Industries. Ala. Code § 2-10-29 (1999) (confidential records).

b. *Livestock market annual permit applications*: Information on applications filed with the Alabama Commissioner of Agriculture and Industries regarding the amount or volume of business conducted. Ala. Code § 2-15-62(e) (Supp. 2005) (confidential records).

c. *Meat and poultry inspections*: Annual reports, answers, and information gathered or received by the Alabama Commissioner of Agriculture and Industries during inspections, for those engaged in intrastate commerce, *unless* used in a judicial proceeding to enforce this statute. Ala. Code § 2-17-24(a)(2) (1999) (confidential records).

d. *Milk-processing establishments*: Information received by the Alabama Commissioner of Agriculture and Industries in examination of records of establishments. Ala. Code § 2-13-92 (1999) (confidential records).

e. *Investigative Reports*: investigate reports of the Commissioner of the Department of Agriculture. Ala. Code § 2-2-6



(Supp. 2010)

e. *Seeds*: Records of receipts, sales and deliveries of seed sold in Alabama, for auditing by the Alabama Department of Agriculture and Industries. Ala. Code § 2-26-10(d) (1999) (confidential records).

### 3. Attorneys and Judges

a. *Attorney discipline*: Subpoenas issued in connection with a confidential proceeding under the Alabama Rules of Disciplinary Procedure for attorneys. Alabama Rules of Disciplinary Procedure 17(a) (confidential records).

b. *Attorney discipline*: The affidavit required of an attorney who is disbarred by consent under Alabama's disciplinary rules, *except* upon order of the Disciplinary Board of the Alabama State Bar. Alabama Rules of Disciplinary Procedure 23(c) (confidential records).

c. *Attorney discipline*: Information contained in any file inventoried pursuant to the appointment of a trustee or supervising lawyer by the Disciplinary Board or Disciplinary Commission of the Alabama State Bar to protect the interests of a lawyer and the lawyer's clients, *unless* the client to whom the file relates consents. Alabama Rules of Disciplinary Procedure 29(b) (confidential records).

d. *Attorney discipline*: All disciplinary proceedings of the Alabama State Bar *until* the respondent pleads guilty or the Disciplinary Commission makes a finding of guilty, *except* (1) petitions for reinstatement, (2) proceedings for transfer to disability inactive status, (3) proceedings for interim suspension, (4) character and fitness appeal, (5) all matters regarding surrender of license or public probation, or (6) if the respondent makes the matter public or requests that it be made public. Alabama Rules of Disciplinary Procedure 30(a) (confidential records).

e. *Attorney specialization*: The files and records of certifying agencies concerning lawyers certified or seeking certification, *except* as directed by the board. Alabama State Bar Rules of Specialization 5(5.03) (confidential records).

f. *Attorneys*: Communications with clients. Ala. Code § 12-21-161 (1995) (confidential records); *see also* *Advertiser Co. v. Auburn Univ.*, 17 Media L. Rep. (BNA) 1907, 1910-11 (Cir. Ct. of Lee County, Ala., Mar. 29, 1990) (recognizing attorney-client privilege of Alabama Code § 12-21-161 (1995) as ground for nondisclosure of public record, but finding privilege waived by prior disclosure); Ala. Code § 34-3-20 (2002) (attorney's duty to maintain client confidentiality). *But see* Ala. Code § 36-25A-7(a)(3) (Supp. 2005) (Alabama Open Meetings Act) (allowing executive session to be convened for discussions between governmental body and its attorney regarding pending litigation or imminent litigation, but requiring executive session to be concluded and open meeting to be convened if governmental body begins to deliberate about what action to take based on advice of attorney).

g. *Client Security Fund*: The result of an investigation under the Alabama State Bar Security Fund Rules regarding an application for reimbursement, together with all evidence in connection therewith, *until* the Client Security Fund Committee authorizes reimbursement. Alabama Client Security Fund Rules III(B)(i) (confidential records).

h. *Client Security Fund*: Applications, proceedings, and reports involving applications for reimbursement under the Alabama State Bar Client Security Fund Rules, *until* the Client Security Fund Committee authorizes reimbursement of the claimant, *unless* the lawyer whose alleged conduct gave rise to the claim requests that the matter be made public.

Alabama Client Security Fund Rules X(A), (B) (confidential records).

i. *Contract counsel and/or public defender for defense of indigents*: Attorney-client communications. Ala. Code §§ 15-12-28, -44 (1995) (confidential records).

j. *Judicial Inquiry Commission*: All proceedings, including records, *except* the filing of a complaint by the Commission with the Court of the Judiciary. Ala. Const. of 1901, amend. 328, § 6.17 (confidential records).

k. *Judicial Inquiry Commission*: All proceedings, *except* the filing of a complaint by the Commission with the Court of the Judiciary. Alabama Judicial Inquiry Commission Rule 5 (confidential records).

### 4. Banking

a. *Bank acquisitions*: Records regarding applications filed with the State Superintendent of Banks for acquisition of banks by majority of voting shares. Ala. Code § 5-5A-44(b) (1996) (confidential records).

b. *Banking Department Bureau of Loans*: Records, reports and other data submitted by any licensee to the Supervisor of the State Bureau of Loans and the reporting of all investigations. Ala. Code § 5-2A-80 (1996) (confidential records).

c. *Bank examinations*: Reports and records of examinations by the State Superintendent of Banks, the State Banking Board, or any bank examiner or other state employee; records reflecting action of the bank taken pursuant thereto; and records and minutes of the State Banking Board that relate to a bank or several specific banks. Ala. Code §§ 5-3A-3, -11 (1996) (confidential records).

d. *Foreign banks*: Records regarding examination and investigation of foreign banks by the State Superintendent of Banks, *unless* the Superintendent deems that publication will serve the public advantage. Ala. Code § 5-13B-105(a) (1996) (confidential records).

e. *Savings and loan associations*: Confidential comments by examiner or auditor in reports to the State Savings and Loan Commissioner regarding associations. Ala. Code § 5-16-36(b) (1996) (confidential records).

### 5. Computer Services

a. *Alabama Supercomputer Authority*: Data collected, stored, processed, or disseminated through utilization of the supercomputer system pursuant to sections 41-10-390 through 41-10-406 of the Alabama Code. Ala. Code § 41-10-399(b) (2000) (confidential records).

b. *Computer-based court information maintained by the Administrative Office of Courts ("AOC")*: Records sealed, exempted, or restricted by law or rule, *except* by court order; juvenile matters; adoption matters; mental proceeding matters; personnel matters; criminal matters involving sexual offenses committed on a minor under age 18; and data "made to order" rather than in current retrievable format, *unless* the Administrative Director of Courts ("ADC") determines that the requested "made to order" information possesses significant potential for enhancement of the judicial system. Alabama Rules of Judicial Administration 33 appendix (UJS Computer Data Dissemination Requests — Procedures).

c. *Criminal Justice Information Center*: Records and information that identify an individual about whom information pertains, *except* on a "need to know" or "right to know" basis. Ala. Code § 41-9-642 (2000). *See generally* Ala. Code §§ 41-9-594 (2000) and 41-9-620 *et seq.* (2000). *See also Ex parte Alabama Criminal Justice Information Center Commission*, 572

So. 2d 487, 489 (Ala. Civ. App. 1990) (“The ACJIC is not an agency for public access. Its purpose is to provide law enforcement and other governmental agencies with highly confidential information concerning certain crimes and criminals. The ACJIC Enabling Act disallows public use of the information and requires the Commission to ‘ensure that adequate safeguards are incorporated so that data available through this system is used only by properly authorized persons and agencies.’”).

#### 6. Conservation and Environmental Control

a. *Air pollution control*: Records, reports and information required by the Alabama Department of Environmental Management under this chapter, upon a satisfactory showing that disclosure would divulge production or sales figures or unique methods, processes, or production, trade secrets, or other competitive information. Ala. Code § 22-28-20(a) (1997) (confidential records).

b. *Fees for disposal of hazardous waste*: Fee report of any operator submitted to the Alabama Department of Revenue; reports and information secured by the Alabama Department of Revenue for the purpose of determining fees. Ala. Code § 22-30B-15(a), (c) (1997) (confidential records).

c. *Forever Wild Land Trust Board*: Confidential information, where necessary. Ala. Const. of 1901, amend. 543, § 5(k)(1) (confidential records).

d. *Hazardous wastes management*: Records, reports and information required by the Alabama Department of Environmental Management under this chapter, upon a satisfactory showing that disclosure would divulge production or sales figures or unique methods, processes, or production, trade secrets, or other competitive information. Ala. Code § 22-30-18 (1997) (confidential records).

e. *Hazardous wastes management*: Any records, reports, or information obtained by a duly designated officer, employee or representative of the Environmental Management Department from any person under this section, to the extent required by sections 22-30-9 and 22-30-18 concerning trade secrets and confidentiality. Ala. Code § 22-30-19(d) (1997) (confidential records).

f. *Underground tank and wellhead protection*: Records, reports and information required by the Alabama Department of Environmental Management under this chapter, upon a satisfactory showing that disclosure would divulge production or sales figures or unique methods, processes, or production, trade secrets, or other competitive information. Ala. Code § 22-36-8 (1997) (confidential records).

g. *Water pollution control*: Records, reports and information (other than effluent data) required by the Alabama Department of Environmental Management under this chapter, upon a satisfactory showing that disclosure would divulge production or sales figures or unique methods, processes, or production, trade secrets, or other competitive information. Ala. Code § 22-22-9(c) (1997) (confidential records).

#### 7. Courts

a. *Civil court mediation*: All sessions (and records of sessions), unless the parties and mediator consent otherwise. Alabama Civil Court Mediation Rules 10 (confidential records).

b. *Civil court mediation*: All information disclosed in the course of mediation, including oral documentary or electronic information. Alabama Civil Court Mediation Rules 11 (confidential records).

c. *Civil court mediation*: There shall be no record made of the mediation proceedings. Alabama Civil Court Mediation Rules 12 (confidential records).

d. *Grand jury*: Evidence, exhibits, information. Ala. Code §§ 12-16-215, -216 (1995) (confidential records). *But see Burnham Broad. Co. v. City of Mobile*, CV 92-2752 (Cir. Ct. of Mobile County, Ala., Aug. 4, 1992) (public records remain public records even if same records are also made exhibits before grand jury).

e. *Juror lists*: Names drawn for grand and petit juries. Ala. Code § 12-16-70 (Supp. 2005) (confidential records).

f. *Master jury box*: Names drawn by county jury commissions for juror qualification. Ala. Code § 12-16-59(a) (1995) (confidential records).

#### 8. Criminal Procedure

a. *911 Audio Recordings*: 911 audio recordings are not subject to public disclosure absent a court order finding that the right of the public to the release of the recording outweighs the privacy interests of the individual who made the 911 call or any person involved in the facts or circumstances relating to the 911 call. Ala. Code § 11-98-12 (Supp. 2010).

*Criminal procedure*: Portions of records disclosing the identity of confidential informants. Ala. R. Crim. P. 3.9(a) (confidential records).

b. *Criminal procedure*: Unexecuted search warrants. Ala. R. Crim. P. 3.14 (confidential records).

c. *Criminal procedure*: Reports of court-appointed mental health professionals made pursuant to Rule 11.3 regarding mental health examinations of the defendant. Ala. R. Crim. P. 11.5(a) (confidential records).

d. *Criminal procedure*: Grand jury information and documents. Ala. R. Crim. P. 12.3(c)(4)(iii) (confidential records). *But see Burnham Broad. Co. v. Mobile*, CV 92-2752 (Cir. Ct. of Mobile County, Ala., Aug. 4, 1992) (public records remain public records even if same records are submitted to grand jury).

e. *Criminal procedure*: Reports by mental health experts who have personally examined the defendant or any evidence in the case, and the results of any mental examinations, scientific tests, experiments or comparisons, including all written reports or statements made by mental health experts in connection with the case, unless otherwise ordered by the court. Ala. R. Crim. P. 25.5(a) (confidential records).

f. *Criminal procedure*: Presentence reports, diagnostic evaluation reports, and physical and mental health examination reports. Ala. R. Crim. P. 26.5(c) (confidential records). *But see* Ala. Code § 13A-5-47(b) (1994) (presentence “report and any evidence submitted in connection with it shall be made part of the record in the case”).

g. *Director of Forensic Sciences*: DNA records collected and maintained for the purpose of the identification of criminal suspects or offenders. Ala. Code §§ 36-18-27, -28 (2001) (confidential records).

h. *Pardons, paroles and probation*: State prisoner files, except for entry by each member of the State Board of Pardons and Paroles of reasons for favoring a pardon, parole, remission of fine or forfeiture, or restoration of civil and political rights. Ala. Code § 15-22-36(b) (Supp. 2005) (confidential records); *see also Ex parte Ala. Bd. of Pardons & Paroles*, 814 So. 2d 870 (Ala. 2001) (holding that section 15-22-36(b) “clearly and unambiguously establishes an absolute privilege that the Board is legally bound to obey and the circuit court is under

a duty to uphold” and vacating circuit court’s order to produced privileged records).

i. *Pardons, paroles and probation*: Reports, records and data assembled by probation officer regarding cases referred to the officer by any court or by the State Board of Pardons and Paroles and referred to the court, *except* upon order of the court to which this information is referred. Ala. Code § 15-22-53(b) (1995) (confidential records).

j. *State crime victim counselors*: Communications with crime victims. Ala. Code § 15-23-42 (1995).

k. *State Crime Victims Compensation Commission*: Investigative reports and information obtained from law enforcement officers and agencies by the Commission. Ala. Code § 15-23-5(4) (1995) (confidential records).

l. *State crime victims petition hearing*: Court file information regarding crime victim that reveals address, telephone number, place of employment, and other related information about the victim, including in some circumstances the victim’s name. Ala. Code § 15-23-69 (1995) (confidential records).

## 9. Domestic Abuse

a. *Domestic violence facilities*: Information received by facilities, the circuit court, any district attorney or the district attorney’s employees, or by authorized persons employed by or volunteering services to a facility, through files, reports, inspection or otherwise, *except* to safeguard the identity of individuals and facilities. Ala. Code § 30-6-8 (Supp. 2005) (confidential records).

b. *Protection from abuse*: The home and business address and telephone number of a plaintiff asserting a claim under the Alabama Protection from Abuse Act, the home and business address and telephone number of any member of the plaintiff’s family or household, or an address that would reveal the confidential location of a shelter for victims of domestic violence as defined in section 30-6-1. Ala. Code § 30-5-5(e)(1) (Supp. 2010) (confidential records).

## 10. Elections

a. *Voter registration*: Applications and written answers, *except* with written consent of the person who filed the answers or pursuant to order of a court of competent jurisdiction in a proper proceeding. Ala. Code § 17-3-52 (2006) (confidential records). *But see* Op. Att’y Gen. Ala., No. 2005-185, 2005 Ala. AG LEXIS 150 (Aug. 23, 2005) (concluding that “[t]he boards of registrars and probate judges may provide only the names and precincts of registered voters to persons or entities,” but that political parties are “entitled to obtain all voter registration information in the possession of the boards of registrars or probate judges, except for social security numbers.”)

## 11. Energy Department

a. *Alabama Department of Energy*: Information of a proprietary nature. Ala. Code § 41-6A-4(8) (2000) (confidential records).

b. *Alabama Department of Energy*: Abstracts of proposals for energy-related grants sent to the department for information and coordination purposes. Ala. Code § 41-6A-7 (2000) (confidential records).

c. *Alabama Department of Energy*: Proprietary information acquired under the provisions of this chapter. Ala. Code § 41-6A-11 (2000) (confidential records).

## 12. Fire Marshal

a. *State Fire Marshal*: In the discretion of the Fire Marshal, any testimony taken in an investigation under the provisions of this chapter. Ala. Code § 36-19-25 (2001) (confidential records).

b. *State Fire Marshal*: Any information furnished pursuant to this article, *until* such time as its release is required pursuant to a criminal or civil proceeding. Ala. Code § 36-19-43(b) (2001) (confidential records).

## 13. Geologists

a. *Geologists*: Individual test scores and applications for licensing under the Alabama Professional Geologists Licensing Act and material relating thereto, including letters of reference relating to the application. Ala. Code § 34-41-15(c) (2002) (confidential records).

## 14. Government

a. *Code of Ethics*: A complaint filed pursuant to this chapter and all other information and documents. Ala. Code §§ 36-25-1(7), -4(b) (Supp. 2010) (confidential records).

b. *Governor*: All reports, advice, counsel or recommendations of the governor’s councillor. Ala. Code § 36-13-13(b) (2001) (confidential records).

c. *Legislative reference service*: All requests for assistance and the contents thereof, any communications regarding such requests, any materials related to such requests, and any work product related to or arising from such request, *until* waived in whole or in part. Ala. Code § 29-7-6(c)(1) (2003) (confidential records); *see also* *Bassett v. Newton*, 658 So. 2d 398 (Ala. 1995) (when constitutionally required notice of intent to pass general law applying to only one municipality was given, information concerning the bill and its contents were released and the statutory confidentiality of a legislator’s request for assistance from LRS in drafting the bill was waived) (§ 29-7-6 was revised after this decision was released to limit the holding of the case.).

## 15. Handicapped Persons

a. *Interpreters for speech/hearing defective persons*: Information gathered by interpreters, equal with attorney-client privilege, unless the speech/hearing defective person wants disclosure of such information. Ala. Code § 12-21-131(i) (1995) (confidential records).

## 16. Health Care

a. *Bill of Rights for Persons with Developmental Disabilities and Traumatic Brain Injury*: Personal, financial and medical records. Ala. Code § 38-9C-4(9) (Supp. 2005) (confidential records).

b. *Commissioner of Mental Health*: Information that could identify a reported or reporting person under the commission’s authority to receive data for research. Ala. Code § 22-50-61(b) (Supp. 2010) (confidential records).

c. *Dentists, chiropractors, and physicians’ utilization and quality control committees, peer review committees, and professional standards review committees*: Records and proceedings. Ala. Code § 6-5-333(d) (1993) (confidential records).

d. *Health Care Service Utilization Review Act*: Medical records. Ala. Code § 27-3A-2(5) (1998) (confidential records).

e. *Health Care Service Utilization Review Act*: Individual medical records. Ala. Code § 27-3A-5(a)(7) (1998) (confidential records).



f. *Health maintenance organizations*: Trade secrets and privileged or confidential commercial or financial information that appears on applications, filings and reports required by this chapter; documents and other evidence required to be submitted to the State Commissioner of Insurance or State Health Officer in connection with enforcement of this chapter; and any examination or investigation report, at the discretion of the State Commissioner of Insurance or State Health Officer, so long as deemed necessary to protect the person examined from unwarranted injury or to be in the public interest. Ala. Code § 27-21A-24 (1998) (confidential records).

g. *Health maintenance organizations*: Any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from such person or from any provider by any HMO, *except* to the extent necessary to carry out the purposes of this chapter, or with the express consent of the enrollee or applicant, or pursuant to court order, or in the event of a claim or litigation between such person and the HMO wherein such data or information is pertinent. Ala. Code § 27-21A-25 (1998) (confidential records).

h. *Hospital records*: Subpoenaed, certified records procured by a litigant, *unless* and until ordered published by the court trying the case at the time of the trial. Ala. Code § 12-21-6(a) (1995) (confidential records).

i. *Hospitals and other health care facilities*: Materials regarding accreditation, quality assurance, and credentialing. Ala. Code § 22-21-8(b) (1997) (confidential records).

j. *Hospitals and other health care facilities*: Information regarding health care facilities received by the State Board of Health other than by inspection, *except* in a proceeding involving the question of licensure or revocation of license. Ala. Code § 22-21-30 (1997) (confidential records).

k. *Impaired Professionals' Committee*: All information and documents furnished to or produced by the Alabama Impaired Professionals' Committee and any findings, recommendations, etc; all records and proceedings of such committee (regarding impairment of dentists, dental hygienists and pharmacists), *except* for records made in the regular course of business of an individual. Ala. Code § 34-38-6 (2002) (confidential records).

l. *Licensed professional counselors and certified counselor associates*: Communications with clients, the same as attorney-client privilege of confidentiality. Ala. R. Ev. 503; *see also* Ala. Code § 34-8A-21 (2002) (confidential records).

m. *Licensed psychologists and psychiatrists*: Communications with clients, the same as attorney-client privilege of confidentiality. Ala. Code § 34-26-2 (2002) (confidential records); *see also Ex parte Rudder*, 507 So. 2d 411, 412, 416 (Ala. 1987) (applying statutory psychiatrist-client privilege, Ala. Code § 34-26-2, to deny media access to psychiatric records of patient for use in libel case; “[i]nformation recognized as privileged is not available to the public”).

n. *Medicaid program*: Records that reveal names of recipients of benefits. Ala. Code § 22-6-9(b) (1997) (confidential records).

o. *Medical liability insurers for Alabama physicians and health care providers*: Reports rendered to respective state licensing agencies pursuant to the requirements of this section; any and all information and documents produced by the respective state licensing boards as a result of any investigation of the subject matter of the reports; and all records, reports and other documents of the licensing board, *except* that any such

records otherwise public from the original sources are not to be construed as confidential merely because they were presented to or considered by the licensing board. Ala. Code § 27-26-5(c) (1998) (confidential records).

p. *Mental health direct care providers*: Any criminal history background information requested and secured under this article. Ala. Code § 22-50-91 (Supp. 2010) (confidential records).

q. *Mental Health Consumers' Rights Act*: All information in the consumer's mental health, medical and financial records. Ala. Code § 22-56-4(b)(6) (1997) (confidential records).

r. *Notifiable diseases*: Medical and statistical information and reports required by this chapter. Ala. Code § 22-11A-2 (1997) (confidential records).

s. *Notifiable diseases*: Required reports to county and state health officers regarding tuberculosis. Ala. Code § 22-11A-9 (1997) (confidential records).

t. *Notifiable diseases*: Required reports to county and state health officers regarding sexually transmitted diseases, *except* in “proceedings to compel the examination, testing, commitment, or quarantine of any person or upon the written consent of the patient.” Ala. Code § 22-11A-14(e) (1997) (confidential records).

u. *Notifiable diseases*: Medical records regarding persons infected with sexually transmitted diseases, *except* in commitment proceedings or with written consent of the patient. Ala. Code § 22-11A-22 (1997) (confidential records); *see also State Dep't of Public Health v. Wells*, 562 So. 2d 1315 (Ala. Civ. App. 1989) (exception to confidentiality of test results for inmate compelled to submit to testing did not apply to HIV test results conducted with cooperation by and at request of inmate being tested).

v. *Notifiable diseases*: Any information required pursuant to this chapter. Ala. Code § 22-11A-38(j) (1997) (confidential records).

w. *Notifiable diseases*: Medical test results regarding HIV infection or a specific sickness or medical condition derived from such infection. Ala. Code § 22-11A-54 (1997) (confidential records).

x. *Notifiable diseases*: Pleadings and court documents regarding appeal by infected health care worker from decision of trial court regarding notifiable disease. Ala. Code § 22-11A-64(h), (i) (1997) (confidential records).

y. *Notifiable diseases*: Information collected during investigation of an infected health care worker. Ala. Code § 22-11A-68(b) (1997) (confidential records).

z. *Notifiable diseases*: Records and documents related to the investigation and review of any infected health care worker. Ala. Code § 22-11A-69(a) (1997) (confidential records).

aa. *Nurses*: All records of a licensee who successfully completes the disciplinary alternative program of the State Board of Nursing for impaired nurses. Ala. Code § 34-21-25(j)(6) (Supp. 2010) (confidential records).

bb. *Physicians, practitioners of healing arts*: Complaints regarding physicians or osteopaths submitted for hearing before the State Medical Licensure Commission or the State Board of Medical Examiners. Ala. Code § 34-24-361(i) (2010) (confidential records); *see also* Op. Att'y Gen. Ala. No. 2002-089, 2001 Ala. AG LEXIS 265 (Dec. 10, 2001) (distinguishing “absolutely privileged” from “confidential” and holding that administrative complaints are public records).

cc. *Physicians, practitioners of healing arts*: All information and documents furnished to or produced by the Alabama Impaired Physicians Committee and any finding, recommendation, etc. of such committee; all records and proceedings of such committee; but documents made in the regular course of business of a health care provider or hospital or available from original sources are not immune from discovery or use in a civil proceeding “merely because they were presented or considered during the proceedings of the Alabama impaired physicians committee.” Ala. Code § 34-24-404 (2002) (confidential records).

dd. *Residential Health Care Recipient Ombudsman*: Information regarding a complaint resolution proceeding. Ala. Code § 22-5A-6(d) (1997) (confidential records).

ee. *Statewide Cancer Registry*: Information gathered for cancer registry. Ala. Code § 22-13-33(a), (d) (Supp. 2005) (confidential records).

ff. *Vital statistics*: Birth and death records, until 125 years after the date of birth or 25 years after the date of death, when such records become nonrestricted public records. Ala. Code § 22-9A-21(f) (1997) (confidential records).

#### 17. Horse and Greyhound Racing

a. *Horse and greyhound racing commissions*: Financial, net worth, and other confidential information submitted to the commission by licensee or operator; information from investigations by commission or received from other law enforcement agencies, if necessary or desirable. Ala. Code § 11-65-10(10) (1994) (confidential records).

b. *Horse and greyhound racing facility license application*: Information on application regarding confidential financial information, percentage of ownership, and the information protected in section 11-65-10. Ala. Code § 11-65-15 (1994) (confidential records).

c. *Horse and greyhound racing operator's license application*: Information on application regarding confidential financial information, percentage of ownership, and the information protected in section 11-65-10. Ala. Code § 11-65-18 (1994) (confidential records).

#### 18. Insurance

a. *Life and Disability Insurance Guaranty Association*: The request to the Association Board for examination of a member insured for impairment or insolvency, until the release of the examination report to the public. Ala. Code § 27-44-12 (1998) (confidential records).

b. *Insurance holding company systems*: Upon request of the person filing a statement for approval of merger or other acquisition of control of an insurance holding company system, the identity of the lender that is the source of consideration to be used in effecting the merger or other acquisition. Ala. Code § 27-29-3(b)(2) (1998) (confidential records).

c. *Insurance holding company systems*: All information and documents obtained by or disclosed to the State Commissioner of Insurance or any other person in the course of an examination or investigation made pursuant to section 27-29-6 (1998) (examination of books and records of insurer to ascertain financial condition or legality of conduct) and all information reported pursuant to section 27-29-4 (1998) (registration of insurers that are members of insurance holding company systems). Ala. Code § 27-29-7 (1998) (confidential records).

d. *State Disclosure of Material Transactions Act*: All reports obtained by or disclosed to the State Commissioner of Insur-

ance pursuant to this section, unless prior written consent of insurer to which the report pertains is obtained. Ala. Code § 27-2A-2(d) (1998) (confidential records).

e. *State Risk-based Capital for Insurers Act*: All RBC reports, to the extent the information therein is not required to be set forth in a publicly available annual statement schedule, and RBC plans, including the results or report of any examination or analysis of an insurer performed pursuant hereto and any corrective order issued by the State Commissioner of Insurance pursuant to examination or analysis, with respect to a domestic insurer or foreign insurer which are filed with the Commissioner, unless disclosed by the Commissioner pursuant to enforcement actions taken by the Commissioner pursuant to the chapter or any other provision of the insurance laws of this State. Ala. Code § 27-2B-9(a) (1998) (confidential records).

#### 19. Juveniles

a. *Adoption of children*: All records regarding subsidized adoption. Ala. Code § 26-10-28 (1992) (confidential records).

b. *Adoption of children*: All records regarding adoption, except upon order of court for good cause shown. Ala. Code § 26-10A-31(c) (Supp. 2005) (confidential records).

c. *Alabama Adoption Code*: The original birth certificate and the evidence of adoption, after the new birth certificate has been issued. Ala. Code § 26-10A-32 (Supp. 2005) (confidential records).

d. *Alabama Uniform Parentage Act*: Information that could jeopardize the disclosure of identifying information of the child or other individual, such as addresses, telephone numbers, places of employment, Social Security numbers, and the child's day-care facility and school. Ala. Code § 26-17-105 (2009). (confidential records).

e. *Child care*: Records regarding admission, progress, health, and discharge of children at child-care facilities. Ala. Code § 38-7-7(a)(7) (1992) (confidential records).

f. *Child care*: Records regarding children and facts learned about children and their relatives by child care facilities and the State Department of Human Resources. Ala. Code § 38-7-13 (1992) (confidential records); see also *Birmingham News Co. v. Hornsby*, CV 94-103 TH (Cir. Ct. of Montgomery County, Ala., Mar. 18, 1994) (access to copies of administrative hearing officer's final report regarding child abuse/neglect investigative hearing denied because of jeopardy to statutory provisions for confidentiality).

g. *Child care position applicants*: All information, including any criminal conviction record, procured by the State Department of Human Resources or an approved agency pursuant to this chapter. Ala. Code § 26-1-4(a) (1992) (confidential records).

h. *Child custody and support proceedings*: If the court so orders, the address of the child (whether or not visitation is allowed) or the address of the victim of family or domestic violence. Ala. Code § 30-3-135(c) (1998) (confidential records).

i. *Crime records of employees supervising children*: All reports, records and statements required to be made by this chapter. Ala. Code § 38-13-8 (Supp. 2005) (confidential records).

j. *Delinquent, in need of supervision, and dependent children*: Juvenile legal files and social, medical, psychiatric, and psychological records, including reports of preliminary inquiries and predisposition studies, and court records regarding such children. Ala. Code § 12-15-133 (Supp. 2010) (confi-

dential records).

k. *Education of exceptional children*: Records of case history, classification and placement of exceptional children. Ala. Code § 16-39-8 (2001) (confidential records).

l. *Juvenile appellate procedure*: Identity (in appellate opinions, the style of the case, motions and briefs) of juveniles who have been the subject of a proceeding in the juvenile court system, persons granted youthful offender status, victims of child abuse, and victims of a sex offense. Ala. R. App. P.52 (confidential records).

m. *Juvenile law enforcement*: Records, *unless* a charge of delinquency is transferred for criminal adult prosecution or the court orders in the interest of the child or national security. Ala. Code §§ 12-15-134 (Supp. 2010) (confidential records).

n. *Juvenile procedure*: Summons or other notice, *except* in a proceeding to terminate parental rights. Alabama Rules of Juvenile Procedure 13(A) (confidential records).

o. *Juvenile procedure*: Any information that discloses the identity of the parties or is detrimental to the interests of a child or the work of the juvenile court. Alabama Rules of Juvenile Procedure 18 (confidential records).

p. *Legitimation of children*: The names and addresses on the putative father registry, *except* upon order of court for good cause shown. Ala. Code § 26-10C-1(f), (h) (Supp. 2005) (confidential records).

q. *Parental consent to performing abortion*: In all pleadings or court documents, the minor shall be identified by initials only. Ala. Code § 26-21-4(i) (1992) (confidential records).

r. *Parental consent to performing abortion*: Records and information involving court proceedings conducted pursuant to section 26-21-4 (procedure for waiver of consent requirement to perform abortion on an unemancipated minor). Ala. Code § 26-21-8(a) (1992) (confidential records).

s. *Reporting of child abuse or neglect*: The reports and records of child abuse and neglect, *except* as permitted for specific purposes to authorized persons under this section. Ala. Code § 26-14-8(c) (Supp. 2005) (confidential records); *see also Birmingham News Co. v. Hornsby*, CV 94-103 TH (Cir. Ct. of Montgomery County, Ala., Mar. 18, 1994) (access to final decisions of administrative hearing officer in child abuse/neglect investigative hearing denied because of jeopardy to statutory provisions for confidentiality).

t. *Victims of sexual abuse or exploitation under age 18*: Court records regarding such individuals. Ala. Code § 15-1-2(b) (1995) (confidential records).

u. *Youth Services Department*: Information concerning any youth for whom the department provides social services or care in accordance with the provisions of this chapter. Ala. Code § 44-1-39(a) (1991) (confidential records).

v. *Youthful offenders*: Fingerprints, photographs and other records of person adjudged to be youthful offender, *unless* the court, in its discretion, permits inspection of these records. Ala. Code §§ 15-19-7(b) (1995) (confidential records); *Clerk of Municipal Court of Cordova v. Lynn*, 702 So. 2d 166 (Ala. Civ. App. 1997) (names of defendants adjudicated as youthful offenders are not subject to disclosure absent good cause).

## 20. Library Services

a. *Alabama Public Library Service*: Records regarding public library use by an individual. Ala. Code § 41-8-10 (2000) (confidential records).

## 21. Mining

a. *Surface coal mining and reclamation*: Records, reports or information required to be submitted to the regulatory authority by a licensee or permittee under this chapter that, upon verified representation, would reveal certain production or financial data, unique processes, or other anti-competitive information. Ala. Code § 9-16-100 (2001) (confidential records).

b. *Surface coal mining and reclamation permits*: Information on application for permit pertaining to the analysis of the chemical and physical properties of the coal, *unless* potentially toxic. Ala. Code § 9-16-83(b)(16) (2001) (confidential records).

c. *Surface coal mining and reclamation permits*: Information submitted for permits as confidential trade secrets or privileged commercial or financial information that relates to the competitive rights of the person or entity intended to explore the described area. Ala. Code § 9-16-87(b) (2001) (confidential records).

d. *Surface coal mining reclamation plan*: Information submitted with a mining application and reclamation plan pertaining to analysis of the chemical and physical properties of the coal (*unless* potentially toxic) and, upon verified representation, any report, record, or information the disclosure of which would reveal certain production or financial data, unique processes, or other anti-competitive information. Ala. Code § 9-16-84(a)(12) (2001) (confidential records).

## 22. Motor Vehicles and Traffic

a. *Motor vehicle accidents*: All proof-of-financial-responsibility accident reports made by persons involved in accidents or by garages, *except* that the Director of the State Department of Public Safety may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies being present at such accident. Ala. Code § 32-10-11 (1999) (confidential records). Also, reports and data compiled or collected for identifying, evaluating, or planning safety for potential accident sites, or hazardous roadway conditions. *Ex parte Ala. Dep't of Transp.*, No. 1980486 (Ala. Sup. Ct., December 17, 1999).

b. *Motor vehicle licenses and registration*: Reports or records received or made by the Driver License Medical Advisory Board or any of its members or by the Director's office pursuant to this division for the purpose of assisting the director in determining whether a person meets the medical, physical, or mental standards to be licensed as a driver, *except* in a proceeding under section 32-5A-195 (drivers license cancellation, suspension, or revocation). Ala. Code § 32-6-43 (1999) (confidential records).

## 23. Navigation and Vessels

a. *Navigation and watercourse registration and operation of vehicles*: All confidential reports and accident reports. Ala. Code § 33-5-7 (2002) (confidential records).

b. *Navigation and watercourse registration and operation of vessels*: All accident reports made by operators of vessels involved in accidents, *except* that the State Department of Conservation and Natural Resources may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies being present at such accident. Ala. Code § 33-5-25(c) (Supp. 2010) (confidential records).

## 24. Public Welfare

a. *State Department of Human Resources*: Case records of re-



ipients of public welfare, applicants, payments and services, confidential information concerning children and their families, etc. Ala. Code § 38-2-6(8) (Supp. 2005) (confidential records); *see also Birmingham News Co. v. Hornsby*, CV 94-103 TH (Cir. Ct. of Montgomery County, Ala., Mar. 18, 1994) (access to copies of administrative hearing officer's final reports in child abuse/neglect investigative hearing denied because of jeopardy to statutory provisions for confidentiality).

b. *State Department of Human Resources*: Public welfare case records, cancelled public welfare checks, etc. Ala. Code § 38-2-12(b) (1992) (confidential records).

c. *State protection of aged or disabled adults*: Any record of the State Department of Human Resources or other agency pertaining to an aged or disabled adult pursuant to this chapter. Ala. Code § 38-9-6(e) (Supp. 2005) (confidential records).

d. *State public welfare*: Any records pertaining to adoptions or to children placed in foster homes for adoption or for other purposes. Ala. Code § 38-1-4 (1992) (confidential records).

## 25. Railroads

a. *Railroad preservation*: Confidential information supplied to the State Highway Department by railroads as necessary to the planning process. Ala. Code § 37-10-5(c) (1992) (confidential records); *see also Ex parte Ala. Dep't of Transp.*, 757 So. 2d 371 (Ala. 1999).

## 26. Real Estate Appraisers

a. *Real estate appraisers*: Residence addresses of real estate appraisers on file with the State Board of Real Estate Appraisers. Ala. Code § 34-27A-16(c) (2002) (confidential records).

## 27. Taxation

a. *Alabama Taxpayers' Bill of Rights*: In records of appeals of state tax rulings to an administrative law judge, information received from the Internal Revenue Service that is restricted by law or agreement, and as otherwise ordered by the administrative law judge. Ala. Code § 40-2A-9(m) (2003) (confidential records).

b. *Alabama Taxpayers' Bill of Rights*: Tax returns, information and records, *unless* the taxpayer gives written permission. Ala. Code § 40-2A-10 (2003) (confidential records).

c. *Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act*: Taxpayer assistance officers shall have full access to State Revenue Department's records subject to confidentiality restrictions of this chapter. Ala. Code § 40-2A-4(b) (1) (2003) (confidential records); *see also Brown v. State*, 740 F. Supp. 819, 822-23 (N.D. Ala. 1990) (regarding introduction of evidence regarding trial judge's tax returns into public court record without consent of trial judge; referring to predecessor confidentiality statutes).

d. *Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act*: Upon written request of the taxpayer, trade secrets and other confidential information contained in revenue rulings issued by the State Revenue Department. Ala. Code § 40-2A-5(d) (2003) (confidential records).

e. *Drugs and controlled substances excise tax*: Information and documents obtained pursuant to this chapter, *except* in connection with a proceeding involving taxes due under this chapter, unless such information is independently obtained. Ala. Code § 40-17A-13(a) (2003) (confidential records).

f. *Income taxes*: Information obtained by a claimant agency from the State Department of Revenue in accordance with

the provisions of this article. Ala. Code § 40-18-107(b) (2003) (setoff debt collection by Alabama Commission on Higher Education regarding student loans and by Alabama Department of Pensions and Securities regarding public assistance programs) (confidential records).

g. *Multistate Tax Compact*: Information obtained by an interstate audit pursuant to this article. Ala. Code § 40-27-1, art. VIII(6) (2003) (confidential records).

h. *Providers of medical services privilege tax*: Information and documents secured from pharmaceutical providers pursuant to this article. Ala. Code § 40-26B-5(b) (2003) (confidential records).

i. *Providers of medical services privilege tax*: Information and documents secured from nursing facilities pursuant to this article. Ala. Code § 40-26B-24(b) (2003) (confidential records).

j. *Tax Incentive Reform Act of 1992*: The agreement of a private user of industrial development property or of a major addition to same, as required by this section, *unless* consent by the private user is given in writing. Ala. Code § 40-9B-6(c) (2003) (confidential records).

## 28. Veterinarians

a. *Veterinarians*: The records of meetings of Alabama State Board of Veterinary Medical Examiners closed "to prepare, approve, or grade examinations or to deliberate qualifications of a proceeding to discipline a licensed veterinarian." Ala. Code § 34-29-66(b)(6), (8) (2002) (confidential records).

b. *Veterinarians*: Information received by the Alabama State Board of Veterinary Medical Examiners through inspections and investigations, *except* in a proceeding involving the question of license. Ala. Code § 34-29-68 (2002) (confidential records).

## 29. Workers' Compensation

a. *Unemployment compensation*: Information on covered persons regarding employment, wages, hours, unemployment, and related matters, *except* to the extent necessary for proper presentation of the contest of a claim. Ala. Code § 25-4-116 (2000) (confidential records).

b. *Workers' compensation*: Records and information related to the functioning of this article, *except* to the extent necessary for the proper presentation of the contest of a claim. Ala. Code § 25-5-294(a) (2000) (confidential records). Also, all information, interviews, reports, statements, memoranda and test results, written or otherwise, received by the employer through a substance abuse testing program, *except* with written consent by the person tested, when release of information is compelled by a state agency or court of competent jurisdiction, or when deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. Ala. Code § 25-5-339(a), (b), (c) (2000) (confidential records).

*Other records that are open to the public by specific law, case law or attorney general opinion:*

### 1. Aeronautics

a. *Civil Air Patrol*: current lists of license tags in each county issued to amateur radio operators licensed by the Civil Air Patrol. Ala. Code § 32-6-92 (1999) (public records).

b. *State Department of Aeronautics*: records regarding rules and regulations for licensing certain open-to-the-public airports. 1 Ala. Admin. Code r. 60-X-1-.03 (Supp. March 31, 1991) (public records).

## 2. Agriculture

a. *Alabama Agricultural and Conservation Development Commission*: all records of the Commission. Ala. Code § 9-8A-3(e) (2001) (public records).

## 3. Conservation and Natural Resources

a. *State Department of Conservation and Natural Resources*: all records, *except* confidential reports and accident reports for vessels. Ala. Code § 33-5-7 (2002) (public records).

## 4. Courts

a. *Circuit court register's office*: records of the office, when not in use by the register. Ala. Code § 12-17-119 (1995) (public records).

b. *County juror commissions*: master list of jurors. Ala. Code § 12-16-57(c) (1995) (public record).

c. *County Probate Judge's Office*: records "regarding license plates issued for state vehicles other than unmarked state vehicles that are used for investigative or surveillance work in law enforcement." *Birmingham News Co. v. Hobbie*, 12 Media L. Rep. (BNA) 1687, 1688 (Cir. Ct. of Montgomery County, Ala., Dec. 20, 1985); *see also* Ala. Code § 12-13-50 (1995) ("The records of the office [of probate judge] must be free for the examination of all persons when not in use by the judge, whether such persons are interested in such records or not.") (public records).

## 5. Criminal Procedure

a. *Sheriff's office*: records of prisoners, execution or order of sale of property, and sales of property. Ala. Code § 36-22-13 (2001) (public records); pistol licenses. *TV Alabama Inc. v. Woodward*, No. CV-9707688 (Cir. Ct. of Jefferson County, Alabama, Dec. 17, 1997); the front side of incident/offense reports. *Washington County Publications v. Wheat*, No. CV-99-94 (Cir. Ct. of Washington County, Alabama, May 1, 2000).

b. *State Department of Corrections*: inmate work release rosters, including the inmate's name, the specific location of the inmate, the inmate's place of employment, and the crime for which the inmate is incarcerated. 200 Op. Att'y Gen. Ala. 25 (Aug. 20, 1985) (public records).

## 6. Environmental Control

a. *State Air Pollution Control Act*: records, reports and information gathered pursuant to agency authority, *except* for trade secrets. Ala. Code § 22-28-20(a) (1997) (public records).

b. *State Hazard Waste Management Act*: records, reports and information gathered pursuant to agency authority, *except* for trade secrets. Ala. Code § 22-30-18 (1997) (public records).

c. *State Underground Storage Tank and Wellhead Protection Act*: records, reports and information gathered pursuant to agency authority, *except* for trade secrets. Ala. Code § 22-36-8 (1997) (public records).

d. *Water Pollution Control Commission*: records and reports gathered pursuant to agency authority, *except* for trade secret, profit, production and sales information. Ala. Code § 22-22-9(c) (1997) (public records).

## 7. Fire Marshal

a. *Alabama Fire Fighters' Personnel Standards and Education Commission*: bylaws and regulations. Ala. Code § 36-32-6 (2001) (public records).

b. *State Fire Marshal*: records of all fires occurring in the

state, except that testimony taken in a fire investigation may be withheld at the Marshal's discretion. Ala. Code § 36-19-25 (2001) (public records).

## 8. Government, Local

a. *Board of adjustment*: minutes of proceedings, including the vote of each member upon each question, and records of examinations and other actions. Ala. Code § 11-52-80(b) (1994) (public records).

b. *Board of commissioners in city commission form of government*: a record of the proceedings of every meeting. Ala. Code §§ 11-44-22, -82, -126 (1989) (public records).

c. *City council in mayor-council form of government*: a record of the proceedings of every meeting. Ala. Code §§ 11-44C-28 and -44E-51 (1989) and -44B-6(f) (Supp. 2005) (public records).

d. *City council in council-manager form of government*: a journal of proceedings of every meeting. Ala. Code §§ 11-43A-24 (1989) and -86, -90 (Supp. 2005) (public records).

e. *Municipal planning commissions*: record of resolutions, transactions, findings and determinations. Ala. Code § 11-52-4 (1994) (public records).

## 9. Government, State

a. *Administrative procedure: contested cases*: the recording or stenographic notes of oral proceedings or the transcription thereof, *except* in cases where private hearings are authorized by law, or where the proceedings are ordered sealed by order of court or are required to be sealed by statute. Ala. Code § 41-22-12(h) (2000) (public records).

b. *Alabama Housing Finance Authority Board of Directors*: all records of the Board. Ala. Code § 24-1A-4 (2000) (public records); *see also* Op. Att'y Gen. Ala. No. 2001-063 (Jan. 5, 2001).

c. *Beautification Board of the State of Alabama*: a record of the proceedings. Ala. Code § 41-9-494 (2000) (public records).

d. *State Ethics Commission*: reports and statements filed with commission shall be available during regular business hours and online via the internet. Ala. Code § 36-25-4(a)(5) (2001) (public records).

## 10. Health Care

a. *Alabama Board of Examiners of Counseling*: records, orders and judgments. 4 Ala. Admin. Code r. 255-X-1-.07 (Supp. June 30, 2003) (public records).

b. *Alabama Medicaid Agency*: uniform cost reports filed by providers with the Agency. 184 Op. Att'y Gen. Ala. 27 (Aug. 25, 1981) (public records).

c. *State Nursing Board*: names of nurses whose licenses have been revoked. 167 Op. Att'y Gen. Ala. 28 (May 4, 1997) (based upon statutory provisions that have been revised and replaced by Alabama Code § 34-21-25 (2002), but arguably still good law for this point); *see* Ala. Code § 34-21-25 (j)(6) (2002) ("The records of a licensee who fails to comply with the program agreement or who leaves the state prior to the successful completion of the program shall not be deemed confidential.") (public records).

## 11. Highway Department

a. *State Highway Department*: files and records, including plans and specifications. Ala. Code § 23-1-34 (2000) (public records).



## 12. Railroads

a. *Northeast Mississippi-Northwest Alabama Railroad Authority Compact Board of Directors*: records of the Authority and the Board. Ala. Code § 37-11A-1 art. IV (1992) (public records).

## 13. Veterinarians

a. *Alabama State Board of Veterinary Medical Examiners*: complete and accurate records of all meetings, *except* the records of closed meetings to prepare, approve, administer or grade examinations or to deliberate qualifications of a proceeding to discipline a licensed veterinarian. Ala. Code § 34-29-66(b)(8) (2002) (public records).

### C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

*Criminal judicial records* are subject to federal constitutional rights of access and particular required procedures for closure of such records. *See Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1132-35 (Ala. Crim. App. 1993) (required procedure for closure of criminal records set forth, applying First Amendment right of access); *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423, 433-34 (Ala.), *cert. denied*, 113 S. Ct. 665 (1992).

*Civil judicial records* are subject to common law right of access, *see Brewer v. Watson [Brewer I]*, 61 Ala. 310, 311 (1878), and access under Alabama's Public Records Law, *see Holland v. Eads*, 614 So. 2d 1012, 1015 (Ala. 1993). The *Holland* court held that a motion to seal civil court records can be granted only after the trial court (a) conducts a hearing and (b) makes "a written finding that the moving party has proved by *clear and convincing evidence* that the information contained in the document sought to be sealed:

- (1) constitutes a trade secret or other confidential commercial research or information; or
- (2) is a matter of national security; or
- (3) promotes scandal or defamation; or
- (4) pertains to wholly private family matters, such as divorce, child custody, or adoption [citing *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941); *Ex parte Balogun*, 516 So. 2d 606 (Ala. 1987)];
- (5) poses a serious threat of harassment, exploitation, physical intrusion or other particularized harm to the parties to the action; or
- (6) poses the potential for harm to third persons not parties to the litigation." 614 So. 2d at 1016 (citations deleted; emphasis added).

A record including documents relating to a settlement agreement could not be sealed because the party seeking to have it sealed failed to show extraordinary circumstances outweighing the presumption for openness. *Byrd v. First Real Estate Corp.*, CV-95-N-3087-S (N.D. Ala. 1998).

*Nonjudicial public records* in Alabama are subject to the following categories of court-derived and common law exclusions — which are precatory, not mandatory — that may justify keeping otherwise-public records confidential, despite the absence of an express statutory exclusion to the Public Records Law:

1. *When undue interference or hindrance in the discharge of a public officer's duties would result.* *See Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 597, 200 So. 739, 746 (1941); *see also Munger v. State Board for Registration of Architects*, 607 So. 2d 280, 284 (Ala. Civ. App. 1992); *Birmingham News Co. v. Hornsby*, CV 94-103-TH (Cir. Ct. of Montgomery County, Ala., Mar. 18, 1994) (access to Alabama Department of Human Resources Final Decision in

child abuse/neglect case denied because disclosure would unduly interfere with efficient administration of duties of the Department by chilling public's willingness to report allegations of abuse). *See also Op. Att'y Gen. Ala. No. 1988-079* at 5 (Dec. 16, 1987); 190 Op. Att'y Gen. Ala. 33, 33 (Mar. 7, 1983).

2. *When speculation or idle curiosity is the sole purpose of the request.* *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 597, 200 So. 739, 746 (1941). As early as the *Holcombe* decision, however, the media were said to have such a legitimate interest in public records that this exclusion would not apply to media requests. 240 Ala. at 597-99. The "speculation or idle curiosity" exclusion has its roots in the common law principle barring requesters who do not have a "proper purpose" for their request. *See Blankenship v. City of Hoover*, 590 So. 2d 245, 247-48 (Ala. 1991). The "proper purpose" exclusion has, fortunately, become greatly attenuated and probably now would bar access only to those who sought access to the records in order to destroy or despoil them. *See* 590 So. 2d at 249-50.

3. *Recorded information received in confidence by a public officer.* *See Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981) (a precatory, not mandatory, exclusion; subject to judicial rule of reason); *see also Tuscaloosa News v. Garrison*, No. CV-1999-408 (Cir. Ct. of Tuscaloosa County, Ala., May 31, 2000) (ruling delayed for a determination whether resumes for school board members had been submitted under a promise of confidentiality; the court indicated those resumes so submitted would not be subject to disclosure); *Birmingham News Co. v. Muse [Muse II, 2d appeal]*, 669 So. 2d 138, 139 (Ala. 1995) (access to Auburn University's response to NCAA Letter of Inquiry held properly denied where disclosure would result in breach of numerous promises of confidentiality to participants in response); 200 Op. Att'y Gen. Ala. 25, 26 (Aug. 20, 1985) (information regarding inmates that should not be public includes "information received in confidence from law enforcement agencies"); 227 Op. Att'y Gen. Ala. 42, 48 (June 3, 1992) ("addresses and telephone numbers received [by the fire district from residents] under a promise of confidentiality should not be . . . released").

*But see Bedingfield v. Birmingham News Co.*, 595 So. 2d 1379, 1381 (Ala. 1992) (need for confidentiality of communications in internal audit will not be presumed as necessary to ensure that public officials will be truthful); *Birmingham News Co. v. Muse [Muse II, 1st appeal]*, 638 So. 2d 853, 861 (Ala. 1994) ("If this Court allowed a promise of confidentiality to end the inquiry, any state official could eliminate the public's rights under the Public and Private Writings Act.") (Houston, J., concurring in part and dissenting in part); *Consolidated Publishing Co. v. Smith*, CV 92-500197 (Cir. Ct. of Calhoun County, Ala., Oct. 16, 1992) ("The promise of confidentiality not to disclose the terms of [a settlement] agreement [between former City employees and the City] is not sufficient to preclude disclosure. . . . Upholding a pledge of confidentiality under these circumstances would be contrary to public policy because it would allow an office policy of [the City's] insurance carrier to circumvent the Open Records Law when the records would otherwise be open."); 221 Op. Att'y Gen. Ala. 24, 26-27 (Oct. 24, 1990) ("when public policy considerations in favor of disclosure are weighed against requests [by applicants for county administrator's position] to keep a resume confidential, the presumption in favor of disclosure outweighs a request of confidentiality unless the resume contains sensitive material, the release of which would cause undue harm or embarrassment to the applicant").

4. *Sensitive personnel records.* *See Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981) (a precatory, not mandatory, exclusion; subject to judicial rule of reason); *see also Advertiser Co. v. Auburn Univ.*, 17 Media L. Rep. (BNA) 1907, 1909 (Cir. Ct. of Lee County, Ala., Mar. 29, 1990) (investigatory report by attorneys into alleged wrongdoing of public official not information

“from a personnel record”; sensitivity of information sought is not dispositive); *Birmingham Education Ass’n v. Birmingham City Board of Education*, CV 94-2637 at 4 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995) (lists of employee names for transfer, non-renewal of contract, cancellation of contract, suspension, or dismissal are not “sensitive personnel records” despite “potential for some embarrassment to employees whose names appear on the list”); 227 Op. Att’y Gen. Ala. 60 (June 11, 1992) (names, titles and compensation of county employees are not sensitive personnel records); Op. Att’y Gen. Ala. No. 96-00003 at 4, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995) (“In general, applications, disciplinary actions, and memoranda of reprimand are documents reasonably necessary to conduct business, and thus subject to disclosure . . .,” as are salary expenditure, race, current assignment, rank and type of teaching certificate, employment experience record, employee’s salary, areas of endorsement, sex, date of hire, date employee attained tenure).

*But see Mobile Press Register Inc. v. Jordan*, CV 95-1593 at 3-4 (Cir. Ct. of Mobile County, Ala., June 2, 1995) (proposed organizational chart of superintendent presented to school board “as of this date is a ‘sensitive personnel record’”); *Blankenship v. City of Hoover*, 590 So. 2d 245, 250 (Ala. 1991) (W-2 forms of public employees are sensitive personnel records in that they “would disclose whether or not an individual employee has elected to participate in income-deferral plans, insurance plans, or similar benefits which are more personal than public in nature”) (quoting trial court opinion); *Advertiser Co. v. Montgomery County Bd. of Educ.*, CV-05-389 (Cir. Ct. of Montgomery County, Ala., Oct. 7, 2005) (refusing to hold that names of employees put on paid administrative leave are necessarily subject to public disclosure, but recognizing that disclosure could be required in some situations); Op. Att’y Gen. Ala. No. 88-00079 at 4 (Dec. 16, 1987) (“information such as psychological evaluations, family history, religious affiliation or political opinions or activities” could be sensitive personnel records) (in dicta); 212 Op. Att’y Gen. Ala. 26, 27 (Aug. 1, 1988) (employees’ home address is private matter); Op. Att’y Gen. Ala. No. 96-00003 at 4, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995) (marital status, medical history, confidential recommendations for employment, and drug or alcohol testing results “will, in most cases, fall under the sensitive personnel records exception set out in *Stone*. . . [but] the party refusing to disclose should remember it has the burden of proving the information requested falls within an exception to the Open Records Act.”).

5. *Records of a pending criminal investigation.* See *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (1981) (a precatory, not mandatory, exclusion; subject to judicial rule of reason); see also *Burnham Broad. Co. v. Mobile*, CV 92-2752 (Cir. Ct. of Mobile County, Ala., Aug. 4, 1992) (if documents sought were public records prior to being subpoenaed by grand jury, documents remain public records from the records-holder despite production of copies to grand jury).

6. *Records privileged by common law.* See *Horne v. Patton*, 291 Ala. 701, 708-09, 287 So. 2d 824, 829-30 (1973) (recognizing common law doctor-patient privilege).

The nonstatutory exceptions to the Public Records Law (often referred to as the *Stone* exceptions, from *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981)), are limited by the presumptions, statutory construction, and burdens of proof that were established in *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989), as follows:

a. *The Public Records Law is to be liberally construed.*

1. “It is clear from the wording of § 36-12-40 [the Public Records Law] that the legislature intended that the statute be liberally construed. In addition, we note, statutes intended for the public benefit are to be construed in favor of the public.” 552 So. 2d at 856.

2. “[T]he judiciary has to apply the ‘rule of reason.’ However, it must be noted that this ‘rule of reason’ shall not be applied so as to hamper the liberal construction of § 36-12-40.” 552 So. 2d at 856.

b. *There is a presumption of disclosure under the Public Records Law.*

1. “There is a presumption in favor of public disclosure of public writings and records expressed in the language of § 36-12-40.” 552 So. 2d at 856.

2. “[B]ecause there is a presumption of required disclosure, the party refusing disclosure shall have the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them.” 552 So. 2d at 856-57.

c. *Exceptions to the Public Records Law must be narrowly construed.*

1. “The exceptions set forth in *Stone* must be strictly construed . . .” 552 So. 2d at 856.

2. “[T]he *Stone* exceptions should not come into play merely because of some perceived necessity on the part of a public official or established office policy.” 552 So. 2d at 856.

3. “[W]e emphasize that these exceptions must be narrowly construed and their application limited to the circumstances stated herein, for it is the general rule, and has been the policy of this state for a number of years, to advocate open government. The *Stone* exceptions were not intended, nor shall they be used, as an avenue for public officials to pick and choose what they believe the public should be made aware of.” 552 So. 2d at 857.

Two further factors weigh in the balance *after* a court finds that one of the *Stone* exceptions applies, as follows:

The exceptions set forth in *Stone* must be strictly construed and must be applied *only* in those cases [1] where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or [2] where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure.

*Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989) (emphasis and subpart numbering added).

“Undue harm and embarrassment” and “adverse to the public interest” are not separate exceptions, but only factors for the court to consider after an exception to disclosure has been proven. See, e.g., *Advertiser Co. v. Auburn Univ.*, 17 Media L. Rep. (BNA) 1907 (Cir. Ct. of Lee County, Ala., Mar. 29, 1990) (“The matters sought are, of course, sensitive. The disclosure of the report in this case would not be detrimental to the best interests of the public.”); *State ex rel. Kernells v. Ezell*, 291 Ala. 440, 282 So. 2d 266 (1973), quoting and applying *Excise Commission of Citronelle v. State ex rel. Skinner*, 179 Ala. 654, 60 So. 812 (1912) (“In the present case, . . . whatever personal embarrassments might result from the disclosure of the names of those who have signed this recommendation must be regarded as matters of private interest; and, although they might become, in some sense, matters of public concern, even so, they are wholly subordinate to that paramount public interest — the maintenance and enforcement of public law”; recommendations ordered disclosed) (common law case prior to Public Records Law).

*But see Birmingham News Co. v. Hornsby*, CV 94-103 TH (Cir. Ct. of Montgomery County, Ala., Mar. 18, 1994) (“undue harm and embarrassment” applied as ground for exclusion rather than balancing factor after finding ground for exclusion). See also 221 Op. Att’y Gen. Ala. 24 (Oct. 24, 1990) (“undue harm or embarrassment” as factor to apply to “sensitive personnel records” ground for exclusion); 222 Op. Att’y Gen. Ala. 48 (Mar. 20, 1991) and 223 Op. Att’y Gen. Ala. 19 (May 17, 1991) (“undue harm or embarrassment” as factor to apply to “records



received in confidence” ground for exclusion); *see also* 223 Op. Att’y Gen. Ala. 16 (Apr. 18, 1991) (pistol permits on file in sheriff’s office are public records; “there is not a state privacy law”).

#### D. Are segregable portions of records containing exempt material available?

The Alabama Public Records Law does not expressly provide for access to segregable portions of records that contain exempt material, but numerous statutes provide for partial exclusion, *see, e.g.*, Ala. Code § 9-16-83(b)(16) (2001) (applications for surface coal mining and reclamation permits open except for information pertaining to the coal seam itself), and redaction has been permitted, sanctioned, or ordered in the following cases and attorney general opinions:

1. *Arrest reports*: Complainant names and witness names may be blocked out or otherwise precluded from access. *Birmingham News Co. v. Deutshb*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986).

2. *Complaint reports*: Specific information, or entire reports, may be withheld if “the divulging of such information or complaint reports would actually interfere with the conduct of the efforts of respondents in enforcing the criminal law or would actually hamper law enforcement.” *Birmingham News Co. v. Watkins*, CV No. 38389 at 4 (Cir. Ct. of Jefferson County, Ala., Oct. 30, 1974) (applying First Amendment newsgathering right, not Public Records Law); *see also Washington County Publications v. Wheat*, No. CV-99-94 (Cir. Ct. of Washington County, Ala., May 1, 2000) (incident/offense reports are available for public inspection subject to the right of the sheriff to withhold or redact certain information on a case-by-case basis depending on the nature of the case, the status of the investigation, whether the victim would be subject to threats or intimidation, or when public disclosure would hinder the investigation of a case).

3. *National Fire Incident Reporting System forms*: Home addresses, telephone numbers and the material status of persons involved in an incident may be withheld from public inspection. Op. Att’y Gen. Ala. No. 2006-134, 2006 Ala. AG LEXIS 97 (Aug. 17, 2006).

4. *Personnel records*: Psychological profiles in inmate personnel file, 200 Op. Att’y Gen. Ala. 25 (Aug. 20, 1985); employees’ home addresses, 212 Op. Att’y Gen. Ala. 26 (Aug. 1, 1988); confidential material in a resume the release of which would cause undue harm or embarrassment, 222 Op. Att’y Gen. Ala. 48 (Mar. 20, 1991); addresses or telephone numbers received under a promise of confidentiality, 227 Op. Att’y Gen. Ala. 42 (June 3, 1992); marital status, medical history, confidential recommendations of employment, and drug or alcohol testing, Op. Att’y Gen. Ala. No. 96-00003, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995).

5. *Prison Incident Reports*: The Department of Corrections was permitted to redact information that would subject a person to a specific threat or harm or if the release of the information would jeopardize a pending criminal investigation or violate any state or federal law. *Allen v. Barksdale*, 32 So. 3d 1264 (Ala. 2009).

6. *State license tag records*: Information regarding state license tags for undercover vehicles to be blocked out. *Birmingham News Co. v. Hobbie*, 12 Media L. Rep. (BNA) 1687, 1688 (Cir. Ct. of Montgomery County, Ala., Dec. 20, 1985).

7. *Transcript of pretrial proceedings*: Materials involving ongoing grand jury proceedings are to be kept under seal, by redaction of references to these materials from the transcript of pretrial proceedings. *Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1127-29 (Ala. Crim. App. 1993) (applying common law and First Amendment right of access to criminal court records).

Alabama courts have also *refused* to order redacted disclosure in at least two cases. *Birmingham News Co. v. Hornsby*, CV 94-103-TH (Cir.

Ct. of Montgomery County, Ala., Mar. 18, 1994) (trial court refuses to order redaction and disclosure of Alabama Human Resources Final Decision in child abuse/neglect case because “[t]he issues . . . addressed in the [Final Decision] are so intertwined with information that is made confidential by state statute and administrative rule that it is impossible to determine that any portion of the disputed documents could be redacted so as to be allowed to be open to public inspection and still retain any meaning”); *Birmingham News Co. v. Muse* [*Muse II*, 2d appeal], 669 So. 2d 138, 139 (Ala. 1995) (redaction and disclosure of Auburn University’s Response to NCAA Letter of Inquiry denied because “[i]f the promises [of confidentiality] are to be honored, it would be difficult, if not impossible, to edit out th[e] material [received under promise of confidentiality] and release a response that made sense”) (quoting and adopting trial court’s findings).

#### E. Homeland Security Measures.

In 2004, the Public Records Law was amended to include the following language:

[R]ecords concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation information concerning critical infrastructure (as defined at 42 U.S.C. § 5195c(e) as amended) and critical energy infrastructure information (as defined at 18 C.F.R. § 388.11(c)(1) as amended), the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section. Any public officer who receives a request for records that may appear to relate to critical infrastructure or critical energy infrastructure information, shall notify the owner of such infrastructure in writing of the request and provide the owner an opportunity to comment on the request and on the threats to public safety or welfare that could reasonably be expected from public disclosure of the records.

Ala. Code § 36-12-40 (Supp. 2005).

### III. STATE LAW ON ELECTRONIC RECORDS

The Alabama Public Records Law provides access to “public writings,” without more definition, but recent statutes, case law, and attorney general opinions have recognized that the term includes electronic records. *See, e.g.*, Ala. Code § 22-9A-21(f) (1997) (“The [nonrestricted public birth] records may be made available for viewing in photographic, digital, electronic, or other suitable format as provided for by rules of the [State Board of Health.]”); *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993) (Alabama Department of Public Safety ordered to make computer databases of Department available to provide access to motor vehicle records in the databases) (as of Sept. 13, 1997, access to MVRs is governed by 18 U.S.C. § 2721); 227 Op. Att’y Gen. Ala. 42 (1992) (redacted data from fire district computer database due to be disclosed); 217 Op. Att’y Gen. Ala. 29 (Nov. 17, 1989) and 197 Op. Att’y Gen. Ala. 21 (Nov. 16, 1984) (computer printout of executions and sales is “well-bound book” as required by statute); 209 Op. Att’y Gen. Ala. 29 (Nov. 4, 1987) (“The reasoning applicable to documentary records in [the tax assessor’s] office also applies to information provided by your office through the use of computers.”).

The trial judge in *Peevy* articulated one of the primary reasons that computerized information is recognized as a “writing” for purposes of the Public Records Law, as follows:

Certainly, the Department was able to carry out its business without the aid of computers before such technology was available. However, the Court recognizes that computers have added a great amount of value to our public records, and that currently the Department generates the MVRs by computers. Therefore,

without the aid of the computer data base, citizens would not, as a practical matter, have access to all of the information compiled.

21 Media L. Rep. (BNA) at 2126.

#### A. Can the requester choose a format for receiving records?

In *Birmingham News Co. v. Peevey*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery Co., Ala., July 22, 1993), the trial court ordered the Department of Motor Vehicles to produce motor vehicle records in computer form, as requested — and as generated by the Department for its own use. The trial court quoted with approval an Ohio Supreme Court opinion, as follows:

“[M]embers of the public should not be required ‘to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials at public expense.’ Similarly, a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records.”

*Id.* at 2126 (quoting *Ohio ex rel. Margolius v. Cleveland*, 19 Media L. Rep. (BNA) 2122, 2124 (Ohio S. Ct. 1992) (effective Sept. 13, 1997, access to MVRs is governed by 18 U.S.C. § 2721).

The Alabama Attorney General has declared, however, that

[i]t is not [a public agency’s] responsibility or duty to provide the information to [the requester] in a particular form nor must [the agency] necessarily compile or assimilate the information for the public. Your responsibility is to provide reasonable access to the information and for the information to be a reasonable form (e.g. legible copies if possible or in regular language rather than a code form a person outside the office would not be familiar with).

Op. Att’y Gen. Ala. No. 88-00079 at 5 (Dec. 16, 1987) (diskette of personnel data requested; the requested data need not be provided in that particular form); *see also* Op. Att’y Gen. Ala. No. 2007-001, 2006 Ala. AG LEXIS 119 (Oct. 2, 2006) (“Because a state agency may regulate the manner in which public records are produced, inspected, and copied, a state agency . . . is not required to distribute public records in the manner that a requestor specifies.”)

#### B. Can the requester obtain a customized search of computer databases to fit particular needs?

In *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993), the trial judge ordered the Alabama Department of Public Safety to produce the requested motor vehicle records from its databases and “to create any new computer program required to comply with any such request.” He also ordered The Birmingham News Company to pay the Department “the actual, reasonable cost incurred by the Department” to create such a computer program. *Id.* at 2125 (as of Sept. 13, 1997, access to MVRs is governed by 18 U.S.C. § 2721). *But see* Op. Att’y Gen. Ala. No. 2007-001, 2006 Ala. AG LEXIS 119 (Oct. 2, 2006) (agency did not have to produce information in the electronic form requested); Op. Att’y Gen. Ala. No. 88-00079 (Dec. 16, 1987) (diskette of personnel data requested; agency need not produce the data in diskette form nor compile or assimilate the information); Alabama Rules of Judicial Administration 33 appendix (UJS Computer Data Dissemination Requests-Procedures; “nonavailable data” — i.e., data “made to order” rather than in current retrievable format — is not subject to public disclosure, unless the Administrative Director of Courts (“ADC”) determines that the requested “made to order” information possesses significant potential for enhancement of the judicial system).

#### C. Does the existence of information in electronic format affect its openness?

This question has not been addressed by legislative or judicial action

in Alabama, except by implication in one set of statutes and one rule of judicial administration. In 1991, the Alabama Legislature established the Alabama Criminal Justice Information Center (“ACJIC”) and mandated that a number of categories of information be sent to the Center by state and local law enforcement agencies for storage in the Center’s computer database. Most of the categories of information are public records at the originating agencies, but the ACJIC Act bars public access to its computerized information except on a “need to know” and “right to know” basis. Arguably, the Legislature deems the compilation of that data in computer form to be more invasive of privacy rights than the ungathered data. *See* Ala. Code §§ 41-9-620 *et seq.* (2000). *See also* Ala. Code § 41-9-594 (2000) (ACJIC commission shall appoint a privacy and security committee); Ala. Code § 41-9-636 (2000) (“Provision of information [by ACJIC] shall be limited by . . . the right of privacy . . .”); Ala. Code § 41-9-642 (2000) (ACJIC legislation gives no authority to “invade the privacy of any citizen”).

Rule 33 of the Alabama Rules of Judicial Administration provides the following criteria for evaluating requests for computer-based information that is maintained by the Administrative Office of Courts (“AOC”) regarding court cases in Alabama: (1) Availability of data; (2) Specificity of request; (3) Potential for infringement of personal privacy created by release of the information requested; (4) Potential for abuse or misinterpretation of the information requested as it related to its intended use; and (5) Potential disruption to the internal, ongoing business of the courts.

Since most of the information maintained by the AOC was public record information in the courts throughout the state, this rule has the potential to make some public record information inaccessible when it is gathered in computer form.

The Alabama Attorney General has stated that a state agency is not required to produce information electronically that is already available in paper format. *See* Op. Att’y Gen. Ala. No. 2007-001, 2006 Ala. AG LEXIS 119 (Oct. 2, 2006).

#### D. How is e-mail treated?

##### 1. Does e-mail constitute a record?

The Supreme Court of Alabama has treated email as public records subject to the Public Records Law. *See Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale County*, 2010 ALA. LEXIS 213 (Ala. Oct. 29, 2010) (holding that emails between public employees regarding the sale of public assets was subject to disclosure under the Public Records Law).

Request for emails must be made to the proper custodian of public records, and computer service employees may not be the proper person to provide emails if they are not the custodian of the public records requested. *George v. Gassock*, CV 07-40 (Cir. Ct. of Morgan County, Ala. June 12, 2007).

##### 2. Public matter on government e-mail or government hardware

The Supreme Court of Alabama has treated emails between public employees regarding the sale of public assets as subject to the Public Records Law. *Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale County*, 2010 ALA. LEXIS 213 (Ala. Oct. 29, 2010).

##### 3. Private matter on government e-mail or government hardware

There is no statutory or case law addressing this issue.

##### 4. Public matter on private e-mail

There is no statutory or case law addressing this issue.

##### 5. Private matter on private e-mail

There is no statutory or case law addressing this issue.

### E. How are text messages and instant messages treated?

We know of no request for text or instant messages under the Alabama Public Records Law, but there is no reason for that form of record to be treated any differently from any other form, especially since access to computer records has already been established in this State. See *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993).

#### 1. Do text messages and/or instant messages constitute a record?

There is no statutory or case law addressing this issue.

#### 2. Public matter message on government hardware.

There is no statutory or case law addressing this issue.

#### 4. Public matter message on private hardware.

There is no statutory or case law addressing this issue.

#### 5. Private matter message on private hardware.

There is no statutory or case law addressing this issue.

### F. How are social media postings and messages treated?

We know of no request for social media postings and messages under the Alabama Public Records Law, but there is no reason for that form of record to be treated any differently from any other form, especially since access to computer records has already been established in this State. See *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993).

### G. How are online discussion board posts treated?

We know of no request for online discussion board posts under the Alabama Public Records Law, but there is no reason for that form of record to be treated any differently from any other form, especially since access to computer records has already been established in this State. See *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993).

### H. Computer software

We know of no request for software under Alabama's Public Records Law.

#### 1. Is software public?

There is no statutory or case law addressing this issue.

#### 2. Is software and/or file metadata public?

There is no statutory or case law addressing this issue.

### I. How are fees for electronic records assessed?

There is no uniform fee schedule or formula for the assessment of fees for copies of electronic records. In *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993), the trial court ordered the requester to pay (a) "the actual, reasonable cost incurred by the Department [of Public Safety] to create any new computer program required to comply with [the Plaintiff's request for motor vehicle records]" and (b) the statutorily mandated fee of \$5.75 "for each and every individual driving record identified by named driver in any such copy of the Department's databases delivered to the Plaintiff," *id.* at 2125, presumably on the ground that the MVR fee statute makes no distinction for the form in which the MVR records are produced. Ala. Code § 32-7-4 (1999) (as of Sept. 13, 1997, access to MVRs has been governed by 18 U.S.C. § 2721).

Rule 33 of the Alabama Rules of Judicial Administration provides that the Administrative Director of Courts ("ADC") will promulgate policies and procedures — including a schedule of costs — for handling applications for computer-based information that is maintained by the Administrative Office of Courts ("AOC"). No such cost

schedule has been established, but AOC computer-based information is available through two on-line services, ALALINC and alacourt.com. ALALINC has an annual user fee and provides access to current appellate decisions of the Alabama Supreme Court, Alabama Court of Civil Appeals, Alabama Court of Criminal Appeals, United States Circuit Court for the Eleventh Circuit, and United States Supreme Court, in addition to general information about Alabama's criminal justice system, directories of judicial officers, and related educational information. Alacourt.com has a one-time user fee of \$150, and a monthly fee of \$84 to \$134, depending on the number of users; it provides access to case action summaries of pending civil and criminal actions in all Alabama trial courts, with search capacity.

Much more typically, there will be no statutorily mandated fee, and the fee for records in electronic format should be subject to the same reasonable-cost-of-production requirement that governs records requests in any other form. See Op. Att'y Gen. Ala. No. 2008-030, 2007 Ala. AG LEXIS 97 (Dec. 28, 2007) (stating a state agency "may recoup reasonable costs incurred providing public documents to a citizen").

### J. Money-making schemes.

#### 1. Revenues.

The Alabama Code provides for the sale of information from the Alabama Criminal Justice Information Center (ACJIC) at a fee not to exceed \$25, with all fees collected going to the State's General Fund. Ala. Code § 41-9-644 (2000). There is as yet no other provision for generating revenue by the sale of public records in electronic form.

#### 2. Geographic Information Systems.

We know of no fee schedule or formula for assessment of fees for the use of Geographic Information Systems.

### K. On-line dissemination.

The State of Alabama has a website at <http://www.alabama.gov>. The State Agencies portion of the site (<http://info.alabama.gov/>) has links to websites for over 200 State departments and agencies. The content of these sites varies a great deal, from public relations and descriptive information about the particular agency or department to more substantive information, e.g., maps, statistics, and resource material and citations. There is no fee for these sites.

Public records that are available on-line with a fee charge include the following:

1. *ALALINC*: Current appellate decisions of the Alabama Supreme Court, Alabama Court of Civil Appeals, and Alabama Court of Criminal Appeals, United States Circuit Court for the Eleventh Circuit, and the United States Supreme Court are available. There is an annual user that varies depending on the package selected. ALALINC also provides information about Alabama's judicial system, directories of judicial officials, and related educational material.

2. *alacourt.com*: Case action summaries for pending civil and criminal actions in all Alabama trial courts, with search capability. The cost is a one-time fee of \$150, and a monthly fee of \$84 to \$134, depending on the number of users. Access is available for free to Alabama State Bar members at a limited number of county courthouse libraries.

## IV. RECORD CATEGORIES — OPEN OR CLOSED

Beyond the categories listed below, the following records are also available to the public by specific law, case law, or attorney general opinion:

#### 1. Aeronautics

a. Civil Air Patrol: current lists of license tags in each county issued to amateur radio operators licensed by the Civil Air Patrol. Ala. Code § 32-6-92 (1999) (public records).



b. State Department of Aeronautics: records regarding rules and regulations for licensing certain open-to-the-public airports. 1 Ala. Admin. Code r. 60-X-1-.03 (Supp. March 31, 1991) (public records).

## 2. Agriculture

a. Alabama Agricultural and Conservation Development Commission: all records of the Commission. Ala. Code § 9-8A-3(e) (2001) (public records).

## 3. Conservation and Natural Resources

a. State Department of Conservation and Natural Resources: all records, except confidential reports and accident reports for vessels. Ala. Code § 33-5-7 (2002) (public records).

## 4. Courts

a. Circuit court register's office: records of the office, when not in use by the register. Ala. Code § 12-17-119 (1995) (public records).

b. County juror commissions: master list of jurors. Ala. Code § 12-16-57(c) (1995) (public record).

c. County Probate Judge's Office: records "regarding license plates issued for state vehicles other than unmarked state vehicles that are used for investigative or surveillance work in law enforcement." *Birmingham News Co. v. Hobbie*, 12 Media L. Rep. (BNA) 1687, 1688 (Cir. Ct. of Montgomery County, Ala., Dec. 20, 1985); see also Ala. Code § 12-13-50 (1995) ("The records of the office [of probate judge] must be free for the examination of all persons when not in use by the judge, whether such persons are interested in such records or not.") (public records).

## 5. Criminal Procedure

a. Sheriff's office: records of prisoners, execution or order of sale of property, and sales of property. Ala. Code § 36-22-13 (2001) (public records); pistol licenses. *TV Alabama, Inc. v. Woodward*, No. CV-9707688 (Cir. Ct. of Jefferson County, Alabama, December 17, 1997); the front side of incident/offense reports. *Washington County Publications v. Wheat*, No. CV-99-94 (Cir. Ct. of Washington County, Alabama, May 1, 2000).

b. State Department of Corrections: inmate work release rosters, including the inmate's name, the specific location of the inmate, the inmate's place of employment, and the crime for which the inmate is incarcerated. 200 Op. Att'y Gen. Ala. 25 (Aug. 20, 1985) (public records).

## 6. Environmental Control

a. State Air Pollution Control Act: records, reports, and information gathered pursuant to agency authority, except for trade secrets. Ala. Code § 22-28-20(a) (1997) (public records).

b. State Hazard Waste Management Act: records, reports, and information gathered pursuant to agency authority, except for trade secrets. Ala. Code § 22-30-18 (1997) (public records).

c. State Underground Storage Tank and Wellhead Protection Act: records, reports, and information gathered pursuant to agency authority, except for trade secrets. Ala. Code § 22-36-8 (1997) (public records).

d. Water Pollution Control Commission: records and reports gathered pursuant to agency authority, except for trade secret, profit, production, and sales information. Ala. Code § 22-22-9(c) (1997) (public records).

## 7. Fire Marshal

a. Alabama Fire Fighters' Personnel Standards and Education Commission: bylaws and regulations. Ala. Code § 36-32-6 (2001) (public records).

b. State Fire Marshal: records of all fires occurring in the State, except that testimony taken in a fire investigation may be withheld at the Marshal's discretion. Ala. Code § 36-19-25 (2001) (public records).

## 8. Government, Local

a. Board of adjustment: minutes of proceedings, including the vote of each member upon each question, and records of examinations and other actions. Ala. Code § 11-52-80(b) (1994) (public records).

b. Board of commissioners in city commission form of government: a record of the proceedings of every meeting. Ala. Code §§ 11-44-22, -82 -126 (1989) (public records).

c. City council in mayor-council form of government: a record of the proceedings of every meeting. Ala. Code §§ 11-44C-28 and -44E-51 (1989) and -44B-6(f) (Supp. 2005) (public records).

d. City council in council-manager form of government: a journal of proceedings of every meeting. Ala. Code §§ 11-43A-24 (1989) and -86, -90 (Supp. 2005) (public records).

e. Municipal planning commissions: record of resolutions, transactions, findings, and determinations. Ala. Code § 11-52-4 (1994) (public records).

## 9. Government, State

a. Administrative procedure: contested cases: the recording or stenographic notes of oral proceedings or the transcription thereof, except in cases where private hearings are authorized by law, or where the proceedings are ordered sealed by order of court or are required to be sealed by statute. Ala. Code § 41-22-12(h) (2000) (public records).

b. Alabama Housing Finance Authority Board of Directors: all records of the Board. Ala. Code § 24-1A-4 (2000) (public records); see also Op. Att'y Gen. Ala. No. 2001-063 (Jan. 5, 2001).

c. Beautification Board of the State of Alabama: a record of the proceedings. Ala. Code § 41-9-494 (2000) (public records).

d. State Ethics Commission: financial disclosure statements filed by public officers and employees. Ala. Code § 36-25-4(a)(5) (2001) (public records).

## 10. Health Care

a. Alabama Board of Examiners of Counseling: records, orders, and judgments. 4 Ala. Admin. Code r. 255-X-1-.07 (Supp. June 30, 2003) (public records).

b. Alabama Medicaid Agency: uniform cost reports filed by providers with the Agency. 184 Op. Att'y Gen. Ala. 27 (Aug. 25, 1981) (public records).

c. State Nursing Board: names of nurses whose licenses have been revoked. 167 Op. Att'y Gen. Ala. 28 (May 4, 1997) (based upon statutory provisions that have been revised and replaced by Alabama Code § 34-21-25 (2002), but arguably still good law for this point); see Ala. Code § 34-21-25 (j)(6) (2002) ("The records of a licensee who fails to comply with the program agreement or who leaves the state prior to the successful completion of the program shall not be deemed confidential.") (public records).

## 11. Highway Department

a. State Highway Department: files and records, including plans and specifications. Ala. Code § 23-1-34 (2000) (public records).

## 12. Railroads

a. Northeast Mississippi-Northwest Alabama Railroad Authority Compact Board of Directors: records of the Authority and the Board. Ala. Code § 37-11A-1 art. IV (1992) (public records).

## 13. Veterinarians

a. Alabama State Board of Veterinary Medical Examiners: complete and accurate records of all meetings, except the records of closed meetings to prepare, approve, administer, or grade examinations or to deliberate qualifications of a proceeding to discipline a licensed veterinarian. Ala. Code § 34-29-66(b)(8) (2002) (public records).

### A. Autopsy reports.

Most autopsies in Alabama are performed by the State Department of Forensic Sciences, and records of those autopsies are expressly public by statute. Ala. Code § 36-18-2 (2001) (“The director [of the Department of Forensic Sciences] shall keep photographed or micro-photographed reproductions of original reports of all investigations that he conducts in his office. Reproductions of such materials shall be public records and shall be open to public inspection at all reasonable times.”). County coroners may also require autopsies to be performed, pursuant to their duty to hold inquests under Alabama Code § 11-5-4 (1998). *See also* Ala. Code § 15-4-2 (1995) (examination of body and report by coroner; autopsy).

Since a county coroner is a public officer, *see* Ala. Code § 36-12-1 (2001), records of the county coroner’s autopsies are public records subject to disclosure under the Public Records Law, unless there is a pending criminal investigation and the disclosure of their information will compromise the investigation. Op. Att’y Gen. Ala. No. 2007-015, 2006 Ala. AG LEXIS 142 (Dec. 4, 2006).

### B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

We know of no statutory provision or reported case law regarding public access to this category of records.

#### 1. Rules for active investigations.

There is no statutory or case law addressing this issue.

#### 2. Rules for closed investigations.

There is no statutory or case law addressing this issue.

### C. Bank records.

Records of the State Banking Department of Alabama, the Banking Board of Alabama, the Bureau of Savings and Loan, and the Bureau of Credit Unions are public writings within the meaning of the Alabama Public Records Law unless an express statutory provision makes particular bank records confidential. The following statutes provide for confidentiality of particular bank records:

1. Ala. Code § 5-3A-11 (1996): All reports of an examination of a bank by the State Superintendent of Banks, all records reflecting the action of any bank taken pursuant to such an examination, and those portions of minutes of meetings of the Banking Board that relate to a specific bank or banks.
2. Ala. Code §§ 5-3A-3 (Supp. 2010), 5-5A-43 (1996): A bank customer’s financial records.
3. Ala. Code § 5-2A-80 (1996): Records, reports and other data

submitted by a licensee to the Supervisor of the Bureau of Loans, and the reporting of all investigations made under the Small Loan Act.

4. Ala. Code § 5-3A-3(a) (Supp. 2010): The condition or affairs of any bank ascertained by examination of such bank and any report or information regarding depositors or debtors of such bank, *except* as authorized or required by law.

5. Ala. Code § 5-5A-44 (Supp. 2010): Records regarding applications for acquisition of banks by a majority of voting shares.

6. Ala. Code § 5-13B-105(a) (1996): Records regarding examination and investigation of foreign banks, *unless* the Superintendent of Banks deems that publication will serve the public advantage.

7. Ala. Code § 5-16-36(b) (1996): Confidential comments by an examiner or auditor in reports to the State Savings and Loan Commissioner regarding savings and loan associations.

### D. Budgets.

We know of no statutory provision or reported case law regarding public access to this category of records.

### E. Business records, financial data, trade secrets.

The Alabama Code contains numerous provisions for the confidentiality of business information, financial data, trade secrets, and other proprietary information that is gathered or required to be filed with state agencies, including such information as is related to or included in records involving the following matters:

1. *Agricultural cooperative marketing associations.* Ala. Code §§ 2-10-28, -29 (1999).
2. *Banking.* Ala. Code §§ 5-2A-80, 5-3A-11 (1996) and 5-3A-3(a), 5-5A-44(b), 5-13B-105(a) (Supp. 2010).
3. *Department of Energy matters.* Ala. Code §§ 41-6A-4(8), -7, -11 (2000).
4. *Environmental pollution control.* Ala. Code §§ 22-22-9(c), 22-28-20(a), 22-30-18, 22-30-19(d) (1997).
5. *Health maintenance organizations.* Ala. Code §§ 27-21A-24, -25 (1998).
6. *Horse and greyhound racing.* Ala. Code §§ 11-65-10(10), -15, -18 (1994).
7. *Livestock markets.* Ala. Code § 2-15-62(e) (Supp. 2005).
8. *Meat and poultry.* Ala. Code § 2-17-24(a)(2) (1999).
9. *Milk-processing establishments.* Ala. Code § 2-13-92 (1999).
10. *Revenue rulings.* Ala. Code § 40-2A-5(d) (2003).
11. *Seed.* Ala. Code § 2-26-10(d) (1999).
12. *Surface coal mining.* Ala. Code §§ 9-16-83(b)(16), -84(a)(14), -87(b), -100 (2001).
13. *Underground tank and wellhead.* Ala. Code § 22-36-8 (1997).

Alabama courts also protect the confidentiality of proprietary information and trade secrets in court records in appropriate cases. *See Holland v. Eads*, 614 So. 2d 1012, 1016 (Ala. 1993); *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897, 916-17 (Ala. 1995).

The following otherwise-private financial and business information is subject to public disclosure:

1. The data on financial disclosure statements that public officials in the state are required to file with the Alabama Ethics Commission. Ala. Code § 36-25-4(a)(5) (Supp. 2010).
2. Documents filed by a taxpayer in support of a protest of prop-

erty valuation. 215 Op. Att’y Gen. Ala. 39, 41 (June 14, 1989).

#### F. Contracts, proposals and bids.

Documents relating to the award of public contracts in Alabama — whether by the state, county, municipality or a public corporation, and whether the contracts are required to be bid or not — are open to public inspection. *See, e.g.*, Ala. Code § 9-15-78(a) (2001) (sale or lease of public lands); Ala. Code § 9-14-22(b) (2001) (all documents pertaining to award of contracts for concessions at state parks); and Ala. Code §§ 41-16-24(b), -54(b), -57(d) (Supp. 2010); 200 Op. Att’y Gen. Ala. 23 (Aug. 19, 1985) (Medicaid fiscal agent contract); 227 Op. Att’y Gen. Ala. 42 (June 3, 1992) (fire district contracts); 237 Op. Att’y Gen. Ala. 18 (Oct. 11, 1994) (all documents relating to the award of the contract, including correspondence with references to check the bidder’s credibility). Settlement agreements entered into by a public entity are also public contracts, notwithstanding a confidentiality clause in the settlement agreement. *Consolidated Publishing Co. v. Smith*, CV 92-500197 (Cir. Ct. of Calhoun County, Ala., Oct. 16, 1992).

#### G. Collective bargaining records.

We know of no statutory provision or reported case law regarding public access to this category of records.

#### H. Coroners reports.

In Alabama, a coroner is an elected county official, *see* Ala. Code §§ 11-5-1 *et seq.* (1989), whose records should be presumptively open under the State’s Public Records Law, with the possible exception for records that relate to a pending criminal investigation. *See Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981); *see also* Op. Att’y Gen. Ala. No. 2007-015, 2006 Ala. AG LEXIS 142 (Dec. 4, 2006) (stating that reports prepared by coroners are subject to inspection under the Public Records Law).

#### I. Economic development records.

We know of no statutory provision or reported case law regarding public access to this category of records.

#### J. Election records.

The following election records are closed pursuant to statutory, case law or Alabama Attorney General opinion authority:

1. Voter registration applications. Ala. Code § 17-3-52 (2006); 202 Op. Att’y Gen. Ala. 19 (Jan. 24, 1986). *But see* Op. Att’y Gen. Ala., No. 2005-185, 2005 Ala. AG LEXIS 150 (Aug. 23, 2005) (concluding that “[t]he boards of registrars and probate judges may provide only the names and precincts of registered voters to persons or entities,” but that political parties are “entitled to obtain all voter registration information in the possession of the boards of registrars or probate judges, except for social security numbers”).
2. The list of registered voters that is used at the polling place in an election, which is marked to indicate the persons voting. *Advertiser Co. v. Hobbie*, 474 So. 2d 93, 95 (Ala. 1985); *see also* Ala. Code § 17-7-16 (1995) (“The poll list shall be sealed in an envelope before the inspectors begin to count the vote and shall not be opened.”).

The following election records are open pursuant to statutory, case law or Alabama Attorney General opinion authority:

1. Lists of registered voters, with names and polling places only. Ala. Code §§ 17-4-129, -130 (Supp. 2005); Op. Att’y Gen. Ala., No. 2005-185, 2005 Ala. AG LEXIS 150 (Aug. 23, 2005) (concluding that “[t]he boards of registrars and probate judges may provide only the names and precincts of registered voters to persons or entities,” but that political parties are “entitled to obtain all voter registration information in the possession of the boards of registrars or probate judges, except for social security numbers.”); 202 Op. Att’y Gen. Ala. 19 (Jan. 24, 1986).

2. Candidate statements, finances, organization of political committee, expenditures, contributions, etc. Ala. Code §§ 17-22A-9, -10 (1995).

3. Lists of absentee voters. Ala. Code § 17-10-5 (Supp. 2005). In a 1994 election dispute that involved the counting of absentee votes, the federal court judge in *Roe v. State*, CV 94-885-AH-S (S.D. Ala.), entered a permanent injunction, at the plaintiffs’ request, to seal the absentee voter lists in all sixty-seven counties of Alabama in order to protect the lists from alteration or destruction. In April of 1996, The Birmingham News Company filed a petition for access to the lists, citing Alabama Code § 17-10-5 and asking the court to vacate its permanent injunction sealing the lists. By order of April 15, 1996, the court granted the motion and amended the permanent injunction to provide access to the absentee voting lists in Alabama’s counties. The Court also ordered the State Attorney General’s Office to “continue to protect and maintain the original absentee voting lists from the 1994 elections.” *Roe v. State*, CV 94-885-AH-S (S.D. Ala., Apr. 15, 1996).

4. Lists from which poll workers are appointed. 210 Op. Att’y Gen. Ala. 45 (June 3, 1988).

#### 1. Voter registration records.

Voter registration applications are closed pursuant to statute. Ala. Code § 17-3-52 (2006); 202 Op. Att’y Gen. Ala. 19 (Jan. 24, 1986). *But see* Op. Att’y Gen. Ala., No. 2005-185, 2005 Ala. AG LEXIS 150 (Aug. 23, 2005) (concluding that “[t]he boards of registrars and probate judges may provide only the names and precincts of registered voters to persons or entities,” but that political parties are “entitled to obtain all voter registration information in the possession of the boards of registrars or probate judges, except for social security numbers”).

#### 2. Voting results.

There is no statutory or case law addressing this issue.

#### K. Gun permits.

Copies of pistol permits kept in the sheriff’s office are public records. Op. Att’y Gen. Ala. No. 2002-227, 2002 Ala. AG LEXIS 140 (May 8, 2002); 223 Op. Att’y Gen. Ala. 16 (Apr. 18, 1991).

#### L. Hospital reports.

The following records for medical institutions in Alabama that are organized as public corporations are open pursuant to statutory authority:

1. Certificate of incorporation. Ala. Code §§ 22-21-172, -173 (1997); §§ 11-95-3, -4 (1994).
2. Annual fiscal year financial statement. Ala. Code § 22-21-187 (1997).
3. Audit reports. Ala. Code § 22-21-4(b) (1997).

The following records for public and private medical institutions in Alabama are open pursuant to statutory and Alabama Attorney General opinion authority:

1. Information received by the state board of health through on-site inspections conducted by the state licensing agency. Ala. Code § 22-21-30 (1997).
2. Uniform cost reports of Medicaid providers. 184 Op. Att’y Gen. Ala. 27 (Aug. 15, 1981).

The following records for public and private medical institutions in Alabama are closed pursuant to statutory, case law or administrative rule authority:

1. Accreditation, quality assurance credentialing, and similar materials. Ala. Code § 22-21-8(b) (1997).



2. Information received by the State Board of Health from the state licensing agency if the information is gathered or received through means other than on-site inspection, *except* that the information may be made public in a proceeding involving the question of licensure or revocation of license. Ala. Code § 22-21-30 (1997).

3. Patient records. *Horne v. Patton*, 291 Ala. 701, 708-09, 287 So. 824, 829-30 (1973) (physician-patient privilege); Ala. Code § 34-26-2 (2002) (psychologist/psychiatrist-patient privilege); *see also Ex parte Rudder*, 507 So. 2d 411 (Ala. 1987) (psychiatrist-patient privilege).

4. Records of residents in health/assisted-living facility. 9C Ala. Admin. Code r. 420-5-4.05(3) (Supp. Sept. 30, 2004).

5. Patient records at birthing centers. 9C Ala. Admin. Code r. 420-5-13.11(6) (Supp. Sept. 30, 2002).

6. Records of patients at nursing homes. 9C Ala. Admin. Code r. 420-5-10-.05(3)(w) (Supp. Sept. 30, 2004).

7. Hospital patient records produced pursuant to subpoena duces tecum, “until ordered published by the court trying the case at the time of trial.” Ala. Code § 12-21-6(a) (1995).

8. Reports by insurance companies of judgments and settlements of medical liability claims, which are required to be filed with state licensing entities. Ala. Code § 27-26-5(c) (1998).

Investigative reports regarding patient injuries and death prepared by the Bureau of Special Investigations, the investigative division of the Alabama Department of Mental Health, are considered “law enforcement investigative reports” within the meaning of Alabama Code § 12-21-3.1, and are therefore entitled to protection from civil subpoena, except upon a showing that the information contained in the report cannot be obtained from other sources without undue hardship. *Lambert v. Alabama Dep’t of Mental Health and Mental Retardation*, 840 So. 2d 863 (Ala. 2002); *Vick v. Alabama Dep’t of Mental Health and Mental Retardation*, 840 So. 2d 876 (Ala. 2002).

### M. Personnel records.

In *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981), the Alabama Supreme Court included “sensitive personnel records” as one category of records that might not be open to public disclosure, depending upon the facts of the case, despite the absence of an express statutory exclusion of such records from the Public Records Act. Notwithstanding that invitation to exclusion, most personnel records should be presumptively open.

For examples of records and information that are not “sensitive personnel records,” *see Advertiser Co. v. Auburn Univ.*, 17 Media L. Rep. (BNA) 1907, 1909 (Cir. Ct. of Lee County, Ala., Mar. 29, 1990) (investigatory report by attorneys into alleged wrongdoing of public official not information “from a personnel record”; sensitivity of information sought is not dispositive); *Birmingham Education Ass’n v. Birmingham City Board of Education*, CV 94-2637 at 4 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995) (lists of employee names for transfer, nonrenewal of contract, cancellation of contract, suspension, or dismissal are not “sensitive personnel records” despite “potential for some embarrassment to employees whose names appear on the list”); *University of Montevallo Education Ass’n v. Vickery*, CV 86-121 (Cir. Ct. of Shelby County, Ala., Nov. 2, 1987) (“Official Appointment Form,” “Appointment Form, Limitations and Contingencies,” “UM Fringe Benefits, A Worksheet,” and “Job Description” regarding state university employees ordered disclosed) (affirmed without opinion in *Vickery v. University of Montevallo Education Ass’n*, 527 So. 2d 125 (Ala. 1988); 227 Op. Att’y Gen. Ala. 60 (June 11, 1992) (names, titles, and compensation of county employees are not sensitive personnel records); Op. Att’y Gen. Ala. No. 96-00003 at 4, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995) (“In general, applications, disciplinary actions, and memoranda of reprimand are documents reasonably necessary to conduct business,

and thus subject to disclosure . . .,” as are salary expenditure, race, current assignment, rank and type of teaching certificate, employment experience record, employee’s salary, areas of endorsement, sex, date of hire, date employee attained tenure).

For examples of records and information that may be “sensitive personnel records,” *see Advertiser Co. v. Montgomery County Bd. of Educ.*, CV-05-389 (Cir. Ct. of Montgomery County, Ala., Oct. 7, 2005) (refusing to hold that names of employees put on paid administrative leave are necessarily subject to public disclosure, but recognizing that disclosure could be required in some situations); *Mobile Press Register Inc. v. Jordan*, CV 95-1593 at 3-4 (Cir. Ct. of Mobile County, Ala., June 2, 1995) (proposed organizational chart of superintendent presented to school board “as of this date is ‘sensitive personnel record’”); *Blankenship v. City of Hoover*, 590 So. 2d 245, 250 (Ala. 1991) (W-2 forms of public employees are sensitive personnel records in that they “would disclose whether or not an individual employee has elected to participate in income-deferral plans, insurance plans, or similar benefits which are more personal than public in nature”) (quoting trial court opinion); Op. Att’y Gen. Ala. No. 88-00079 at 4 (Dec. 16, 1987) (“information such as psychological evaluations, family history, religious affiliation or political opinions or activities” could be sensitive personnel records); 212 Op. Att’y Gen. Ala. 26, 27 (Aug. 1, 1988) (employees’ home address is private matter); Op. Att’y Gen. Ala. No. 96-00003 at 4, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995) (marital status, medical history, confidential recommendations for employment, and drug or alcohol testing results “will, in most cases, fall under the sensitive personnel records exception set out in *Stone* . . . [but] the party refusing to disclose should remember it has the burden of proving the information requested falls within an exception to the Open Records Act.”); Op. Att’y Gen. Ala. No. 2001-269, 2001 Ala. AG LEXIS 165 (Aug. 29, 2001) (“Information such as an employee’s marital status, medical history, confidential recommendations for employment, and drug or alcohol testing results will, in most cases, fall under the sensitive personnel records exception in *Stone*.”).

Alabama Code § 36-26-44 (2001) provides that the records of the State Personnel Department and Merit System shall be open to the public except for such records as the Department’s rules require to be confidential by reason of public policy. The Department’s rules provide as follows:

The records of the Department are public records and are open to public inspection during normal working hours, provided that the following shall be held confidential as a matter of public policy: (a) Applications for examination of persons who have not been employed. (b) Lists of eligibles who have competed successfully on examinations. (c) Test materials such as written tests or forms or instructions which if known to an applicant might give him an advantage in competing for appointment or promotion. 18 Ala. Admin. Code r. 670-x-17-.03 (Supp. Sept. 30, 1990).

#### 1. Salary.

Pervasive Alabama Attorney General authority states that the following record are subject to disclosure under the Public Records Law: Lists of public employees and employee salaries, Op. Att’y Gen. Ala. No. 88-00079 (Dec. 16, 1987), 212 Op. Att’y Gen. Ala. 26 (1988), and Op. Att’y Gen. Ala. No. 96-00003, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995) (teacher lists); 210 Op. Att’y Gen. Ala. 20 (1988) (county employee lists); 171 Op. Att’y Gen. Ala. 14 (1978) (employee list of a mental health board); Op. Att’y Gen. Ala. No. 2006-076, 2006 Ala. AG LEXIS 39 (Mar. 27, 2006) (salary of Water and Sewer Board Members); Att’y Gen. Ala. No. 2007-067, 2007 Ala. AG LEXIS 40 (Apr. 3, 2007) (contract terms of state university athletic coaches); Op. Att’y Gen. Ala. No. 2008-004, 2008 Ala. AG LEXIS 118 (Oct. 2, 2007) (Health Care Authority executive salaries).

The following compensation records are closed pursuant to case law authority: W-2 forms, *Blankenship v. City of Hoover*, 590 So. 2d 245, 250 (Ala. 1991).

## 2. Disciplinary records.

The following disciplinary records are open pursuant to case law or Alabama Attorney General opinion authority:

- a. Revocation of a nurse's license. 167 Op. Att'y Gen. Ala. 28, 29 (May 4, 1977).
- b. A report of an investigation concerning alleged misconduct of an employee of a State university. *Advertiser Co. v. Auburn University*, 17 Media L. Rep. (BNA) 1907 (Cir. Ct. of Lee County, Ala., Mar. 29, 1990), *aff'd*, 579 So. 2d 645 (Ala. Civ. App. 1991) (attorneys' fee award was the only question on appeal).
- c. Records regarding appeal to the State Tenure Commission from a private or public hearing before the local board of education, except for those portions of the record from any proceedings before the State Tenure Commission, if any, that were conducted in closed hearing to discuss the character or good name of an individual. 224 Op. Att'y Gen. Ala. 109 (July 25, 1991).
- d. Minutes of State Tenure Commission meetings, regardless of whether the teacher had a private or public hearing at the local level. 224 Op. Att'y Gen. Ala. 109 (July 25, 1991).
- e. Lists of teachers and other personnel to be given notice of transfer, nonrenewal of contract, termination, suspension or dismissal. *Birmingham Education Association v. Birmingham City Board of Education*, CV 94-2637 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995).
- f. Documents in teacher personnel files regarding disciplinary actions and memos of reprimand. Op. Att'y Gen. Ala. No. 96-00003, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995).

The following disciplinary records are closed pursuant to Alabama Attorney General opinion authority: Disciplinary charges and proceedings of the State Nursing Board. 167 Op. Att'y Gen. Ala. 28, 29 (May 4, 1977).

## 3. Applications.

The following application records are open pursuant to case law and Alabama Attorney General opinion authority:

- a. Applications and resumes for county water and sewer coordinator, *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989).
- b. Resumes of applicants for county administrator's position. 221 Op. Att'y Gen. Ala. 24 (Oct. 24, 1990).
- c. Names and resumes of applicants for executive director of industrial development authority. 222 Op. Att'y Gen. Ala. 48 (Mar. 20, 1991).
- d. Biographical information from independent agency regarding applicants for executive director of industrial development authority. 223 Op. Att'y Gen. Ala. 19 (May 17, 1991).
- e. Application for licensure as a nursing home administrator, including education, past employment history, and previous licensure. 226 Op. Att'y Gen. Ala. 15 (Jan. 15, 1992).

One trial court refused to order disclosure of personnel information in the following case: Identity of applicants for president of State university who were interviewed by a search committee that contained no university board members and that made no narrowing of applicants. *Birmingham News Co. v. Bartlett*, CV 88-504-403 MC (Cir. Ct. of Jefferson County, Ala., Equity Div., Nov. 15, 1988). Additionally, in *Tuscaloosa News v. Garrison*, No. CV-1999-408 (Cir. Ct. of Tuscaloosa County, Ala., May 31, 2000), the trial court delayed ruling on whether resumes of applicants to the city school board had been submitted under a promise of confidentiality, indicating that those resumes would not be subject to disclosure.

## 4. Personally identifying information.

There is no statutory or case law addressing this issue in the context of personnel reports, but the Alabama Attorney General has stated that this information may be redacted from other types of public records. Op. Att'y Gen. Ala. No. 2006-134, 2006 Ala. AG LEXIS 97 (Aug. 17, 2006) (home addresses, telephone numbers, and marital status of individual may be removed from National Fire Incident Reporting Systems forms)..

## 5. Expense reports.

There is no statutory or case law addressing this issue.

## 6. Other.

Alabama Attorney General opinions have indicated or opined that the following material in a personnel file would not generally be open: psychological evaluations, family history, religious affiliation or political opinions or activities, Op. Att'y Gen. Ala. No. 88-00079 (Dec. 16, 1987); marital status, medical history, confidential recommendations for employment, and drug or alcohol testing results, Op. Att'y Gen. Ala. No. 96-00003, 1995 Ala. AG LEXIS 59 (Oct. 4, 1995); Op. Att'y Gen. Ala. No. 2001-269, 2001 Ala. AG LEXIS 165 (Aug. 29, 2001).

Information about employees that is gathered from employers by the Director of Unemployment Compensation is held confidential except as necessary for the proper presentation of the contest of an unemployment claim. Ala. Code § 25-4-116 (2000).

The Alabama Court of Civil Appeals has held that state agencies must allow inspection of nonidentifying hiring and training records. *Grabam v. Ala. State Employees Ass'n*, 991 So. 2d 710 (Ala. Civ. App. 2007)(requiring the Alabama State Personnel Department to produce records related to the hiring and training of administrative law judges).

The Alabama Attorney General has stated that employee time sheets are public records subject to inspection under the Public Records Law. Certain sensitive information contained in the time sheets, such as doctor's excuses, time off for medical reasons, or personal vacation time is confidential. In addition, other information that may be contained in the records requested, such as medical history, confidential recommendations for employment, drug or alcohol testing results, home addresses, telephone numbers, Social Security numbers, and marital status of public employees, are not public records and are not subject to disclosure. The custodian of records responding to these requests for public records should ensure that the aforementioned sensitive personnel information is redacted from any publicly disclosed records. Op. Att'y Gen. Ala. No. 2008-073, 2008 Ala. AG LEXIS 43 (Apr. 21, 2008).

H2-B visa information is subject to disclosure under the Alabama Public Records Law. *Southern Poverty Law Ctr. v. Kennedy* CV 06-787 (Cir. Cit. of Montgomery County Sept. 26, 2006).

## N. Police records.

Since police departments and their officers can properly be considered "public officers and servants of counties and municipalities" within Alabama Code § 36-12-1 (2001) and thus are required to "correctly make and accurately keep in and for their respective offices and places of business all such books or sets of books, documents, files, papers, letters and copies of letters," pursuant to Alabama Code § 36-12-2 (2001), all police records that are not expressly made confidential by statute or that must be kept confidential to protect a pending criminal investigation should be presumptively open. For example, the front side of Alabama Uniform Incident/Offense reports are open subject to the right of the sheriff to withhold or redact certain information on a case-by-case basis depending on the nature of the case, the status of the investigation, whether the victim would be subject to threats or intimidation, or when public disclosure would hinder the investigation. *Washington County Publications v. Wheat*, No. CV-99-94 (Cir. Ct. of Washington County, Ala., May 1, 2000).

## 1. Accident reports.

Accident reports (Alabama Uniform Traffic Reports) are available to the public at a fee of \$15.00 per report. Ala. Code § 32-2-8 (Supp. 2005).

The following proof-of-financial-responsibility accident reports are confidential by statutory provision:

- a. Motor vehicle accident reports made by persons involved in the accidents or by garages, *except* that the Director of Public Safety may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies being present at such accident. Ala. Code § 32-10-11 (1999).
- b. Watercourse vessel accident reports made by persons involved in the accidents, *except* that the Department of Conservation and Natural Resources may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies being present at such accident. Ala. Code § 33-5-25(c) (Supp. 2010).

## 2. Police blotter.

The police blotter is a public record under the authority of *Birmingham News Co. v. Watkins*, No. 38389 (Cir. Ct. of Jefferson County, Ala., Oct. 30, 1974) (based upon First Amendment, not Public Records Law, with discretion for police department to withhold portions of records or entire records if and as necessary to prevent “actual interference” with law enforcement); *see also* Op. Att’y Gen. Ala. No. 97-00043 (Nov. 27, 1996) (Alabama Uniform Incident/Offense Report is public record, but “portions of such reports may be kept confidential and not subject to public disclosure, especially any portion the disclosure of which would compromise criminal investigations, result in potential harm to innocent persons or infringe upon the constitutional rights of the accused”); *Birmingham News Co. v. Jones*, CV-00-677 (Cir. Ct. of Shelby County, Ala., Oct. 27, 2000) (back side of Alabama Uniform Incident/Offense Report is work product of officer and therefore not subject to public inspection; front side is generally public record but sensitive information, such as social security numbers, may be redacted on case-by-case basis).

The Alabama Criminal Justice Information Center Law Enforcement Officers’ Handbook largely mirrors applicable case law and Alabama Attorney General opinions. The Handbook states that social security numbers, unlisted telephone numbers, medical information, and identifying information concerning juveniles must always be redacted from the police reports. In addition to these mandatory exemptions from disclosure, the Handbook states that identifying information about individuals may be redacted from the reports for the following reasons:

- (1) “the information would compromise criminal investigations, result in potential harm to innocent persons or infringe upon the constitutional rights of the accused”;
- (2) redaction “is necessary to protect witnesses and/or victims”;
- (3) “[t]o protect the identities of law enforcement officers currently working undercover with their agencies”;
- (4) “disclosure would reveal the identity of informants”;
- (5) “disclosure . . . would impede an agency’s enforcement or detection efforts”;
- (6) “disclosure would reveal investigatory techniques”; and
- (7) “disclosure would deprive a person of a right to a fair trial or an impartial adjudication.”

Finally, the Handbook states that law enforcement officials are not required to, but may at the discretion of the chief executive officer of the agency, release the second page (or “back side”) of the reports. *See* ACJIC, *Law Enforcement Officers’ Handbook* (August 2006), available at

[http://www.acjic.alabama.gov/documents/law\\_handbook.pdf](http://www.acjic.alabama.gov/documents/law_handbook.pdf).

The sheriff’s department is required to expunge identifying information from its records and website, including the booking photograph, of individuals who are released without being charged or cleared of an offense. Att’y Gen. Ala. No. 2007-052, 2007 Ala. AG LEXIS 25 (Feb. 26, 2007).

## 3. 911 tapes.

As of April 21, 2010, an audio recording of a 911 telephone call may not be released to the public absent a court order finding that the right of the public to the release of the recording outweighs the privacy interests of the individual who made the 911 call or any person involved in the facts or circumstances relating to the 911 call. Ala. Code § 11-98-12 (Supp. 2010).

## 4. Investigatory records.

Law enforcement “investigative reports and related investigatory material” are not public records. Ala. Code § 12-21-3.1(b) (Supp. 2005).

### a. Rules for active investigations.

There is authority for closure of the following records pertaining to active investigations:

- (1) Records regarding pending criminal investigations. *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981) (establishing a precatory, not mandatory, exclusion).
- (2) Information regarding witness identification and reports from such witnesses, at the discretion of the Police Department. *Birmingham News Co. v. Deutsch*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986) (consent order).
- (3) Search warrants, arrest warrants, supporting affidavits and depositions, until the search warrant or arrest warrant is executed and returned. 197 Op. Att’y Gen. Ala. 13 (Oct. 10, 1984).
- (4) Prison incident reports with information regarding a pending criminal investigation. *Allen v. Barksdale*, 32 So. 3d 1264 (Ala. 2009).
- (5) Autopsy reports that relate to a pending investigation. Op. Att’y Gen. Ala. No. 2007-015, 2006 Ala. AG LEXIS 142 (Dec. 4, 2006).
- (6) National Fire Incident Reporting Systems forms that relate to a pending investigation. Op. Att’y Gen. Ala. No. 2006-134, 2006 Ala. AG LEXIS 97 (Aug. 17, 2006).

There is authority for public access to the following records of active investigations:

- (1) Complaint reports, including the front side of incident/offense reports subject to the right of the sheriff to withhold or redact certain information on a case-by-case basis depending on the nature of the case, the status of the investigation, whether the victim would be subject to threats or intimidation, or when public disclosure would hinder the investigation. *Washington County Publications v. Wheat*, No. CV-99-94 (Cir. Ct. of Washington County, Ala., May 1, 2000); Op. Att’y Gen. Ala. No. 2000-197, 2000 Ala. AG LEXIS 112 (July 19, 2000); Op. Att’y Gen. Ala. No. 2000-004, 1999 Ala. AG LEXIS 89 (Oct. 7, 1999). *See also* *Birmingham News Co. v. Watkins*, No. 38389 (Cir. Ct. of Jefferson County, Ala., Oct. 30, 1974) (based on First Amendment, not Alabama’s Public Records Law, with discretion for police department to withhold portions of reports or entire reports if and as necessary to prevent “actual interference” with law enforcement).
- (2) Search and arrest warrants, with supporting affidavits and depositions, after a search warrant or arrest warrant is executed and returned. 197 Op. Att’y Gen. Ala. 13 (Oct. 10, 1984); *see also* Op.



Att’y Gen. Ala. No. 2008-030, 2007 Ala. AG LEXIS 97 (Dec. 28, 2007).

#### b. Rules for closed investigations.

There is no statutory or case law addressing this issue.

#### 5. Arrest records.

There is authority for public access to the following arrest records:

a. Arrest reports, with redaction of witness identification and witness reports at the discretion of the police department, are open. *Birmingham News Co. v. Deutchsh*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986) (consent order).

b. Arrest warrants and search warrants, with supporting affidavits and depositions, are open after execution and return. 197 Op. Att’y Gen. Ala. 13 (Oct. 10, 1984).

#### 6. Compilations of criminal histories.

Compilations of criminal histories by the Alabama Criminal Justice Information Center (ACJIC) are available to only those persons with a “right to know” or “need to know” as determined by the ACJIC Commission. Op. Att’y Gen. Ala. No. 2005-042, 2005 Ala. AG LEXIS 9 (Jan. 18, 2005); Ala. Code §§ 41-9-590 et seq. (2000); Ala. Code § 41-9-636 to 642 (2000); 4 Ala. Admin. Code chapter 265-X-2 (Supp. June 30, 1994). Criminal history information from the Alabama Department of Public Safety is not a matter of public record and is not open to public inspection without the written permission of the individual whose criminal history is sought. Ala. Code § 32-2-61(a) (1999).

#### 7. Victims.

There is statutory or case law authority for closure of the following records regarding crime victims:

a. Court file regarding crime victim’s petition hearing that reveals the victim’s address, telephone number, place of employment, and related information. Ala. Code § 15-23-69 (1995).

b. Crime Victims Compensation Commission reports and information obtained from law enforcement officers and agencies. Ala. Code § 15-23-5 (1995).

c. Child abuse reports and records. Ala. Code § 26-14-8(c) (Supp. 2005); see also *Birmingham News Co. v. Hornsby*, CV 94-103 TH (Cir. Ct. of Montgomery County, Ala., Mar. 18, 1994).

d. Complainant identification on arrest reports. *Birmingham News Co. v. Deutchsh*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986).

Alabama Attorney General opinions have approved closure of information gathered about a crime victim who is also a witness to a crime. Op. Att’y Gen. Ala. No. 2000-225, 2000 Ala. AG LEXIS 166 (Aug. 30, 2000); Op. Att’y Gen. Ala. No. 2000-203, 2000 Ala. AG LEXIS 136 (Aug. 8, 2000).

#### 8. Confessions.

There is no statutory or case law addressing this issue.

#### 9. Confidential informants.

Rule 3.9 of the Alabama Rules of Criminal Procedure protects the identity of confidential informants when sworn testimony is taken to support the issuance of a search warrant. In addition, the final order in *Deutchsh* permits redaction of witness identification from arrest reports, *Birmingham News Co. v. Deutchsh*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986) (consent order), and the decision in *Stone* permits closure of records regarding pending criminal investigations and recorded information received by a public officer in confidence, *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981).

#### 10. Police techniques.

There is no statutory or case law addressing this issue. The Alabama Criminal Justice Information Center’s Law Enforcement Officers’ Handbook, however, states that a law enforcement agency may redact information from Alabama Uniform Incident/Offense Reports that “would reveal investigatory techniques.” See ACJIC, Law Enforcement Officers’ Handbook (August 2006), available at [http://www.acjic.alabama.gov/documents/law\\_handbook.pdf](http://www.acjic.alabama.gov/documents/law_handbook.pdf).

#### 11. Mug shots.

A mug shot in a police computer database is a public record. Op. Att’y Gen. Ala. No. 2004-108, 2004 Ala. AG LEXIS 35 (Apr. 1, 2004).

State law requires each sheriff to keep in the sheriff’s office, subject to public inspection during office hours, a well-bound book in which must be entered a description of each prisoner received into the county jail. Ala. Code § 36-22-8 (2001).

#### 12. Sex offender records.

Sex offender registration records have been made expressly confidential by statute. Ala. Code § 15-20-5 (Supp. 2010).

#### 13. Emergency medical services records.

There is no statutory or case law addressing this specific issue. As of April 21, 2010, however, an audio recording of a 911 telephone call may not be released to the public absent a court order finding that the right of the public to the release of the recording outweighs the privacy interests of the individual who made the 911 call or any person involved in the facts or circumstances relating to the 911 call. Ala. Code § 11-98-12 (Supp. 2010).

#### O. Prison, parole and probation reports.

1. *City jail records*: The Docket Book with information regarding the arrest of each person booked at the jail — including name, birth date, home address, charges, bonds, fines, etc. — is a public record. Inter-Office Communication from Birmingham Law Department attorney Charles H. Wyatt, Jr., to Birmingham’s Chief Jail Administrator, Major Frank Alexander, confirming public record status of City Jail Docket, Aug. 1, 1985; see also *Deutchsh v. State*, 610 So. 2d 1212, 1224 (Ala. Crim. App. 1992) (Birmingham “Chief Jail Administrator Frank Alexander testified that the index book and the docket book are public records.”).

2. *County jail records*: A well-bound book regarding prisoners received into county jails is required to be kept available for public inspection. Ala. Code § 36-22-8 (2001); see also *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941).

3. *Department of Corrections records*: An Alabama Attorney General opinion, applying the *Stone* balancing test, has declared the following records public: “the work release roster including the inmate’s name, the specific location of the inmate, the inmate’s place of employment, and the crime for which the inmate is incarcerated,” and the following records nonpublic: an inmate’s “psychological profiles, information received in confidence from law enforcement agencies and other information which clear policy dictates should be maintained in confidence or that other statutes require to [remain] confidential.” 200 Op. Att’y Gen. Ala. 25 (Aug. 20, 1985).

The Alabama Attorney General has also held that prison incident and investigation reports maintained by the Department of Corrections are subject to inspection under the Public Records Law. *Allen v. Barksdale*, 32 So. 3d 1264 (Ala. 2009).

4. *Municipal court probation officer records*: The records of these officers concerning their charges are closed. Ala. Code § 12-14-13(f) (1995).

5. *Pardon and Parole Board records*: Prisoner files are closed except for that portion in which each member of the Board records any deci-

sion affecting the prisoner's liberty, property, or civil rights and the reasons, in detail, for such a decision. Ala. Code § 15-22-36(b) (Supp. 2005); see also *Ex parte Ala. Bd. of Pardons & Paroles*, 814 So. 2d 870 (Ala. 2001) (holding that section 15-22-36(b) "clearly and unambiguously establishes an absolute privilege that the Board is legally bound to obey and the circuit court is under a duty to uphold" and vacating circuit court's order to produce privileged records).

6. *Pardon and Parole Board records*: Minute books and Board orders pertaining to pardons before the Board are public records. Op. Att'y Gen. Ala. No. 2002-136, 2002 Ala. AG LEXIS 30 (Feb. 8, 2002).

7. *Probation and parole officer records*: Reports, records, and data assembled by these officers regarding their charges is closed to the public except by order of the court. Ala. Code §§ 15-22-53(b) and -73 (1995).

## P. Public utility records.

1. *Alabama Public Services Commission*: The Commission is required to "keep a record of all their proceedings, which shall be open at all times to the inspection of the public." Ala. Code § 37-1-8 (Supp. 2005).

2. *Alabama Public Utilities Commission*: "[A]ll reports, records and accounts in the possession of the [Commission] shall be open to inspection by the public at all times . . ." Ala. Code § 37-1-62 (1992).

3. *Publicly owned public utilities*: The records of these utilities are open. 197 Op. Att'y Gen. Ala. 24 (Nov. 27, 1984).

4. *Telephone records (ATTNet remote access) for members of the Alabama Senate and House of Representative*: In 1989, a Montgomery County trial court ordered the State Finance Director, the Clerk of the State House, and the Secretary of the State Senate to preserve the "records that reflect, by ATTNet remote access code number, the quantity, duration, and cost of long-distance telephone calls logged per month against each remote access code number assigned to the Alabama Senate and House of Representatives," as well as the "records that identify, by individual name and ATTNet remote access code number, the members or staff of the Alabama Senate [or Alabama House of Representatives] to whom ATTNet remote access code numbers have been assigned" "for at least one year after any change in the assignment of ATTNet remote access code numbers to the Alabama Senate and House of Representatives." The court also ordered that those records be made available for inspection and copying. *Birmingham News Co. v. Swift*, CV 88-1390 G (Cir. Ct. of Montgomery County, Ala., Sept. 7, 1988). An amendment to State law thereafter, however, requires the Alabama Telecommunications Division of the Department of Finance to "destroy and discard from its system all records of telephone usage six months following the payment of the billing for that usage period." Ala. Code § 41-4-284(9) (2000).

## Q. Real estate appraisals, negotiations.

1. *County boards of equalization*: The records of these boards are public records. 215 Op. Att'y Gen. Ala. 39 (June 14, 1989).

2. *County real estate maps and plat books*: Maps and plat books of all real estate in each county are required to be kept in the office of the county's tax assessor "open to the inspection of the public at all times when not in use by the assessor or the board of equalization." Ala. Code § 40-7-41 (2003).

### 1. Appraisals.

There is no statutory or case law addressing this issue.

### 2. Negotiations.

There is no statutory or case law addressing this issue.

### 3. Transactions.

Records regarding bids for the sale or lease of public lands are open. Ala. Code § 9-15-78 (2001). Contracts and documents related to the

sale of public assets are subject to disclosure under the Public Records Law. See *Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale County*, 2010 ALA. LEXIS 213 (Ala. Oct. 29, 2010).

## 4. Deeds, liens, foreclosures, title history.

There is no statutory or case law addressing this issue.

## 5. Zoning records.

The Supreme Court of Alabama has implicitly held zoning records to be public records. See *Riverchase Homeowners Protective Assn. v. Hoover*, 531 So. 2d 645 (Ala. 1988) (holding that the master development plan of a suburban mall was a public record)

## R. School and university records.

### 1. Athletic records.

a. *Athletic Coach Contracts*: Jacksonville State University was required to disclose the contracts of its coaches to a newspaper pursuant to a request under the Public Records law. Op. Att'y Gen. Ala. No. 2007-067, 2007 Ala. AG LEXIS 40 (Apr. 3, 2007).

b. *NCAA Letter of Inquiry to State university*: The NCAA Letter of Inquiry must be disclosed, but disclosure may be deferred until after the time for the university to file its Response to the Letter of Inquiry. *Birmingham News Co. v. Muse [Muse I]*, 21 Media L. Rep. (BNA) 1094, 1095 (Cir. Ct. of Lee County, Ala., Dec. 7, 1992); *Birmingham News Co. v. Sayers*, 23 Media L. Rep. (BNA) 2473, 2479-80 (Cir. Ct. of Tuscaloosa County, Ala., May 16, 1995).

c. *NCAA Self Reports*: The self-report of NCAA violations submitted by Alabama State University to the NCAA with student information redacted was subject to inspection under the Public Records Law. *The Advertiser Co. v. Lee*, CV 06-900013 (Cir. Ct. of Montgomery, Ala., Apr. 28, 2007).

d. *State university's Response to NCAA Letter of Inquiry*: Auburn University was permitted to keep its Response confidential because "the majority of the statements which are part of the Response were received under express promises of confidentiality," and that confidential material and information was so intertwined with nonconfidential material that "[i]f the promises [of confidentiality] are to be honored, it would be difficult, if not impossible, to edit out this material and release a response that made sense." *Birmingham News Co. v. Muse [Muse II]*, 2d appeal, 669 So. 2d 138 (Ala. 1995); see also *Birmingham News Co. v. Muse [Muse II]*, 1st appeal, 638 So. 2d 853 (Ala. 1994) (quoting and adopting trial court's findings).

### 2. Trustee records.

There is no statutory or case law addressing this issue.

### 3. Student records.

a. *Library registration and circulation records*: These records are closed under the Alabama Public Records Law itself. Ala. Code § 36-12-40 (Supp. 2005); see also Ala. Code § 41-8-10 (2000) (confidentiality of library registration and circulation records).

b. *Student academic and other records*: Under federal law, most student school records — including academic records — are not open to the public if the educational institution in question receives federal funds. 20 U.S.C. § 1232g (2010).

### 4. Other.

a. *Alabama School of Trades Board of Control*: Book of the Board's full and complete record of all of its "acts and doings" shall be "open to the public inspection for any and all persons interested in the same or in the school." Ala. Code § 16-60-220 (2001).

b. *Local board of education and public school system records*:

(1) *Letters and documents* of such agencies are open. 170 Op. Att’y Gen. Ala. 20, 21 (Feb. 1, 1978).

(2) *Names of teachers whom the Board has voted to give notice of transfer, proposed cancellation, non-renewal of contract, or suspension or dismissal* must be disclosed, but not before the affected employees receive notice of these decisions. *Birmingham Education Association v. Birmingham City Board of Education*, CV 94-2637 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995).

(3) *Proposed organizational chart for a school* may be withheld if the injury to the school board outweighs the benefit to the public. *Mobile Press Register, Inc. v. Jordan*, CV 95-1593 (Cir. Ct. of Mobile County, Ala., June 2, 1995).

(4) *Reports of annual school bus inspections* conducted by the State Department of Education must be made public by the local school board as each bus inspection is completed. *Mobile Press Register, Inc. v. Jordan*, CV 95-1593 (Cir. Ct. of Mobile County, Ala., June 2, 1995).

c. *Names of applicants for State university president*: Such information is closed when in the hands of a citizen advisory committee that contains no university board of trustee’s members and that gathers facts about the applicants but does not eliminate any candidates. *Birmingham News Co. v. Bartlett*, CV 88-504-403 MC (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1988, and Jan. 17, 1989).

d. *State university public relations corporation records*: The records of such a corporation that contributes financial benefit to the school are open. *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981) (trial court found public relations corporation to be alter ego of university).

## S. Vital statistics.

### 1. Birth certificates.

*Birth certificates* become “nonrestricted public records” “[w]hen 125 years have elapsed after the date of birth,” but are not public records before that date. Ala. Code § 22-9A-21(f) (1997).

### 2. Marriage & divorce.

*Marriage and divorce certificates* “in the custody of the State Registrar [of Vital Statistics] shall be considered nonrestricted public records.” Ala. Code § 22-9A-21(e) (1997).

### 3. Death certificates.

*Death certificates* become “nonrestricted public records” when “25 years have elapsed after the date of death, but are not public records before that date. Ala. Code § 22-9A-21(f) (1997).

### 4. Infectious disease and health epidemics.

Reports and records kept of sexually transmitted and other infectious diseases are confidential by statute and not subject to inspection under the Public Records Law. See Ala. Code § 22-11A-1, *et. seq.*

## V. PROCEDURE FOR OBTAINING RECORDS

### A. How to start.

#### 1. Who receives a request?

Alabama’s Public Records Law is silent as to the procedure for obtaining public records. Typically, the request is made initially in person or by telephone to the office that holds the records. If a more formal, written request is necessary, that request is typically made to the custodian of the records, the governmental entity or officer that holds the records, or (if the request has reached the “lawyering” stage) to the attorney for the governmental entity or officer that holds the records.

The statute that immediately follows the Public Records Law in the Alabama Code requires that “[e]very public officer having the custody

of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor.” Ala. Code § 36-12-41 (2001). The Code also requires public officers and servants to make and keep these records at their office, as follows:

All public officers and servants shall correctly make and accurately keep in and for their respective offices and places of business all such books or sets of books, documents, files, papers, letters and copies of letters as at all times shall afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant and from which the actual status and condition of such activities and business can be ascertained without extraneous information, and all of the books, documents, files, papers, letters, and copies of letters so made and kept shall be carefully protected and safely preserved and guarded from mutilation, loss or destruction.

Ala. Code § 36-12-2 (2001) (quoted, adopted, and applied in *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (1981), as an element of the definition of “public writing” for purposes of the Public Records Law). See also 223 Op. Att’y Gen. Ala. 25 (May 22, 1991) (“Public records must be kept in the office where created or in a depository approved by the state or local records commission.”).

## 2. Does the law cover oral requests?

Alabama’s Public Records Law is silent as to the manner of making the request. In most instances, it is sufficient to make the request initially in person or by telephone. If appropriate, the agency to which the request is made may — but is not required to — give the requested information by telephone. 223 Op. Att’y Gen. Ala. 16 (April 18, 1991).

Some governmental entities require requesters to complete a written request form. Requiring such a form is permissible if that requirement (a) is not “implemented . . . in order to dissuade or prevent any individual from acquiring access to public documents or records” and (b) does not give the custodian “the power to hinder access or refuse disclosure based on perceived necessity or established office policy.” *Blankenship v. Hoover*; 590 So. 2d 245, 250 (Ala. 1991).

### a. Arrangements to inspect & copy.

The requester typically does not have to make arrangements beforehand to inspect and copy public records unless the records require time for search or retrieval, or delay is genuinely necessary to avoid undue interference with the workings of the custodian’s office.

Two nineteenth century pre-Public Records Law decisions denied or limited the right to inspect and copy admittedly public records because the requests were so large and the logistics for examination and copying so cumbersome as to interfere unduly with the workings of the offices in question. See *Phelan v. State ex rel. Rosenstok*, 76 Ala. 49, 51 (1884) (requester had no right to sit in Secretary of State’s office and copy track-books (including field notes) of public land; “we should bear in mind that, if one have such right, many may claim it at the same time, and thus fill the rooms allotted to the Secretary with encumbering copyists having no connection with the office, nor with its official duties”); *Randolph v. State ex rel. Collier*, 82 Ala. 527, 2 So. 714 (1887) (request to examine and abstract all records of conveyances in Montgomery County denied because of interference with office and others who need the records). Requests for inspection and copying of voluminous records presumably would not result in an absolute bar today, especially when many large-volume public records and information are kept in computer databases.

### b. If an oral request is denied:

#### (1). How does the requester memorialize the refusal?

There is no required manner of memorializing the refusal. It is important to make some written record (notes, internal memo, etc.) of the dates of the oral request and the refusal so that the history of the



request can be narrated in the complaint if a lawsuit is filed for access to the requested records.

**(2). Do subsequent steps need to be in writing?**

A written record should be made and kept of all subsequent steps taken so that the history of the request can be narrated in the complaint if a lawsuit is filed for access to the requested records.

**3. Contents of a written request.**

There is no prescribed manner of making a written request, except for the few offices that require a request form to be completed. See *Blankenship v. Hoover*, 590 So. 2d 245 (Ala. 1991). Unless the constraints of time and events dictate otherwise, it is important to follow the denial of an oral request with a written request (typically, a letter to the custodian or governmental entity or official) so that a clear record of the request is established in tangible form — and to give the refusing agency an opportunity to reconsider its initial refusal.

**a. Description of the records.**

The description of the requested records should be clear and specific, but broad enough to include all of the records that are sought. A lawsuit for the records might not necessarily be limited to the description in the earlier oral and written requests, but the suing requester will be viewed as fairer if the requester has been clear and reasonably consistent in describing the records that are sought. See *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941) (“We are of opinion and hold that relators had the right, under the statute and their pleadings, to obtain their demand for inspection, and that said demand was not vague or indefinite, but specific.”).

**b. Need to address fee issues.**

There is no need to address fee issues in the written request unless (a) that issue has been raised by the refusing agency, (b) there is a statutory fee provision for the requested records, or (c) the requester anticipates a problem because of the volume of documents requested, the expense of search and retrieval, or transformation of the requested documents into a different format.

**c. Plea for quick response.**

To avoid misunderstanding — and possible obfuscating delay — it is useful for the written request to include a date or time period for the requested records to be made available. If a quick response is needed because of developing events, it is important to include that information in the written request — so that the custodian will be fully and fairly informed and the court, if necessary, will be assured that the custodian was fully and fairly informed.

**d. Can the request be for future records?**

There is no prohibition on making a request for future records.

**e. Other.**

*Record of delivery of written request:* If practicable, a record of delivery of the written request should be made: to whom, what date and time, and where.

In *Ex parte Gill*, 841 So. 2d 1231 (Ala. 2002), a prison inmate requested from the Circuit Clerk of Morgan County all records related to his criminal trial. The inmate’s request was denied. The inmate petitioned the Alabama Supreme Court for a writ of mandamus, citing his right to inspect and copy public records granted to him by § 36-12-40. The court noted that the inmate did not appear personally and did not send an agent on his behalf to inspect and identify the records he requested, and he did not send payment for the requested records. Accordingly, the court held that while the inmate had the right to inspect and copy public records, he did not have the right to shift the burden of inspection and identification of relevant documents to the court clerk, and he did not have the right to get free copies of the requested

records. The court further held that section 36-12-40 does not entitle inmates to any relief from their incarceration or to any transportation to the custodian’s office to accomplish the inspection and identification of documents and does not entitle them to free copies or to funds to pay for copies.

**B. How long to wait.**

There is no prescribed length of time to wait for a response to a request for access to public records. The length of time to wait, and the steps to take next, will vary with the circumstances for each request. If the relief that is ultimately sought in court is preliminary or permanent injunction, however, care should be taken not to delay unduly and thus jeopardize the claim for “irreparable injury.” See *Birmingham News Co. v. Chambers*, CV 89-186 (Cir. Ct. of Shelby County, Ala., May 17, 1989) (request for permanent injunction granted and records ordered released within seven days, but application for preliminary injunction denied because of perceived delay by newspaper in bringing suit) (permanent injunction affirmed in *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989)).

**1. Statutory, regulatory or court-set time limits for agency response.**

Alabama’s Public Records Law contains no prescribed time for an agency to respond to a records request. Some statutes require that particular records be available for inspection at all reasonable times, Ala. Code § 11-44-82 (1989) (county board of commissioners minutes, including copies of all resolutions and ordinances passed), but even those statutes do not prescribe how quickly the records must be prepared for public availability. Depending upon the circumstances of the request, a continued or repeated delay in response that undercuts the intended “public benefit” of the Public Records Law could be deemed violative of the Law. See *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856 (Ala. 1989) (Public Records Law is intended for public benefit and is to be liberally construed with “a presumption in favor of public disclosure”).

The Alabama Attorney General has stated that a custodian of records may not cause any unreasonable delays in accommodating a request for public records. Op. Att’y Gen. Ala. No. 2008-073, 2008 Ala. AG LEXIS 43 (Apr. 21, 2008).

**2. Informal telephone inquiry as to status.**

Not specified.

**3. Is delay recognized as a denial for appeal purposes?**

The *Muse II (1st appeal)* decision does not mean that a delay-equals-denial argument is foreclosed. See 628 So. 2d 853 (Ala. 1994). If an agency delays in producing the requested records so that public benefit of the records is effectively undermined, a good argument can be made for delay’s being equivalent to denial of access. Furthermore, if the agency refuses to produce the requested records and also refuses to give an overt denial of access to the records, a good case can be made that after a reasonable period of time, under the circumstances, delay is equivalent to denial and the requester can proceed to court without waiting for an overt denial.

**4. Any other recourse to encourage a response.**

In Alabama, the following tactics have been useful in encouraging a response: (a) publicizing the records request and the delay or refusal as part of regular news coverage, editorials, or letters to the editor; (b) “lawyering” the request with a call by the requester’s attorney to the agency’s attorney; (c) educating the agency, directly or through its attorney, by providing copies of governing statutes, Alabama Attorney General opinions, and case law; (d) reminding the agency, directly or through its attorney, that attorneys’ fee awards can be made against the recalcitrant agency in some cases. See *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991) (former open meetings law case; fee award upheld); *Advertiser Co. v. Auburn Univ.*, 579 So. 2d 645 (Ala.

Civ. App. 1991) (Public Records Law case; fee award denial upheld, but recognizing discretion for attorneys' fee awards in Public Records Law cases).

### C. Administrative appeal.

Alabama has no provision for administrative appeal from denial of access to public records. A public official who is reluctant to produce the requested records can sometimes be persuaded, however, to seek a ruling from the Alabama Attorney General's office, pursuant to the following statute:

[The Attorney General] shall give his or her opinion in writing, or otherwise, on any question of law connected with the interests of the state or with the duties of any of the departments, when required by the Governor, Secretary of State, Auditor, Treasurer, Superintendent of Education, Commissioner of Agriculture and Industries, Director of Department of Finance, Comptroller, State Health Officer, Public Service Commissioners, Commissioner of Conservation and Natural Resources, or the Director of the Department of Revenue or any other officer or department of the state when it is made, by law, his or her duty so to do, and he or she shall also give his or her opinion to the chairman of the judiciary committee of either house, when required, upon any matter under the consideration of the committee.

The Attorney General shall give his or her opinion, in writing or otherwise, as to any question of law connected with the duties of the following county or city officer when requested so to do in writing: judge of probate, clerk of the circuit court, sheriff, city and county boards of education, county commission, register of the circuit court, tax collector, tax assessor, mayor or chief executive officer of any incorporated municipality, city council or like governing body of any incorporated municipality, or any other officer required to collect, disburse, handle, or account for public funds.

Ala. Code § 36-15-1(a), (b) (2001).

A written opinion from the Alabama Attorney General is advisory, not binding, but it "shall protect such officer and the members of such board, local governing body or agency to whom it is directed or for whom the same is secured from liability to either the state, county or other municipal subdivisions of the state because of any official act or acts heretofore or hereafter performed as directed or advised in such opinion." Ala. Code § 36-15-19 (1991); *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So. 2d 479 (1942). As the number and results of the Attorney General opinions cited in this outline attest, the Alabama Attorney General's office has, throughout the course of several changes in administrations, consistently upheld the spirit, the letter, and the rationale of Alabama's Public Records Law.

#### 1. Time limit.

Inapt; Alabama has no provision for administrative appeal from denial of access to public records.

#### 2. To whom is an appeal directed?

Inapt; Alabama has no provision for administrative appeal from denial of access to public records.

##### a. Individual agencies.

Inapt; see above.

##### b. A state commission or ombudsman.

Inapt; see above.

##### c. State attorney general.

Inapt; see above.

#### 3. Fee issues.

Inapt; Alabama has no provision for administrative appeal from denial of access to public records.

#### 4. Contents of appeal letter.

Inapt; Alabama has no provision for administrative appeal from denial of access to public records.

##### a. Description of records or portions of records denied.

Inapt; see above.

##### b. Refuting the reasons for denial.

Inapt; see above.

#### 5. Waiting for a response.

Inapt; Alabama has no provision for administrative appeal from denial of access to public records.

#### 6. Subsequent remedies.

Inapt; Alabama has no provision for administrative appeal from denial of access to public records.

### D. Court action.

#### 1. Who may sue?

Any citizen, including any member of the news media (whether a corporation or other business form) and any group with an interest or stake in the controversy, may sue for access to public records. *See* Ala. Code § 36-12-40 (Supp. 2005); *Scott v. Culpepper*, 220 Ala. 393, 393-94, 125 So. 643, 644 (1930) (county citizen); *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989) (newspaper); *Accident Information Services of Alabama Inc.*, CV 92-9619 (Cir. Ct. of Jefferson County, Ala., Jan. 11, 1993) (corporation); *Birmingham Education Ass'n v. Birmingham City Board of Education*, CV 94-2637 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995) (professional organization); *Walsh v. Barnes*, 541 So. 2d 33 (Ala. Civ. App. 1989) (insurance agent).

#### 2. Priority.

There is no specific provision for expedited consideration of public records cases in Alabama. The general provisions for temporary restraining orders (TROs) and preliminary injunctions, when immediate and irreparable injury can be averred, might be available in the appropriate case. Ala. R. Civ. P. 65(b). More likely, the trial court will grant a request for an early hearing (usually within a very few days) of a motion for preliminary injunction, with notice to the individuals and/or agency being sued. The parties often agree to by-pass the preliminary injunction hearing and proceed directly to a hearing on the merits of the request for a permanent injunction.

#### 3. Pro se.

An individual, but not a corporation, may bring suit in Alabama without an attorney in state court, Ala. Code § 34-3-19 (2002), or in federal court, 28 U.S.C. § 1654. There are no procedural provisions specific to *pro se* litigation. We know of no reported decisions of *pro se* litigation under the Alabama Public Records Law.

#### 4. Issues the court will address:

##### a. Denial.

The typical public records case addresses a denial of the request for access to the records, with the court deciding whether the requested records are public records, whether they are subject to an exclusion in whole or in part, and sometimes the logistics of an ordered disclosure of the records. *See, e.g., Birmingham News Co. v. Muse [Muse I]*, 21 Media L. Rep. (BNA) 1094 (Cir. Ct. of Lee County, Ala., Dec. 7, 1992) (release of NCAA Letter of Inquiry to public university ordered, but delayed until date for university to file response).

##### b. Fees for records.

In appropriate cases, the court will address the question of fees for the requested records. *See, e.g., Birmingham News Co. v. Peavy*, 21 Me-



dia L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993) (plaintiff ordered to pay actual, reasonable cost of creating a new computer program to retrieve the requested records and the statutorily mandated \$5.75 for each driving record identified by named driver) (effective Sept. 13, 1997, access to MVRs is governed by 18 U.S.C. § 2721).

### c. Delays.

The Alabama Supreme Court found in *Birmingham News Co. v. Muse* [*Muse II, 1st appeal*], 638 So. 2d 853 (Ala. 1994), that the question of delay in the release or ordered release of the requested records was moot and refused to address the issue. The Court did not suggest, however, that delay was an inappropriate issue to address, in the proper case.

### d. Patterns for future access (declaratory judgment).

A judicial action for access to public records may include a demand for declaratory judgment, asking the trial court to declare that a particular category of requested records is public under the Public Records Law. Rule 57 of the Alabama Rules for Civil Procedure provides for an action for declaratory judgment. In at least one recent case, however, the trial judge ordered a city internal audit released, as a public record, but refused to find that all internal audit reports of the city are “automatically subject to public disclosure.” *Birmingham News Co. v. Bedingfield*, CV 91-1803 JDC (Cir. Ct. of Jefferson County, Ala., May 2, 1991) (affirmed in *Bedingfield v. Birmingham News Co.*, 595 So. 2d 1379 (Ala. 1992)).

## 5. Pleading format.

The early records access cases in Alabama proceeded on petition for writ of mandamus. See, e.g., *Brewer v. Watson* [*Brewer II*], 65 Ala. 88, 96 (1880) (pre-Public Records Law case; “mandamus will lie to compel inspection” of public records); *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941) (“the publisher of a newspaper has such a public interest as will entitle him or his duly accredited representatives to a right of inspection of public records, and on denial the aid of a court by writ of mandamus to compel such public official to allow a reasonable inspection of public records in his charge, in order that the publisher may disseminate correct information therefrom to the public interest thus served”). As recently as 1973, the Alabama Supreme Court was still declaring that “[m]andamus is the proper remedy to compel a public official having custody of public writings to permit a citizen to inspect such public writings.” *State ex re. Kernells v. Ezell*, 291 Ala. 440, 282 So. 2d 266 (1973). See also *Walsh v. Barnes*, 541 So. 2d 33, 34 (Ala. Civ. App. 1989) (grant of petition for writ of mandamus for access to public records affirmed).

A petition for injunctive relief, however, sometimes coupled with a prayer for declaratory judgment, is the typical pleading in the most recent cases. Since mandamus is permitted only when no other relief is available, the recent acceptance by trial and appellate courts of actions for injunctive relief in public records cases suggests that mandamus may no longer be appropriate. See *Accident Information Services of Alabama Inc. v. Hoover*, CV 92-9619 (Cir. Ct. of Jefferson Co., Ala., Jan. 11, 1993) (defendant moved to dismiss petition for writ of mandamus because injunctive relief would be adequate remedy). The petition for injunctive relief should ask the court to enjoin the defendant from denying the plaintiff access to the requested records.

The Supreme Court of Alabama has declared that “a motion to intervene is the procedurally correct means to seek the opening of a sealed court file.” *Holland v. Eads*, 614 So. 2d 1012, 1014 (Ala. 1993). The Court has also made clear that the trial judge must do a complete *in camera* review of the withheld records in all public records cases and make “individualized determinations as to whether the [requested records] are due to be disclosed under the standards set out in *Stone* [404 So. 2d 678], *Chambers* [552 So. 2d 854], and [*Muse*, 638 So. 2d 853].” *Birmingham News Co. v. Muse* [*Muse II, 1st appeal*], 638 So. 2d 853, 858 (Ala. 1994).

## 6. Time limit for filing suit.

The governing statute of limitations for actions for access under the Public Records Law is Alabama Code § 6-2-38(l) (1993), which provides that “[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.” Since an action for records access typically asks for equitable relief, not money damages, timeliness of the action may also be governed by laches, which bars an action that is not brought within a “reasonable time,” even if the statutory two-year period has not run. A defendant who seeks to bar an action by laches, however, must show that the plaintiff’s delay in bringing suit resulted in prejudice to the defendant. See, e.g., *Hogan v. Carter*, 431 So. 2d 1160, 1164 (Ala. 1983).

As a practical matter, timeliness is not usually a problem in records access cases. These actions are typically brought by members of the news media, who want and often need access to the requested records as quickly as possible. A petition for access is often filed within days or weeks of the denial of access, and sometimes within hours of such denial. Undue delay in filing suit may jeopardize the chances of convincing a court to enter a preliminary injunction, however. See *Birmingham News Co. v. Chambers*, CV 89-186 (Cir. Ct. of Shelby County, Ala., May 17, 1989) (request for permanent injunction granted and records ordered released within seven days, but application for preliminary injunction denied because of perceived delay by newspaper in bringing suit) (entry of permanent injunction affirmed in *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989)).

Occasionally, the question of mootness will arise in a records access case. In *State ex rel. Kernells v. Ezell*, 291 Ala. 440, 282 So. 2d 266 (1973), for example, a citizen asked to inspect a petition for a county liquor referendum, the probate judge refused, and the citizen petitioned for a writ of mandamus, by which time the election on the matter was already completed. The Alabama Supreme Court found that because of the timing of such referendums, the issue was “capable of repetition yet evading review” and rejected the probate judge’s mootness argument.

The mootness argument by a state university in *Birmingham News Co. v. Muse* [*Muse II, 1st appeal*], 638 So. 2d 853 (Ala. 1994), was more persuasive to the appellate court. The newspaper appealed the trial court’s denial of a preliminary injunction, arguing that timeliness of the release of the university’s response to the NCAA Letter of Inquiry was significant in order to give the public an opportunity to be informed about the process in time to participate in it. The Alabama Supreme Court disagreed, noting that the trial court had later entered a permanent injunction granting access to the requested documents: “The only judgment now capable of having any effect is the permanent injunction, and we decline to express an advisory opinion on the preliminary injunction under the circumstances of this case.” 638 So. 2d at 854.

## 7. What court.

Although we know of no authority that directly addresses this point, a complaint for access to public records in Alabama may be filed in the state circuit court in the county where the custodian of the records resides. See Ala. Code § 6-3-2(b)(3) (1993).

## 8. Judicial remedies available.

Injunctive relief is the usual modern remedy, sometimes coupled with a declaratory judgment.

## 9. Litigation expenses.

The Public Records Law contains no reference to award of costs; therefore, Public Records Law cases are governed by Rule 54(d) of the Alabama Rules of Civil Procedure, which reads as follows: “Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.”

### a. Attorney fees.

There is no statutory provision for the award of attorneys' fees in public records cases in Alabama, but there is case law authority for the award of fees in open-government cases based upon a common-benefit theory. See *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991) (open meetings case; award of attorneys' fees upheld); citizens of Birmingham were benefited generally "by an action which enforces the requirements of the statute that the business of the City Council be conducted in open and public meetings"; *Slawson v. Alabama Forestry Commission*, 631 So. 2d 953, 959 (Ala. 1994) (open meetings case; award of reasonable costs and attorneys' fees "is appropriate when the trial court determines that a case will result in benefit to the general public") (remanded for determination of propriety of awarding fees); *Advertiser Co. v. Auburn Univ.*, 579 So. 2d 645 (Ala. Civ. App. 1991) (recognizing discretionary right of trial court to award fees in public records case in which "a litigant rendered a public service by bringing an improper governmental practice to an end") (denial of fees upheld).

Despite the judicial approval for awarding attorneys' fees in public records cases, only one case could be found where a request for such an award has been granted. See *Tuscaloosa News v. Garrison*, CV-99-408 (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001) (portion of fees granted; case involved both public records and open meetings issues); but see *Advertiser Co. v. Auburn Univ.*, 579 So. 2d 645 (Ala. Civ. App. 1991) (denial of fees upheld); *Birmingham Education Ass'n v. Birmingham City Board of Education*, CV 94-2637 (Cir. Ct. of Jefferson County, Ala., Nov. 15, 1995) (fees denied: "[w]hile the result of this litigation will result in a benefit to the public, the Court finds that it is not such a benefit that would justify making an exception to the 'American Rule' that each party should be responsible for its own legal expenses"); *Blankenship v. City of Hoover*, 590 So. 2d 245, 250 (Ala. 1991) ("In this case, there is no statute or contract providing for the award of attorney fees; and, based on the facts before us, we find no exceptions founded on equitable principles within which to fit this case. Therefore, we hold that the trial court did not err in refusing to award attorney fees."); *Mobile Press Register Inc. v. Jordan*, CV 95-1593 (Cir. Ct. of Mobile County, Ala., June 2, 1995) (claim for attorney fees denied, citing *Blankenship*, 590 So. 2d at 250).

There is early common law authority for the award of costs and fees in a public records cases, based upon the principle that a public official who wrongfully refuses to perform an official task is liable for compensatory damages. *Brewer v. Watson [Brewer II]*, 65 Ala. 88, 96-98 (1880); *Brewer v. Watson [Brewer III]*, 71 Ala. 299, 307 (1882). This common law authority plus the more recent judicial approval for awarding costs and attorneys' fees in public records cases make the possibility of such an award an important arguing point when attempting to gain access to documents that are clearly public records under Alabama law.

One potential hurdle in obtaining attorneys' fees in public records cases, however, is section 14 of the Alabama Constitution of 1901. Section 14 provides for state immunity from civil suit and has been interpreted to extend to state agencies. Although the Alabama Supreme Court has not addressed this issue, the Alabama Court of Civil Appeals recently reversed an award of attorneys' fees in a declaratory judgment action (not an open-government case) based on section 14 state immunity. *Alabama Dep't of Environmental Management v. Town of Lowndesboro*, 2005 Ala. Civ. App. LEXIS 172 (Ala. Civ. App. Apr. 8, 2005). The court held that prior Alabama Supreme Court cases upholding awards of attorneys' fees against state agencies were not binding precedent because the issue of section 14 state immunity had not been addressed. *Id.* at \*38, 42. The court further held that section 14 bars an award of attorneys' fees even when the underlying action is not barred by the state-immunity provision. *Id.* at \*56-58 (citing *Haley v. Barbour County*, 885 So. 2d 783 (Ala. 2004) (holding that civil contempt sanctions against state official were barred by section 14 of the Alabama Constitution). It is important to note, however, that section 14 immunity does not extend to municipalities. *Id.* at \*47.

When an award of attorneys' fees is granted, it is not an "all-or-

nothing" proposition. It is in the trial court's discretion to award a portion of the attorneys' fees. See *Tuscaloosa News v. Garrison*, CV-99-408, Order (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001) (portion of fees granted; case involved both public records and open meetings issues).

### b. Court and litigation costs.

There is early common law authority for the award of costs and fees in a public records cases, based upon the principle that a public official who wrongfully refuses to perform an official task is liable for compensatory damages. *Brewer v. Watson [Brewer II]*, 65 Ala. 88, 96-98 (1880); *Brewer v. Watson [Brewer III]*, 71 Ala. 299, 307 (1882). This common law authority plus the more recent judicial approval for awarding costs and attorneys' fees in public records cases make the possibility of such an award an important arguing point when attempting to gain access to documents that are clearly public records under Alabama law.

### 10. Fines.

Former Alabama Code § 36-12-40 (1975) imposed a fine of not less than fifty dollars on any public officer who refused to allow a person to examine a public writing, but this provision was repealed effective Jan. 1, 1980. There is now no provision for a fine for the wrongful refusal to disclose public records in Alabama.

A number of Alabama statutes provide for fines for the unauthorized or prohibited disclosure of records that are made confidential by law. Some of these statutes purport to extract a fine from any person, arguably including reporters, who discloses the confidential record in question. See, e.g., Ala. Code § 12-15-100 (Supp. 2005) ("Whoever, except for the purposes permitted and in the manner provided by this section, discloses or makes use of or knowingly permits the use of information concerning a child before the [juvenile] court directly or indirectly derived from the records of the court or acquired in the course of official duties, upon conviction thereof, shall be guilty of a misdemeanor."). If the reporter has not obtained the records "wrongfully," the reporter's disclosure of the records should be protected from penalty by federal constitutional law. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (media not liable for disclosure of rape victim's name in violation of state law). To obtain the protection of *Florida Star*, the reporter must not knowingly solicit confidential records.

### 11. Other penalties.

None.

### 12. Settlement, pros and cons.

Settlement of records access cases in Alabama is often possible and desirable. Denial of access to public records is usually not a popular position for a public official to take in this traditionally populist state; therefore, public officials are sometimes willing to settle in order to avoid the publicity of further litigated controversy. The requester often benefits by a consensual resolution of the controversy because it is less expensive, and more certain, than trial. See, e.g., *Moore v. Westover Water Authority*, No. CV-96-000810 (Cir. Ct. of Shelby County, Ala.) (by agreement of the parties, the Water Authority's employment agreements were produced at the request of *The Birmingham News*, and a portion of the newspaper's attorneys' fees were paid); *Birmingham News Co. v. Swift*, CV 88-1390 G (Cir. Ct. of Montgomery Co., Ala., Sept. 7, 1988) (by stipulation of parties, State Director of Finance enjoined to preserve certain telephone records of State Legislature and to permit inspecting and copying of said records); *Birmingham News Co. v. Birmingham Racing Commission*, CV 87-501-622 MC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 28, 1987) (by stipulation of parties, resolution adopted giving access to certain financial records of Birmingham Racing Commission); *Birmingham News Co. v. Deutsch*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986) (by consent of parties, access to arrest reports, with agreed-to deletions, ordered). If possible, settlement of a public records case should include agreement to a consent order by the court, as in the above-cited cases.

## E. Appealing initial court decisions.

### 1. Appeal routes.

An appeal from a decision of a state circuit court judge on a petition for injunction or writ of mandamus is to the Supreme Court of Alabama pursuant to Alabama Code § 12-22-6 (1995) and Rule 4 of the Alabama Rules of Appellate Procedure.

### 2. Time limits for filing appeals.

Under Rule 4(a) of the Alabama Rules of Appellate Procedure, a notice of appeal must be filed with the clerk of the trial court within forty-two days (six weeks) of the date of entry of the order issuing or denying the permanent injunction or writ. The rule requires filing within fourteen days (two weeks) if appeal is taken on an order granting, continuing, modifying, refusing or dissolving a preliminary injunction or refusing to dissolve or modify an injunction. The Alabama Supreme Court may expedite an appeal for good cause, but may not extend the time for taking an appeal.

### 3. Contact of interested amici.

Because court decisions on public records issues may have far-reaching consequences, press groups and others may have an interest in filing a friend-of-the-court brief on behalf of the request for public records. The filing of *amicus curiae* briefs is permitted by Rule 29 of the Alabama Rules of Appellate Procedure only with leave of the appellate court. Typically, the *amicus* brief is filed conditionally with the motion for leave. *Amicus* briefs must follow the form prescribed for the brief of an appellee in Rule 28(b) of the Alabama Rules of Appellate Procedure, and the brief must be filed within the time allowed to the party whose position on the appeal the *amicus curiae* brief will support. The motion for leave must identify the interest of the applicant and must state the reasons why the brief of an *amicus curiae* is desirable. Under Rule 29, an *amicus curiae* may participate in oral argument only upon motion and leave of the court and, unless additional time is granted, must share the time of the party whose position the *amicus curiae* supports.

*Amicus curiae* participation has been permitted, to substantial benefit, in the following recent records access cases under federal constitutional law in Alabama: *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423 (Ala.), *cert. denied*, 113 S. Ct. 665 (1992) (*amicus* brief and oral ar-

gument by Alabama Press Association for access to pretrial records in retrial of capital murder case); and *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. 1993) (*amicus* brief and oral argument by Alabama Press Association for access to pretrial records in criminal trial of Gov. Hunt); and in the following cases under the Public Records Law: *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981) (brief by Alabama Press Association); and *Chambers v. Birmingham News Co.*, 552 So. 2d 854 (Ala. 1989) (brief by Alabama Press Association).

Press groups, members of the media and others interested in access to public records may also participate at the trial court level — either by moving to participate as an *amicus curiae* or by moving to intervene. Unlike a party who intervenes, a party who participates as *amicus curiae* may not add parties, raise new issues, or otherwise control the litigation. *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 74, 300 So. 2d 106, 111 (1974). “The *amicus curiae* may, with permission of the court[,] file briefs, argue the case and introduce evidence.” *Id.*

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues.

## F. Addressing government suits against disclosure.

Although we know of no published cases involving a government suit against disclosure of public records, a declaratory judgment action filed by a governmental body under the former open meetings law in Alabama provides guidance if such an action should arise. In *Huntsville-Madison County Airport Authority v. Huntsville Times*, 564 So. 2d 904 (Ala. 1990), the Huntsville-Madison County Airport Authority claimed that the Huntsville Times newspaper “had accused it of conduct in violation of the [former] ‘Sunshine Law.’” *Id.* at 904. The Authority brought a declaratory judgment action against the newspaper seeking answers to questions regarding whether the Authority was governed by the former Sunshine Law and, if so, to what extent. *Id.* at 905. The newspaper filed a motion to dismiss the action, asserting multiple grounds for dismissal, “including the lack of a justiciable controversy, prohibition against advisory opinions, failure to join indispensable parties, and failure to state a claim upon which relief could be granted.” *Id.* The court granted the newspaper’s motion and dismissed the Authority’s action, holding that the Authority’s complaint did not present a justiciable controversy, but rather sought an advisory opinion. *Id.*



# Open Meetings

## I. STATUTE — BASIC APPLICATION.

### A. Who may attend?

The Alabama Open Meetings Act grants the right to attend meetings covered by the Act to the public generally. Ala. Code § 36-25A-1(a) (“It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings . . .”). The Alabama Open Meetings Act defines the “public” portion of a meeting as being “conducted so that constituents of the governmental body, members of the media, person interested in the activities of the governmental body and citizens of this state could, if they desired, attend and observe.” Ala. Code § 36-25A-2(7) (Supp. 2005).

### B. What governments are subject to the law?

#### 1. State.

The Alabama Open Meetings Act applies to boards, bodies, and commissions of the executive and legislative departments of the state that expend or appropriate public funds, to multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state, and to quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, those bodies. Ala. Code § 36-25A-2(4) (Supp. 2005).

#### 2. County.

The Alabama Open Meetings Act applies to boards, bodies, and commissions of the executive and legislative departments of counties, and to multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of counties. Ala. Code § 36-25A-2(4) (Supp. 2005).

#### 3. Local or municipal.

The Alabama Open Meetings Act applies to boards, bodies, and commissions of the executive and legislative departments of municipalities, and to multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of municipalities. Ala. Code § 36-25A-2(4) (Supp. 2005); Op. Att’y Gen. Ala., No.2006-108 (volunteer fire department subject to the Alabama Open Meetings Act); Op. Att’y Gen. Ala., No.2006-122 (county hospital board subject to the Alabama Open Meetings Act); Op. Att’y Gen. Ala., No.2007-039 (community action agencies subject to the Alabama Open Meetings Act).

### C. What bodies are covered by the law?

#### 1. Executive branch agencies.

##### a. What officials are covered?

Individual executive officials are not subject to the Alabama Open Meetings Act except when they meet as members of governmental bodies.

##### b. Are certain executive functions covered?

All executive functions are presumptively subject to the Alabama Open Meetings Act when those functions are performed in meetings of governmental bodies.

##### c. Are only certain agencies subject to the act?

All multimember agencies of the executive department of the state or its political subdivisions or municipalities are subject the Alabama Open Meetings Act. Ala. Code § 36-25A-2(4).

The former open meetings law was specifically applied to the following executive agencies:

(1) *County personnel board*. 205 Op. Att’y Gen. Ala. 16 (Oct. 29, 1986).

(2) *Municipal housing authority*. *Birmingham News Co. v. Ward*, CV 90-9338 (Cir. Ct. of Jefferson County, Ala., Feb. 20, 1991) (by stipulation).

(3) *Municipal solid waste authority*. 212 Op. Att’y Gen. Ala. 50 (Sept. 22, 1988).

(4) *State Ethics Commission*. *Birmingham News Co. v. Cooper*, 13 Media L. Rep. (BNA) 1655 (Cir. Ct. of Jefferson County, Ala., Equity Div., Oct. 29, 1986).

## 2. Legislative bodies.

All boards, bodies, and commissions, and all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the legislative department of the state or its political subdivisions or municipalities are covered by the Alabama Open Meetings Act.

The former open meetings law was specifically applied to the following legislative bodies:

a. *Alabama House and Senate*. Ala. Constitution of 1901, art. IV, § 57.

b. *Alabama House Committee*. 165 Op. Att’y Gen. Ala. 23 (Nov. 17, 1976) (“legislative committee meetings . . . must be open . . . to the public”); 224 Op. Att’y Gen. Ala. 38 (Aug. 22, 1991).

c. *Alabama Lieutenant Governor and Ex Officio President of the Alabama Senate*. *Birmingham News Co. v. Folsom*, CV 88-1591 G (Cir. Ct. of Montgomery County, Ala., Nov. 30, 1989) (meetings with members of Alabama Senate).

d. *Public corporation to which legislative functions are delegated*. *Birmingham News Co. v. Birmingham Racing Commission*, CV 87-501-622 MC at 4 (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 28, 1987) (“The Commission, having both legislative and judicial functions, falls within the scope of § 13A-14-2.”).

## 3. Courts.

The Alabama Open Meetings Act specifically excludes from its coverage Alabama appellate and trial courts, except as required by the Constitution of Alabama or any body governed by the rules of the Alabama Supreme Court.

Notwithstanding that exclusion, Alabama has a fully developed body of case law that recognizes and adopts procedures to enforce the federal constitutional right to attend criminal court proceedings, including pretrial proceedings. *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423 (Ala.) (qualified First Amendment right of access to pretrial proceedings and court file in criminal cases; requirements for closure), *cert. denied*, 113 S. Ct. 665 (1992); *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993) (required procedure for closure of criminal proceedings). However, the court does have some discretion in deciding whether to clear the courtroom under certain circumstances. *See P.M.M. v. State*, 762 So. 2d 384 (Ala. Crim. App. 1999) (closure of courtroom for the entire trial of a rape, sex abuse, and sodomy case was too broad; the trial court failed to make specific findings to justify total closure); *Ex parte Judd*, 694 So. 2d 1294 (Ala. 1997) (total closure is justified only in the narrowest of circumstances).

Alabama also adopted one of the earliest provisions for the televising of court proceedings. Alabama Canons of Judicial Ethics 3(A)(7A) and (7B) (requirements for televised coverage of trial court and appellate court proceedings in Alabama state courts). Under the governing regulations, however, televised coverage can be effectively vetoed by any party, witness, or juror, as was done (by jurors, at the invitation of the trial judge) in the criminal trial of Gov. Harold Guy Hunt. *Ex parte Courtroom Television Network*, No. 1920991 (Ala., Apr. 12, 1993, & Apr. 13, 1993).

Juvenile proceedings are closed by separate statute, however. Ala. Code § 12-15-65(a) (1995). In addition, Alabama Code § 12-21-9 (1995) provides for closure of certain civil cases, as follows:

In all civil cases sounding in damages involving the question of rape, assault with intent to ravish, seduction, divorce or any other case where the evidence is vulgar, obscene or related to the improper acts of the sexes and tends to debauch the morals of the young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of plaintiffs or defendants or their attorneys, to hear and try the case after clearing the courtroom of all or any portion of the audience whose presence is not necessary.

See also Ala. Code § 12-21-202 (1995) (trial judge has discretion to clear courtroom in prosecutions for rape and assault with intent to ravish or when evidence is vulgar, obscene, etc.); Ala. Code § 12-21-203(d)(1) (1995) (in prosecution for criminal sexual conduct, evidence regarding past sexual behavior of complaining witness is first presented *in camera*, for court's determination as to admissibility).

Closure of divorce proceedings based upon the authority of Alabama Code § 12-21-9 was unsuccessfully challenged in a federal court case, but the opponents of closure in that case did not challenge the constitutionality of the statute itself. *Simmons v. Conger*, 86 F.3d 1080 (11th Cir. 1996). In the proper case, such a challenge might be successful.

#### 4. Nongovernmental bodies receiving public funds or benefits.

By its terms, the Alabama Open Meetings Act applies only to "governmental bodies." Ala. Code § 36-25A-1(a) (Supp. 2005). We know of no reported case law or Alabama Attorney General opinion that addresses the question whether the Alabama Open Meetings Act could apply, in some circumstances, to nongovernmental bodies that receive public funds or benefits.

#### 5. Nongovernmental groups whose members include governmental officials.

The Alabama Open Meetings Act does not, on its face, apply to nongovernmental groups whose members include governmental officials, and we know of no authority for the Act to apply to such groups, unless the groups are deemed alter egos of governmental groups or delegates of governmental functions. See, e.g., *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981) (public records case; personal relations corporation that included officers of state university deemed alter ego of state university).

The Alabama Open Meetings Act specifically excludes from coverage "[v]oluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor." Ala. Code § 36-25A-2(4) (Supp. 2005).

#### 6. Multi-state or regional bodies.

The Alabama Open Meetings Act does not, on its face, apply to multistate or regional bodies, and we know of no reported authority to apply the Act to such bodies.

#### 7. Advisory boards and commissions, quasi-governmental entities.

The Alabama Open Meetings Act applies to advisory boards and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; and to quasi-governmental entities of the state or its political subdivisions or municipalities, including all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions or municipalities. Ala. Code § 36-25A-2(4) (Supp. 2005).

#### 8. Other bodies to which governmental or public functions are delegated.

By its terms, the Alabama Open Meetings Act applies to all boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing boards of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committee or subcommittees of, or appointed by, the body. Ala. Code § 36-25A-2(4) (Supp. 2005); Op. Att'y Gen. Ala., No.2006-108 (volunteer fire department subject to the Alabama Open Meetings Act); Op. Att'y Gen. Ala., No.2006-122 (county hospital board subject to the Alabama Open Meetings Act); Op. Att'y Gen. Ala., No.2007-039 (community action agencies subject to the Alabama Open Meetings Act); but see Op. Att'y Gen. Ala. 2009-006 (Health Care Authority of City of Huntsville specifically exempted from the Alabama Open Meetings Act under Ala. Code § 22-21-316).

The Alabama Open Meetings Act specifically excludes from coverage (1) legislative party caucuses or coalitions; (2) Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court; and (3) voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor. Ala. Code § 36-25A-2(4) (Supp. 2005).

#### 9. Appointed as well as elected bodies.

The Alabama Open Meetings Act makes no distinction between elected and appointed bodies.

#### D. What constitutes a meeting subject to the law.

##### 1. Number that must be present.

##### a. Must a minimum number be present to constitute a "meeting"?

The Alabama Open Meetings Act requires that a "quorum" must be present to constitute a "meeting." Ala. Code § 36-25A-2(6) (Supp. 2005).

"Unless otherwise provided by law, a 'quorum' is a majority of the voting members of a governmental body." Ala. Code § 36-25A-2(12) (Supp. 2005); *Slagle v. Ross*, CV2009-1846 (Cir. Ct. of Montgomery County, Ala., Jan 28, 2010) (holding that the Alabama Open Meetings Act was not violated because a quorum was not present).

##### b. What effect does absence of a quorum have?

Without a quorum, there is no "meeting" for purposes of the Alabama Open Meetings Act. Ala. Code § 36-25A-2(6) (Supp. 2005).

##### 2. Nature of business subject to the law.

##### a. "Information gathering" and "fact-finding" sessions.

These sessions are presumptively subject to the Alabama Open Meetings Act, except (1) to discuss the general reputation and character, physical condition, professional competence or mental health of individuals, or the job performance of certain public employees; (2) when expressly allowed by federal law or state law, to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body; (3) to discuss with

the governmental body's attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action or to meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group or body; (4) to discuss security plans, procedures, assessments, measures or systems, or the security or safety of persons, structures, facilities or other infrastructures, including, without limitation, information concerning critical infrastructure and critical energy infrastructure information, the public disclosure of which could reasonably be expected to be detrimental to public safety or welfare; (5) to discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint; (6) to discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease or market value of real property; (7) to discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other states or foreign nations or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act; and (8) to discuss strategy in preparation for negotiations between the governmental body and a group of public employees.

Also, the Alabama Open Meetings Act specifically excludes from coverage meetings of a governmental body with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body. Ala. Code § 36-25A-6(b)(2) (Supp. 2005).

#### **b. Deliberations toward decisions.**

All deliberations toward decisions must be in open meeting, except that a governmental body may hold a closed meeting to deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public. Ala. Code § 36-25A-7(a)(9) (Supp. 2005); *Guice v. Cherokee Co. Bd. Of Ed.*, CV 2009-086 (Cir. Ct. of Cherokee County, Ala, Aug. 25, 2010) (holding that the signing of resolutions by individual board members where quorum was present constituted a closed meeting in violation of the Alabama Open Meetings Act); Op. Att'y Gen. Ala., 2011-014 (board members can meet at and deliberate during an open meeting of a committee of the board when quorum of the full board is present).

### **3. Electronic meetings.**

#### **a. Conference calls and video/Internet conferencing.**

Use of conference calls to circumvent the requirement of open government is a violation of the Alabama Open Meetings Act. Ala. Code § 36-25A-1(a) (Supp. 2005) ("Electronic communications shall not be utilized to circumvent any of the provisions of this chapter."); Op. Att'y Gen. Ala., 2006-071 (Quorum is based solely on members physically present at meeting and members attending meeting via telephone do not count toward establishing quorum); Op. Att'y Gen. Ala., 2010-07 (members attending meeting by telephone cannot vote even when quorum is physically present at meeting); *but see* Op. Att'y Gen. Ala., 2006-130 (Ala. Code § 33-1-18(d) exempts Alabama State Port Authority from prohibition regarding meeting and voting via teleconference contained in Ala. Code § 36-25A-1(a)).

#### **b. E-mail.**

Use of e-mail to circumvent the requirement of open government is a violation of the Alabama Open Meetings Act. Ala. Code § 36-25A-1(a) (Supp. 2005) ("Electronic communications shall not be utilized to circumvent any of the provisions of this chapter.")

#### **c. Text messages.**

There is no statutory or case law addressing this issue

#### **d. Instant messaging.**

There is no statutory or case law addressing this issue

#### **e. Social media and online discussion boards.**

There is no statutory or case law addressing this issue

### **E. Categories of meetings subject to the law.**

#### **1. Regular meetings.**

##### **a. Definition.**

The Alabama Open Meetings Act defines the term "meeting" to include "[t]he prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body at a time and place which is set by law or operation of law." Ala. Code § 36-25A-2(6)(a)(1) (Supp. 2005).

Several statutes require an entity to hold "regular" meetings at specified intervals. *See, e.g.*, Ala. Code § 11-43C-28 (1994) ("council shall hold regular public meetings weekly").

##### **b. Notice.**

The Alabama Open Meetings Act requires that, unless otherwise specified by law, a governmental body subject to the Act, except for an advisory board, advisory commission, advisory committee, task force, or other advisory body created solely to make recommendations on public policy issues and composed of persons who do not receive compensation for their service from public funds, must post notice of all regular meetings, as defined in Alabama Code § 36-25A-2(6)(a)(1) (Supp. 2005); Op. Att'y Gen. Ala., 2006-027 (seven days notice required for regularly scheduled meetings of city council and committees).

Some statutes require specific time and manner of notice for particular meetings. *See, e.g.*, Ala. Code § 11-44-136 (1994) (seven days' notice by publication in a newspaper is required before a commission may enact a resolution or ordinance granting a franchise, appropriating money, providing for public improvements, or enacting any regulation regarding public comfort, safety or health or of any other general and permanent nature, *except* in case of an emergency regarding public safety or health).

#### **(1). Time limit for giving notice.**

Notice of regular meetings, as defined in Alabama Code § 36-25A-2(6)(a)(1) (Supp. 2005), must be posted at least seven calendar days prior to the meeting. Ala. Code § 36-25A-3(a) (Supp. 2005); *see also* Op. Att'y Gen. Ala., No. 2006-027, 2005 Ala. AG LEXIS 196 (Nov. 15, 2005).

#### **(2). To whom notice is given.**

The Alabama Open Meetings Act requires notice to the public generally. The Act also requires e-mail notice to those who have registered with the Secretary of State to receive such notice of meetings of governmental bodies with statewide jurisdiction. The Act also requires that governmental bodies, if practicable, provide direct notification of meetings to any member of the public who has registered with the



governmental body to receive notification of meetings.

### (3). Where posted.

The Alabama Open Meetings Act does not specify where notice is to be posted by the respective houses of the Alabama Legislature, but requires the houses to “develop rules consistent with the Constitution of Alabama of 1901, providing for . . . prior notice” of meetings. Ala. Code § 36-25A-3(a)(1) (Supp. 2005).

Any governmental body with statewide jurisdiction is required to submit notice of its meeting to the Secretary of State. The Secretary of State is then required to post the notice on the Internet and send e-mail notification to those who have registered with the Secretary of State to receive notification of meetings. Ala. Code § 36-25A-3(a)(2) (Supp. 2005); Op. Att’y Gen. Ala., 2007-086 (University of North Alabama does not exercise statewide jurisdiction and thus is not required to provide notice of meetings via Secretary of State).

A municipal governmental body is required to post notice of each meeting on a bulletin board at a place convenient to the public in city hall. A corporation a majority of whose governing board is appointed or elected by a municipality may, in lieu of posting notice in city hall, post notice on a bulletin board at a place convenient to the public in the principal office of the corporation or other instrumentality. Ala. Code § 36-25A-3(a)(3) (Supp. 2005).

Local school boards are required to post notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the board. Ala. Code § 36-25A-3(a)(4) (Supp. 2005).

Any other governmental body is required to post notice of each meeting in a “reasonable location” or use a “reasonable method of notice that is convenient to the public.” Any change of the location or method for posting notices of meetings shall not take effect until the change has been approved at an open meeting by the members of the governmental body and announced to the public at an open meeting. Ala. Code § 36-25A-3(a)(5) (Supp. 2005).

If practicable, governmental bodies must provide direct notification to any member of the public who has registered with the governmental body to receive notification of meetings. Notice may be transmitted by e-mail, telephone, facsimile, U.S. Mail, or any other method reasonably likely to provide the requested notice. Ala. Code § 36-25A-3(a)(6) (Supp. 2005).

### (4). Public agenda items required.

If the governmental body has created a preliminary agenda, the Alabama Open Meetings Act requires that it be posted as soon as practicable in the same location or manner as the notice of the meeting. *Citizens For Better Schools v. Greene*, CV 2007-932 (Cir. Ct. of Jefferson County, Ala. Mar. 19, 2008) (declaring vote null and void and imposing fines and awarding attorneys fees based on failure to post preliminary agenda in proper location). A governmental body may discuss matters not included in the preliminary agenda. *Underwood v. Alabama State Univ.*, 51 So. 3d 1010 (Ala. 2010); *but see Guice v. Cherokee Co. Bd. Of Ed.*, CV 2009-086 (Cir. Ct. of Cherokee County, Ala. Aug. 25, 2010) (holding that knowing failure to include information on agenda constitutes a violation of the Alabama Open Meetings Act). If a preliminary agenda has not been created, the notice must include a general description of the nature and purpose of the meeting.

### (5). Other information required in notice.

Notices posted pursuant to the Alabama Open Meetings Act must include the time, date and place of the meeting. Ala. Code § 36-25A-3(c) (Supp. 2005); *see also* Op. Att’y Gen. Ala., No. 2006-027, 2005 Ala. AG LEXIS 196 (Nov. 15, 2005).

### (6). Penalties and remedies for failure to give adequate notice.

Enforcement of the Alabama Open Meetings Act may be sought by civil action brought in the county where the governmental body’s

primary office is located. Such an action may be brought for failure of the governmental body to follow the notice requirements of the Act. Ala. Code § 36-25A-9(b)(1) (Supp. 2005). Remedies available include declaratory judgments, injunctions, invalidation of actions taken during the meeting held in violation of the act, and civil penalty up to \$1,000. *Citizens For Better Schools v. Greene*, CV 2007-932 (Cir. Ct. of Jefferson County, Ala. Mar. 19, 2008) (declaring vote null and void and imposing fines and awarding attorneys fees based on failure to post preliminary agenda in proper location).

### c. Minutes.

#### (1). Information required.

The Alabama Open Meetings Act requires governmental bodies to maintain accurate records of their meetings setting forth the date, time, place, members present or absent, and actions taken at each meeting. Ala. Code § 36-25A-4 (Supp. 2005).

#### (2). Are minutes public record?

Under the Alabama Open Meetings Act, the minutes are presumptively public record and are to be made available to the public as soon as practicable after approval.

## 2. Special or emergency meetings.

### a. Definition.

In addition to the regular meeting discussed above, under the Alabama Open Meetings Act the term “meeting” includes (1) “[t]he prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the body, committee or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds, and (2) “[t]he gathering, whether or not it was prearranged, of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee or subcommittee at a later date. Ala. Code § 36-25A-2(6)(a)(2) & (3) (Supp. 2005).

### b. Notice requirements.

#### (1). Time limit for giving notice.

The time limit for giving notice for a “meeting” as defined under Alabama Code § 36-25A-2(6)(a)(2) or (3) (Supp. 2005) is as soon as practicable and at least 24 hours before the meeting is scheduled to begin. The Alabama Open Meetings Act provides exceptions to this rule where notice is prevented by emergency circumstances requiring immediate action to avoid physical injury to persons or damage to property, or relates to a meeting to be held solely to accept the resignation of a public official or employee. In those situations, notice is to be given as soon as practicable and at least one hour before the meeting is scheduled to begin. Ala. Code § 36-25A-3(b) (Supp. 2005); *see also* Op. Att’y Gen. Ala., No. 2006-027, 2005 Ala. AG LEXIS 196 (Nov. 15, 2005).

#### (2). To whom notice is given.

Notice must be given to the public and special notice is to be directed to any person who has registered to receive direct notices from the governmental body. Ala. Code § 36-25A-3(b) (Supp. 2005).

#### (3). Where posted.

The Alabama Open Meetings Act does not specify where notice should be posted for a “meeting” as defined in Alabama Code § 36-25A-2(6)(a)(2) or (3) (Supp. 2005). Under the former open meetings law the notice of special or emergency meetings was required to be posted where reasonable under the circumstances. *Slawson v. Alabama Forestry Commission*, 631 So. 2d 953, 959 (Ala. 1994).

#### (4). Public agenda items required.

As with regular meetings, if the governmental body has created a preliminary agenda, the Alabama Open Meetings Act requires that it be posted as soon as practicable in the same location or manner as the notice of the meeting. A governmental body may discuss matters not included in the preliminary agenda. If a preliminary agenda has not been created, the notice must include a general description of the nature and purpose of the meeting. Ala. Code § 36-25A-3(c) (Supp. 2005).

#### (5). Other information required in notice.

As with regular meetings, notices posted for special or emergency meetings must include the time, date and place of the meeting. Ala. Code § 36-25A-3(c) (Supp. 2005); *see also* Op. Att’y Gen. Ala., No. 2006-027, 2005 Ala. AG LEXIS 196 (Nov. 15, 2005).

#### (6). Penalties and remedies for failure to give adequate notice.

Enforcement of the Alabama Open Meetings Act may be sought by civil action brought in the county where the governmental body’s primary office is located. Such an action may be brought for failure of the governmental body to follow the notice requirements of the Act, including the requirements for special or emergency meetings. Ala. Code § 36-25A-9(b)(1) (Supp. 2005). Remedies available include declaratory judgments, injunctions, invalidation of actions taken during the meeting held in violation of the act, and civil penalty up to \$1,000.

#### c. Minutes.

##### (1). Information required.

The Alabama Open Meetings Act requires governmental bodies to maintain accurate records of their meetings (whether regular, special or emergency) setting forth the date, time, place, members present or absent, and actions taken at each meeting. Ala. Code § 36-25A-4 (Supp. 2005).

##### (2). Are minutes a public record?

Under the Alabama Open Meetings Act, the minutes are presumptively public record and are to be made available to the public as soon as practicable after approval.

### 3. Closed meetings or executive sessions.

#### a. Definition.

The Alabama Open Meetings Act defines “executive session” as “[t]hat portion of a meeting of a governmental body from which the public is excluded for one or more of the reasons prescribed in Section 36-25A-7(a).” Ala. Code § 36-25A-2(2) (Supp. 2005).

A governmental body may hold an executive session (1) to discuss the general reputation and character, physical condition, professional competence or mental health of individuals, or, subject to the limitations set out herein, to discuss the job performance of certain public employees; (2) when expressly allowed by federal law or state law, to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body; (3) to discuss with its attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated if the governmental body pursues a proposed course of action or to meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body; (4) to discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, including without limitation, information concerning critical infrastructure and critical energy

infrastructure information the public disclosure of which could reasonably be expected to be detrimental to public safety or welfare; (5) to discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint; (6) to discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property; (7) to discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other states or foreign nations or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act; (8) to discuss strategy in preparation for negotiations between the governmental body and a group of public employees; and (9) to deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public. Ala. Code § 36-25A-7 (Supp. 2005).

To convene an executive session, a governmental body must first convene a prearranged “meeting” as defined in Sections 36-25A-2(6)(a)(1) or (2) (Supp. 2005). A majority of the members of the body present must adopt, by recorded vote, a motion calling for the executive session and setting out the statutory authority for convening the executive session. The vote of each member must be recorded in the minutes. Prior to calling the executive session to order, the presiding officer must state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene. Ala. Code § 36-25A-7(b) (Supp. 2005).

#### b. Notice requirements.

##### (1). Time limit for giving notice.

The Alabama Open Meetings Act does not provide a time limit for giving notice of executive sessions beyond the procedural requirements discussed above in Section I.E.2.b.1.

Pretrial motions for closure of criminal proceedings must be docketed. *See Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1134 (Ala. Crim. App. 1993).

##### (2). To whom notice is given.

To those in attendance at the open portion of the meeting when the motion to convene an executive session is approved, as discussed above in Section I.E.2.b.2.

When the subject of the executive session involves critical infrastructure or critical energy infrastructure information, the owners and operators of the infrastructure are to be given notice and an opportunity to attend the executive session. Ala. Code § 36-25A-7(a)(4) (Supp. 2005).

Pretrial motions for closure of criminal proceedings must be docketed. *See Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1134 (Ala. Crim. App. 1993).

##### (3). Where posted.

Under the Alabama Open Meetings Act, notice of an executive session is given at a prearranged public meeting, as discussed above in Section I.E.2.b.3.

Pretrial motions for closure of criminal proceedings must be docketed. *See Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1134 (Ala. Crim. App. 1993).

**(4). Public agenda items required.**

The Alabama Open Meetings Act does not provide any notice requirements for executive sessions beyond the procedural requirements discussed above in Section I.E.2.b.4.

Pretrial motions for closure of criminal proceedings must be docketed. See *Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1134 (Ala. Crim. App. 1993).

**(5). Other information required in notice.**

None specified.

**(6). Penalties and remedies for failure to give adequate notice.**

If a governmental body fails to fulfill the procedural requirements for convening an executive session, enforcement of the Alabama Open Meetings Act may be sought by civil action brought in the county where the governmental body's primary office is located. Such an action may be brought for failure of the governmental body to follow the notice requirements of the Act. Ala. Code § 36-25A-9(b)(1) (Supp. 2005). Remedies available include declaratory judgments, injunctions, invalidation of actions taken during the meeting held in violation of the act, and civil penalty up to \$1,000.

**c. Minutes.****(1). Information required.**

Governmental bodies are not required to keep minutes of executive sessions. Ala. Code § 36-25A-4 (Supp. 2005).

**(2). Are minutes a public record?**

If a meeting or portion of a meeting is properly closed under the Alabama Open Meetings Act, any minutes of such meeting would likely be deemed properly closed as well, unless an argument can be made that the passage of time and/or events nullifies the continued validity of the reasons for closure of the meeting.

**d. Requirement to meet in public before closing meeting.**

Before convening an executive session, a governmental body must convene a prearranged "meeting" as defined in Sections 36-25A-2(6)(a)(1) or (2) (Supp. 2005). A majority of the members of the body present must adopt, by recorded vote, a motion calling for the executive session and setting out the purpose of the executive session. The vote of each member must be recorded in the minutes. Prior to calling the executive session to order, the presiding officer must state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene. Ala. Code § 36-25A-7(b) (Supp. 2005).

**e. Requirement to state statutory authority for closing meetings before closure.**

Before convening an executive session, a governmental body must adopt, by recorded vote, a motion calling for the executive session and setting out the statutory authority for convening the executive session, as provided in Section 36-25A-7(a). Ala. Code § 36-25A-7(b) (Supp. 2005).

Prior to voting to convene an executive session to discuss with an attorney pending litigation, controversies imminently likely to be litigated, or to meet with a mediator or arbitrator, the governmental body is required to receive a written opinion or oral declaration reflected in the minutes from an attorney licensed to practice law in Alabama that an executive session is proper under the Alabama Open Meetings Act. Ala. Code § 36-25A-7(a)(3) (Supp. 2005).

Prior to convening an executive session to discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is

not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint, a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the attorney general or assistant attorney general must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session. Ala. Code § 36-25A-7(a)(5) (Supp. 2005).

Prior to convening an executive session to discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act, a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matters or information of the character defined or described in the Alabama Trade Secrets Act must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or upon the location, retention, expansion or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or would disclose information protected by the Alabama Trade Secrets Act. Ala. Code § 36-25A-7(a)(7) (Supp. 2005).

Prior to convening an executive session to discuss strategy in preparation for negotiations between the governmental body and a group of public employees, a person representing the interests of a governmental body involved in such negotiations must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session. Ala. Code § 36-25A-7(a)(8) (Supp. 2005).

**f. Tape recording requirements.**

There is no requirement to tape record a closed meeting or closed portion of a public meeting under Alabama law.

**F. Recording/broadcast of meetings.****1. Sound recordings allowed.**

The Alabama Open Meetings Act allows open meetings to be recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic or video reproduction provided the recording does not disrupt the conduct of the meeting. Ala. Code § 36-25A-6 (Supp. 2005).

Parts 7A and 7B of Canon 3(A) of the Alabama Canons of Judicial Ethics permit a trial judge or appellate court to authorize broadcasting, televising, recording, or taking of photographs in the courtroom during a trial or other judicial proceeding, but only if the parties and counsel have given written consent and the plans and conditions established by the Supreme Court of Alabama have been adhered to. See Rule 9.4 of the Alabama Rules of Criminal Procedure; Alabama Rules for Using Videotape Equipment to Record Court Proceedings (recording under direction of trial judge); Order Adopting Courtroom Media Plan in Accordance with Canon 3A(7B) of the Alabama Canons of Judicial Ethics; and Alabama Canons of Judicial Ethics 3(A)(7A) and (7B).

Under most local plans, however, an objection by any juror or witness also closes the courtroom to sound and video recording, as happened in the criminal trial of incumbent Gov. Harold Guy Hunt. See *Ex parte Courtroom Television Network*, No. 1920991, Order (Ala., Apr. 13, 1993) (after being ordered to permit televising and sound recording of the proceedings, the trial judge asked the jurors if any objected and several did; the trial judge refused the request by counsel for Courtroom Television Network that he inform the jury that local rules would bar the photographing of jurors in a manner that would specifically identify any individual juror).



## 2. Photographic recordings allowed.

The Alabama Open Meetings Act allows open meetings to be recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic or video reproduction provided the recording does not disrupt the conduct of the meeting. Ala. Code § 36-25A-6 (Supp. 2005).

Parts 7A and 7B of Canon 3(A) of the Alabama Canons of Judicial Ethics permit a trial judge or appellate court to authorize broadcasting, televising, recording or taking of photographs in the courtroom during a trial or other judicial proceeding, but only if the parties and counsel have given written consent and the plans and conditions established by the Supreme Court of Alabama have been adhered to. See Rule 9.4 of the Alabama Rules of Criminal Procedure; Alabama Rules for Using Videotape Equipment to Record Court Proceedings (recording under direction of trial judge); Order Adopting Courtroom Media Plan in Accordance with Canon 3A(7B) of the Alabama Canons of Judicial Ethics; and Alabama Canons of Judicial Ethics 3(A)(7A) and (7)(B).

Under most local plans, however, an objection by any juror or witness also closes the courtroom to sound and photographic recording, as happened in the criminal trial of incumbent Gov. Harold Guy Hunt. See *Ex parte Courtroom Television Network*, No. 1920991, Order (Ala., Apr. 13, 1993) (after being ordered to permit televising and sound recording of the proceedings, the trial judge asked the jurors if any objected and several did; the trial judge refused the request by counsel for Courtroom Television Network that he inform the jury that local rules would bar the photographing of jurors in a manner that would specifically identify any individual juror).

### G. Are there sanctions for noncompliance?

Enforcement of the Alabama Open Meetings Act may be sought by civil action brought in the county where the governmental body's primary office is located. Such an action may be brought for failure of the governmental body to follow the notice requirements of the Act. Ala. Code § 36-25A-9(b)(1) (Supp. 2005). Remedies available include declaratory judgments, injunctions, invalidation of actions taken during the meeting held in violation of the act, and civil penalty up to \$1,000. *Citizens For Better Schools v. Greene*, CV 2007-932 (Cir. Ct. of Jefferson County, Ala. Mar. 19, 2008) (declaring vote null and void and imposing fines and awarding attorneys fees based on failure to post preliminary agenda in proper location).

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open meetings statute.

#### 1. Character of exemptions.

##### a. General or specific.

The Alabama Open Meetings Act contains specific exemptions. Ala. Code § 36-25A-7 (Supp. 2005).

##### b. Mandatory or discretionary closure.

The specific exemptions in the Alabama Open Meetings Act are discretionary: "Executive sessions are not required by this act, but may be held by a governmental body for the following purposes . . ." Ala. Code § 36-25A-7 (Supp. 2005).

#### 2. Description of each exemption.

An otherwise public meeting may be closed:

(1) to discuss the general reputation and character, physical condition, professional competence or mental health of individuals, or, subject to the limitations set out herein, to discuss the job performance of certain public employees;

(2) when expressly allowed by federal law or state law, to consider the discipline or dismissal of, or to hear formal written complaints or

charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body;

(3) to discuss with its attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated if the governmental body pursues a proposed course of action or to meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group or body;

(4) to discuss security plans, procedures, assessments, measures or systems, or the security or safety of persons, structures, facilities or other infrastructures, including without limitation, information concerning critical infrastructure and critical energy infrastructure information the public disclosure of which could reasonably be expected to be detrimental to public safety or welfare;

(5) to discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint;

(6) to discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease or market value of real property;

(7) to discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other states or foreign nations or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act;

(8) to discuss strategy in preparation for negotiations between the governmental body and a group of public employees; and

(9) to deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision that may be appealed to a hearing officer, an administrative board, court or other body that has the authority to conduct a hearing or appeal of the matter, which is open to the public.

Ala. Code § 36-25A-7 (Supp. 2005); Op. Att'y Gen. Ala., 2006-068 (personal financial records submitted to and considered by regional planning commission as part of determination regarding award of funds does not fall within one of the enumerated exceptions and thus discussions of same cannot be closed); Op. Att'y Gen. Ala., 2006-088 (Executive session appropriate for interviewing public employees in connection with proposed promotions); Op. Att'y Gen. Ala., 2009-106 (State Banking Board exempted from publicly voting to enter executive session and giving notice of executive session when deliberating issues enumerated in Ala. Code §§ 5-2A-12 and 5-8A-20); Op. Att'y Gen. Ala., 2010-11 (executive session appropriate for discussions involving individuals' general reputation and character).

### B. Any other statutory requirements for closed or open meetings.

Many of the statutes listed below contain an express, unconditional requirement that all meetings of the pertinent body be open to the public. The Alabama Supreme Court ruled, however, that these statutes must be read *in pari materia* with the former open meetings law, which permitted closure when the character or good name of a person was involved. *Miglionico v. Birmingham News Co.*, 378 So. 2d 677, 680 (Ala. 1979). Because the former open meetings law has been repealed, these statutes probably should now be read *in pari materia* with the Alabama Open Meetings Act.

Likewise, notwithstanding the exceptions in the Alabama Open Meetings Act for closed discussions, a number of statutes specifically provide for closed meetings.

Statutes that provide expressly for open or closed meetings are as follows:

### 1. Agriculture

a. Open: *Alabama Agricultural and Conservation Development Commission*: All proceedings except that executive or secret sessions may be held when the character or good name of a person is involved. Ala. Code § 9-8A-3(e) (2001).

b. Open: *Alabama Agricultural Development Authority*: All meetings of the Board of the Authority. Ala. Code § 2-3A-7(b) (1999).

### 2. Attorneys and Judges

a. Open: *Alabama Court of Judiciary*: Hearings on a complaint — i.e., a formal written charge filed by the Judicial Inquiry Commission. Rules of Procedure of the Alabama Court of the Judiciary 9.

b. Closed: *Alabama Judicial Inquiry Commission*: All proceedings. Ala. Const. of 1901, amend. no. 328, § 6.17(b); see also *id.* amend. no. 581.

c. Closed: *Alabama Judicial Inquiry Commission*: All proceedings except the filing of a complaint with the Court of the Judiciary. Alabama Judicial Inquiry Commission Rules 5.

d. Closed: *Alabama State Client Security Fund Committee*: All proceedings involving applications for reimbursement, unless the lawyer whose alleged conduct gave rise to the claim for reimbursement requests that the matter be made public. Alabama State Bar Client Security Fund Rules 11.

### 3. Banking

a. Closed: *State Banking Board*: All proceedings regarding unsafe and unsound conditions at a bank and correction of those conditions, including proceedings for removal of a director or officer of a bank. Ala. Code § 5-2A-12 (1996); Op. Att’y Gen. Ala., 2009-106 (State Banking Board exempted from publicly voting to enter executive session and giving notice of executive session when deliberating issues enumerated in Ala. Code §§ 5-2A-12 and 5-8A-20);

### 4. Conservation and Environmental Control

a. Open: *Alabama Forever Wild Land Trust Board of Trustees*: Annual meeting at which annual report is presented. Ala. Const. of 1901 amend. no. 543, § 5(d).

b. Closed: *Solid waste disposal authorities*: All meetings of the board. Ala. Code § 11-89A-6(c) (1994).

c. Open: *Solid waste management plan*: Meeting at which any determination is made by the local governing body of the proposed issuance of or modification of a permit for a new or existing solid waste management site or the proposal to contract for any services described in the solid waste management plan. Ala. Code § 22-27-48(a) (1997).

d. Open: *Solid waste management plan*: Any meeting at which the governing body of the jurisdiction adopts a request for waiver of a moratorium. Ala. Code § 22-27-49(a) (1997).

e. Open: *Southeast Interstate Low-level Radioactive Waste Management Compact Commission*: All meetings. Ala. Code § 22-32-1, art. IV, § d (1997).

### 5. Courts

a. Open: *Bail*: Bail hearings. Ala. Code §§ 15-13-142 and -143 (1995).

b. Closed: *Civil court mediation*: Mediation sessions. Alabama Civil Court Mediation Rules 10.

c. Closed: *Court*: Hearing on the merits of a petition to direct that the victim of a crime or any other witness not be compelled to testify or that facts that could divulge the identity of the victim or other related information not be revealed. Ala. Code § 15-23-69 (1995).

d. Open: *Court*: When a defendant in a criminal matter appears via audio-video communication device, rather than being physically present, for any proceeding that is required to be open to the public, television monitors shall be situated in the courtroom and at the place of incarceration to ensure the public, the court, and the defendant a clear view of the proceedings. Ala. Code § 15-26-6 (Supp. 2005).

e. Closed: *Grand juries*: All proceedings. Ala. Code § 12-16-214 (1995).

f. Open: *Probate court*: All hearings regarding petitions to commit persons to the custody of the Alabama Department of Public Health or such other facility because of a “notifiable disease” problem, unless the person sought to be committed or that person’s attorney requests in writing that the hearings be closed. Ala. Code § 22-11A-31(4) (1997).

g. Open: *Probate court*: All hearings, including probable cause hearings, in relation to a petition to involuntarily commit a person to a state mental health institution, unless the subject of the petition or that person’s attorney requests in writing that the hearings be closed. Ala. Code § 22-52-9(4) (1997).

### 6. Education

a. Open: *County boards of education*: Meetings. Ala. Code §§ 16-8-2 and -4 (2001).

b. Optional: *Local boards of education*: Hearing regarding cancellation of an employment contract with a teacher on continuing service status shall be public or private at the discretion of the teacher. Ala. Code § 16-24-9 (Supp. 2005).

c. Open: *State Board of Education*: Meeting at which textbooks are adopted. Ala. Code § 16-36-61 (2001).

### 7. Elections

a. Open: *Political parties*: Meetings for the purpose of nominating any candidate for public office, to be voted for in a general election in Alabama, or for the purpose of selecting delegates or other representatives to any convention that may select such candidates for public office, or for the purpose of selecting committeemen, representatives or other party officers. Ala. Code § 17-16-43(b) (1995).

### 8. Government, Local

a. Open: *Boards of adjustment*: All meetings. Ala. Code § 11-52-80(b) (1994).

b. Open: *Board of commissioners in city commission form of government*: Regular meetings, with a regular hour publicly announced. Ala. Code § 11-44-19 (1989).

c. Open: *Board of commissioners in city commission form of government*: All meetings at which any person not a city or town officer is present. Ala. Code § 11-44-21 (1989).

d. Open: *Board of commissioners in city commission form of government*: All meetings at which a resolution, bylaw or ordinance is enacted granting any franchise, appropriating any money for any purpose, providing for any public improvements, enacting any regulations concerning the public comfort, the public safety, or public health, or of any other general or permanent nature. Ala. Code § 11-44-31 (1989).

e. Open: *Board of commissioners in city commission form of government, optional form A*: Regular meetings and all meetings at which any person not a city or town officer is present. Ala. Code § 11-44-82 (1989).

f. Open: *Board of commissioners in city commission form of government, optional form A*: All meetings at which a resolution, bylaw or ordinance is enacted granting any franchise, appropriating any money for any purpose, providing for any public improvements, enacting any regulations concerning the public comfort, the public safety, or public health or of any other general or permanent nature. Ala. Code § 11-44-87 (1989).

g. Open: *Board of commissioners in city commission form of government, optional form B*: Regular weekly meetings, with the hour publicly announced. Ala. Code § 11-44-126 (1989).

h. Open: *Board of commissioners in city commission form of government, optional form B*: All regular and adjourned meetings, *except* for meetings held for the purpose of disciplining employees of the municipality. Ala. Code § 11-44-127 (1989).

i. Open: *Board of commissioners in city commission form of government, optional form B*: All meetings at which a resolution or ordinance is enacted granting any franchise, appropriating any money for any purpose (except ordinary payroll, monthly expense, and supply items), providing for any public improvements, enacting any regulations concerning the public comfort, public safety, or public health, or of any other general or permanent nature, with at least seven days' notice, *except* for emergency meetings that involve the public safety or public health when not otherwise provided by this section. Ala. Code § 11-44-136 (1989).

j. Open: *City council in council-manager form of government*: All meetings. Ala. Code § 11-43A-21 (1989).

k. Open: *City council in council-manager form of government*: Regular meetings, with a regular date and hour publicly announced. Ala. Code § 11-43A-24 (1989).

l. Open: *City council in council-manager form of government*: All meetings, to the extent required by law. Ala. Code § 11-43A-87 (Supp. 2005) (Council-Manager Act of 1991).

m. Open: *City council in council-manager form of government*: Regular meetings, with a regular day and hour publicly announced. Ala. Code § 11-43A-90 (Supp. 2005) (Council-Manager Act of 1991).

n. Open: *City council in mayor/commission/city manager form of government in class 5 municipalities*: Regular meetings; every meeting at which a resolution, bylaw or ordinance is enacted granting any franchise, appropriating any money for any purpose, providing for any public improvements, concerning the public health, or of any other general or permanent nature. Ala. Code § 11-44E-51 (1989).

o. Open: *City council in mayor/council form of government*: Meetings. Ala. Code § 11-43-49 (1989).

p. Open: *City council in mayor-council form of government in class 5 municipalities*: All meetings. Ala. Code § 11-43C-25 (1989).

q. Open: *City council in mayor-council form of government in class 5 municipalities*: Regular weekly meetings, with a regular hour publicly announced. Ala. Code § 11-43C-28 (1989).

r. Open: *City council in mayor-council form of government in class 4 municipalities*: Regular meetings and adjourned, called, or other meetings, complying with all applicable law concerning open or public meetings. Ala. Code § 11-44B-6(a) and (b) (Supp. 2005).

s. Open: *City council in mayor-council form of government in class 2 municipalities*: All meetings. Ala. Code § 11-44C-25 (1989).

t. Open: *City council in mayor-council form of government in class 2 municipalities*: Regular weekly meetings, with the hour publicly announced; every meeting at which a resolution, bylaw or ordinance is enacted granting any franchise, appropriating any money for any purpose, providing for any public improvements, regulation concerning the public health, or of any general or permanent nature. Ala. Code § 11-44C-28 (1989).

u. Open: *County commission*: Meeting to establish the office of supernumerary county commissioner; notice, with intention, required. Ala. Code § 11-3-26(b) (1989).

#### 9. Government, State

a. Open: *Administrative procedure: Contested cases*: Oral proceedings, *unless* private hearings are otherwise authorized by law. Ala. Code § 41-22-12(h) (2000).

b. Open: *Alabama Housing Finance Authority Board*: All meetings, with notice. Ala. Code § 24-1A-4(d) (2000).

c. Open: *Alabama Shakespeare Festival Theatre Finance Authority*: All meetings for any purpose. Ala. Code § 41-10-205(b) (2000).

d. Open: *Beautification Board of the State of Alabama*: All meetings. Ala. Code § 41-9-494 (2000).

#### 10. Handicapped Persons

a. Open: *Alabama Institute for Deaf and Blind*: Meetings at which bids are taken or opened for all contracts for the sale or disposal of tangible personal property or standing timber owned by the Alabama Institute for Deaf and Blind. Ala. Code § 21-1-80 (1997).

#### 11. Health Care

a. Open: *Alabama Board of Examiners for Speech Pathologists and Audiologists*: All meetings, *except* meetings for the Board to prepare, approve, grade, or administer examinations or, upon a request of an applicant who has failed an examination, to prepare a response indicating the reason for failure. Ala. Code § 34-28A-40(d) (2002).

b. Open: *Alabama Board of Social Work Examiners*: All meetings, with notice. Ala. Code § 34-30-56 (2002).

c. Closed: *Alabama Impaired Physicians Committee*: All proceedings. Ala. Code § 34-24-404 (2002).

d. Open: *Alabama Public Health Finance Authority*: Meetings to consider reduction of an allocation to a county or municipality by more than five percent or \$50,000, whichever is less. Ala. Code § 22-3A-19(c)(3) (1997).

e. Open: *Alabama State Board of Pharmacy*: Meetings, with notice. Ala. Code § 34-23-91 (2002).

f. Open: *County and municipal hospital authorities*: All meetings of the board of directors, *except* as otherwise provided by law. Ala. Code § 22-21-175(d) (1997).

g. Closed: *Driver License Medical Advisory Board*: Meetings in which reports are received for the purpose of determining the medical condition of an applicant for license and registration. Ala. Code § 32-6-46 (1999).

h. Open: *Interagency Coordinating Council for Early Intervention for Infants and Toddlers with Disabilities*: Meetings. Ala. Code § 21-3A-4(e) (1997).

i. Closed: *Physician/dentist/chiropractor peer review, utilization, and quality control committees*: All proceedings. Ala. Code § 6-5-333(d) (1993).

j. Closed: *State Board of Medical Examiners*: Hearings of the Medical Licensure Commission. Ala. Code § 34-24-361.1 (2002).

k. Open: *Statewide Health Coordinating Council*: All meetings. Ala. Code § 22-4-7 (1997).

l. Closed: *State Health Officer*: All meetings of an expert review panel established to evaluate an infected health care worker and all hearings, administrative proceedings, and deliberations of the State Committee of Public Health in connection with the appeal from the final order



of the State Health Officer regarding the infected health care worker. Ala. Code § 22-11A-63(d) and (g) (1997).

m. Closed: *State Health Officer*: All proceedings related to the investigation and review of any infected health care worker. Ala. Code § 22-11A-69(a) (1997).

#### 12. Historic Preservation

a. Open: *Historic preservation commissions and architectural review boards*: Meetings of the commission, with notice. Ala. Code § 11-68-3(j) (1994).

b. Open: *Historic preservation commissions and architectural review boards*: All meetings of the commission at which applications for certificates of appropriateness are considered by the commission, with notice. Ala. Code § 11-68-9(d) (1994).

c. Open: *Historic preservation commissions and architectural review boards*: Meetings of the board, with notice. Ala. Code § 11-68-13(j) (1994).

#### 13. Industry

a. Open: *Boards of city commercial development authorities*: All meetings for any purpose. Ala. Code § 11-54-178(c) (1994).

b. Open: *City industrial development boards*: Any meeting held for any purpose whatsoever. Ala. Code § 11-54-87(c) (1994).

c. Open: *Promotion of economic and industrial development in certain counties and municipalities*: Any meeting of the governing body of a county or municipality named in the amendment that approves the sale of real property acquired by authority of this amendment for a sale price less than its actual purchase and development cost. Ala. Const. of 1901, amend. no. 429(a).

#### 14. Insurance

a. Optional: *Department of Commissioner of Insurance*: Hearings of grievances against the Department or its actions may be closed at the Commissioner's discretion, *except* that a hearing shall be open if so requested in writing by any party to the hearing. Ala. Code § 27-2-30(b) (1998).

#### 15. Juveniles

a. Open: *Child Abuse and Neglect Prevention Board*: All meetings, with notice. Ala. Code § 26-16-5(a) (1992).

b. Closed: *Court*: All proceedings regarding a minor's petition for waiver of parental consent to abortion. Ala. Code § 26-21-4(i) (1992).

c. Closed: *Department of Human Resources*: Investigative hearing regarding child abuse or neglect allegedly committed by person connected with a child care facility. Ala. Code § 26-14-7.1(6) (Supp. 2005).

d. Closed: *Juvenile proceedings*: Delinquency, in need of supervision, and dependency hearings. Ala. Code § 12-15-65(a) (Supp. 2005).

e. Closed: *Juvenile proceedings*: Involuntary commitment hearings of minors or children. Ala. Code § 12-15-90(g)(4) (1995).

f. Closed: *Youthful offenders*: All proceedings within the juvenile system. Ala. Code § 15-19-1 *et seq.* (1995).

#### 16. Pardons And Paroles

a. Open: *Board of Pardons and Paroles*: Any meeting of the Board at which the Board tentatively approves, grants, or orders any pardon, parole, remission of fine or other forfeiture or restoration of civil and political rights. Ala. Code § 15-22-23(b) (Supp. 2005).

#### 17. Parks, Recreation and Racing

a. Open: *Municipal racing commissions*: All meetings of the

host county house or senate delegation called or held to appoint members of the commission. Ala. Code § 11-65-5(a) (1994).

b. Closed: *Municipal racing commissions*: Deliberations to suspend or revoke any license, fine the holder of a license, or review the performance of a licensee, *unless* otherwise requested by the licensee. Ala. Code § 11-65-21 (1994).

c. Open: *Public park and recreation boards*: Any meeting held for any purpose whatsoever. Ala. Code § 11-60-7 (1994).

#### 18. Railroads

a. Open: *Northeast Mississippi-Northwest Alabama Railroad Authority Compact Board*: Meetings. Ala. Code § 37-11A-1, art. IV (1992).

#### 19. State Property and Contracts

a. Open: *Alabama Department of Transportation*: Meetings at which bids are taken or opened for the sale of surplus personal property. Ala. Code § 23-1-66(c) (2000).

b. Open: *Competitive bidding on contracts of certain state and local agencies*: Meetings at which bids are opened. Ala. Code § 41-16-54(b) (2000).

c. Open: *Competitive bidding on public contracts*: Meetings at which bids are opened. Ala. Code § 41-16-24 (2000).

d. Open: *Disposition of surplus personal property owned by state*: Meetings at which bids are taken or opened. Ala. Code § 41-16-123(3) (2000).

e. Open: *State Department of Conservation and Natural Resources, Parks Division*: Opening of all bids for contracts for the maintenance and operation of concessions within state park areas, at the hour stated in the notice. Ala. Code § 9-14-22 (2001).

f. Open: *State Department of Conservation and Natural Resources, Lands Division*: Acceptance and opening of bids for the sale or lease of state land. Ala. Code § 9-15-78 (2001).

#### 20. Veterinarians

a. Open: *Alabama State Board of Veterinary Medical Examiners*: Meetings of the Board, *except* meetings for the Board to prepare, approve, administer, or grade examinations or to deliberate qualifications of a proceeding to discipline a licensed veterinarian or any other person licensed under this article. Ala. Code § 34-29-66(b)(6) (2002).

### C. Court mandated opening, closing.

The Alabama Open Meetings Act took effect on Oct. 1, 2005. There have not yet been any court mandated additions or exceptions to the Act.

## III. MEETING CATEGORIES — OPEN OR CLOSED.

### A. Adjudications by administrative bodies.

The adjudications of state agencies are open "unless private hearings are otherwise authorized by law." Ala. Code § 41-22-12(h) (2000).

#### 1. Deliberations closed, but not fact-finding.

No pertinent authority.

#### 2. Only certain adjudications closed, i.e. under certain statutes.

a. *Alabama Impaired Physicians Committee*: All proceedings. Ala. Code § 34-24-404 (2002) (proceedings closed).

b. *Alabama State Bar Client Security Fund Committee*: All proceedings involving applications for reimbursement, *unless* the lawyer whose alleged conduct gave rise to the claim for reimbursement requests that

the matter be made public. Alabama State Bar Client Security Fund Rules 11.

c. *Driver License Medical Advisory Board*: Meetings in which reports are received for the purpose of determining the medical condition of an applicant for license and registration. Ala. Code § 32-6-46 (1999) (meetings closed).

d. *Judicial Inquiry Commission*: All proceedings *except* the Commission's filing of a complaint with the Court of the Judiciary. Ala. Const. of 1901, amend. no. 328, § 6.17(b); Alabama Judicial Inquiry Commission Rules 5; *see also* Ala. Const. of 1901, amend. no. 581 (proceedings closed).

e. *Local boards of education*: Hearing regarding cancellation of an employment contract with a teacher on continuing service status shall be public or private at the discretion of the teacher. Ala. Code § 16-24-9 (Supp. 2005) (proceedings closed or open at option of teacher).

f. *Municipal racing commissions*: Deliberations to suspend or revoke any license or fine the holder of a license and review of the performance of each licensee, *unless* otherwise requested by the licensee. Ala. Code § 11-65-21 (1994) (proceedings closed).

g. *Solid waste disposal authorities*: All meetings of the board. Ala. Code § 11-89A-6(c) (1994) (proceedings closed).

h. *State Banking Board*: All proceedings regarding unsafe and unsound conditions at a bank and correction of those conditions, including proceedings for removal of a director or officer of a bank. Ala. Code § 5-2A-12 (1996) (proceedings closed); Op. Att'y Gen. Ala., 2009-106 (State Banking Board exempted from publicly voting to enter executive session and giving notice of executive session when deliberating issues enumerated in Ala. Code §§ 5-2A-12 and 5-8A-20);.

i. *State Department of Human Resources*: Investigative hearings regarding child abuse or neglect allegedly committed by persons connected with a child care facility. Ala. Code § 26-14-7.1(6) (Supp. 2005) (proceedings closed).

j. *State Health Officer*: All meetings of an expert review panel established to evaluate an infected health care worker and all hearings, administrative proceedings, and deliberations of the State Committee of Public Health in connection with an appeal from the final order of the State Health Officer regarding the infected health care worker. Ala. Code § 22-11A-63(d) and (g) (1997) (proceedings closed).

k. *State Health Officer*: All proceedings relating to the investigation and review of any infected health care worker. Ala. Code § 22-11A-69(a) (1997) (proceedings closed).

## B. Budget sessions.

Budget sessions are presumptively open unless they fall within the statutory exceptions in the Alabama Open Meetings Act. Under the Act, the definition of "meeting" includes: "The prearranged gathering of a quorum of a governmental body . . . during which the body . . . is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds." Ala. Code § 36-25A-2(6) (Supp. 2005). Also, a number of statutes contain an explicit requirement that money cannot be appropriated for any purpose except at an open meeting. *See, e.g.* Ala. Code §§ 11-44-31, -87, -136 (1989).

## C. Business and industry relations.

A meeting of a governmental body that deals with business and industry relations is presumptively open under the Alabama Open Meetings Act unless it falls within the statutory exceptions of the Act. A governmental body may convene an executive session to discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other states or foreign nations. Ala. Code § 36-25A-7(a)(7) (Supp. 2005).

## D. Federal programs.

We know of no statute or case law that directly addresses this point in Alabama; nonetheless if a state entity that deals with federal programs comes within the statutory definition of a governmental body covered by the Alabama Open Meetings Act that body is presumptively subject to the Act. *See* Ala. Code § 36-25A-1, *et seq.* (Supp. 2005).

## E. Financial data of public bodies.

Meetings that deal with the financial data of public bodies are neither categorically open nor categorically closed under the Alabama Open Meetings Act. If the entity is covered by the Alabama Open Meetings Act, its meetings — including meetings dealing with financial data of the entity — must be open unless they fall within the statutory exceptions of the Act. Ala. Code § 36-25A-1 *et seq.* (Supp. 2005); Op. Att'y Gen. Ala., 2009-106 (State Banking Board exempted from publicly voting to enter executive session and giving notice of executive session when deliberating issues enumerated in Ala. Code §§ 5-2A-12 and 5-8A-20); Op. Att'y Gen. Ala., 2006-068 (personal financial records submitted to and considered by regional planning commission as part of determination regarding award of funds does not fall within one of the enumerated exceptions and thus discussions of same cannot be closed).

## F. Financial data, trade secrets or proprietary data of private corporations and individuals.

The Alabama Open Meetings Act allows governmental bodies to convene an executive session to discuss information of the character defined or described in the Alabama Trade Secrets Act. *See* Ala. Code §§ 8-27-1 through 8-27-6 (2002) (Alabama Trade Secrets Act).

Also, such data is explicitly protected by several statutory provisions regarding records. *See, e.g.*, Ala. Code § 11-65-15 (1994) (information on applications for racing facility license regarding confidential financial information, percentage of ownership, etc., is not open to the public); Ala. Code § 22-22-9(c) (1997) (water pollution control records produced to the Department of Environmental Management that would divulge production or sales figures or unique methods, processes, or production, trade secrets, or other competitive information is not open to the public). Public officials who receive this sensitive material probably will be aware, or will be made aware, that the confidentiality of much of this data is protected by law and will avoid discussion of the data in open meetings in such a way that confidentiality would be breached. Op. Att'y Gen. Ala., 2006-068 (personal financial records submitted to and considered by regional planning commission as part of determination regarding award of funds does not fall within one of the enumerated exceptions and thus discussions of same cannot be closed).

## G. Gifts, trusts and honorary degrees.

We know of no authority under state law to close a meeting that is otherwise due to be open simply because the meeting deals with gifts, trusts, and honorary degrees, except to the extent, if any, that the discussion falls within the statutory exceptions of the Alabama Open Meetings Act. Ala. Code § 36-25A-1 *et seq.* (Supp. 2005); *see also Auburn Univ. v. The Advertiser Co. d/b/a The Montgomery Advertiser*, 867 So. 2d 293 (Ala. 2003) (holding that discussion of awarding honorary degree was within "character and good name" exception of former open meetings law).

## H. Grand jury testimony by public employees.

Under state law, the testimony of grand jury proceedings in Alabama is confidential, with no exception for public employees. Ala. Code §§ 12-16-214, -215, -216 (1995). The only exception to the confidentiality of such testimony is that the state may use "the testimony of a grand jury witness to impeach that witness's testimony in the trial of a criminal case" or "to prosecute a perjury warrant or indictment." Ala. Code § 12-16-216 (1995).

## I. Licensing examinations.

There is no provision in the Alabama Open Meetings Act to close a meeting that is otherwise due to be open simply because the meeting deals with licensing examinations, except to the extent, if any, that the discussion falls within the statutory exceptions to the Act. Ala. Code § 36-25A-1 *et seq.* (Supp. 2005). Licensing by written examination is typically administered by the staff of a state agency, not by or at any assembled meeting of a public entity, and thus would not fall within the Alabama Open Meetings Act. Notwithstanding the lack of a statutory exclusion in the Act, however, at least one “licensing examination” meeting is closed by separate statute: Meetings of the Driver License Medical Advisory Board are closed by statutory mandate if reports are “received for the purpose of determining the medical condition of an applicant [for a driver’s license] . . . since those reports are confidential under section 32-6-43.” Ala. Code § 32-6-46 (1999). Also, hearings of the Medical Licensure Commission of the State Board of Examiners are closed. Ala. Code § 34-24-361.1 (2002).

#### **J. Litigation; pending litigation or other attorney-client privileges.**

1. *Criminal litigation*: Rule 9.3(b) of the Alabama Rules of Criminal Procedure states that “[a]ll proceedings shall be open to the public, unless otherwise prohibited by law.” Closure of criminal proceedings is primarily a matter of federal constitutional law, which was clearly set out and applied by Alabama’s appellate courts in *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423 (Ala.), *cert. denied*, 113 S. Ct. 665 (1992), and *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993) (petition for writ of mandamus for access to pretrial proceedings and transcripts of same granted in principal part, denied regarding grand jury proceeding portions only). *But see* Ala. Code § 12-21-202 (1995) (trial judge has discretion to clear courtroom in prosecutions for rape and assault with intent to ravish or when evidence is vulgar, obscene, etc.); *Ex parte Judd*, 694 So. 2d 1294 (Ala. 1997) (during the testimony of a child victim of sex abuse and sodomy, the trial court had the discretion to limit access to the courtroom upon a showing of substantial need to exclude some spectators); *P.M.M. v. State*, 762 So. 2d 384 (Ala. Crim. App. 1999) (trial court failed to make specific findings to justify total closure of the courtroom for the entire trial of a rape, sex abuse, and sodomy case); Ala. Code § 12-21-203(d)(1) (1995) (in prosecution for criminal sexual conduct, evidence regarding past sexual behavior of complaining witness is first presented in camera, for court’s determination as to admissibility).

2. *Civil litigation*: Rule 77(b) of the Alabama Rules of Civil Procedure states that “[a]ll trials upon the merits shall be conducted in open court, except as otherwise provided by statute, and so far as convenient in a regular court room.” A state statute permits a judge to clear the courtroom “where the evidence is vulgar,” as follows:

In all civil cases sounding in damages involving the question of rape, assault with intent to ravish, seduction, divorce or any other case where the evidence is vulgar, obscene or relates to the improper acts of the sexes and tends to debauch the morals of the young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of plaintiffs or defendants or their attorneys, to hear and try the case after clearing the courtroom of all or any portion of the audience whose presence is not necessary. Ala. Code § 12-21-9 (1995).

Closure of divorce proceedings based upon the authority of Alabama Code § 12-21-9 (1995) was unsuccessfully challenged in *Simmons v. Conger*, 86 F.3d 1080 (11th Cir. 1996). The federal appellate court found that the Alabama state court trial judge had acted “pursuant to a state statute” in closing the court room, and the plaintiffs in the federal action did not challenge the constitutionality of the state statute. 86 F.3d at 1084, 1086. Although the federal court did not invite such a challenge, in the proper case

a constitutional challenge to Alabama Code §§ 12-21-9 and -202 (1995) might succeed.

3. *Juvenile proceedings*: Juvenile proceedings are closed by state law, and the Alabama Rules of Juvenile Procedure provide that “[t]here shall be no notice by publication of any proceeding in the juvenile court except in proceedings to terminate parental rights.” Alabama Rules of Juvenile Procedure 13(B). *See also* Ala. Code § 12-15-65 (1995) (delinquency, in need of supervision, and dependency hearings for juveniles are closed); Ala. Code § 12-15-90(g)(4) (1995) (involuntary commitment hearings for juveniles are closed); Ala. Code § 15-19-1 (1995) (youthful offender proceedings are closed); Ala. Code § 26-21-4(i) (1992) (all proceedings regarding a minor’s petition for waiver of parental consent to abortion are closed); Ala. Code § 26-14-7.1(6) (Supp. 2005) (investigative hearings regarding child abuse and neglect allegedly committed by persons connected with child care facility are closed).

4. *Attorney-client meetings*: Meetings of governmental bodies may be closed to discuss with their attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action. Ala. Code § 36-25A-7(a)(3) (Supp. 2005).

#### **K. Negotiations and collective bargaining of public employees.**

##### **1. Any sessions regarding collective bargaining.**

Meetings of governmental bodies may be closed to discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Ala. Code § 36-25A-7(a)(8) (Supp. 2005).

##### **2. Only those between the public employees and the public body.**

No pertinent authority.

#### **L. Parole board meetings, or meetings involving parole board decisions.**

Meetings of the Alabama Pardon and Parole Board should be open under the Alabama Open Meetings Act. Ala. Code § 36-25A-1 *et seq.* (Supp. 2005). Nonetheless, the files of state prisoners are closed by statute except for that portion of the file that records a decision affecting a prisoner’s liberty, property, or civil rights, Ala. Code § 15-22-36(b) (Supp. 2005); therefore, the Board will likely avoid discussion of those files in open meeting in such a way that the statutory mandate of confidentiality would be breached. Meetings of the Board at which a decision is made affecting a state prisoner’s liberty, property, or civil rights are expressly open by statute. Ala. Code § 15-22-23(b) (Supp. 2005).

#### **M. Patients; discussions on individual patients.**

Meetings of governmental bodies may be closed to discuss the physical condition or mental health of individuals. Ala. Code § 36-25A-7(a) (1) (Supp. 2005). Also, records that contain patient information are confidential under the physician-patient privilege, *see Horne v. Patton*, 291 Ala. 701, 708-09, 287 So. 2d 824, 829-30 (1973), and state statute, *see, e.g.*, Ala. Code § 22-21-8(b) (1997); therefore, public officials who receive this sensitive information will likely avoid discussion in an open meeting in such a way that confidentiality would be breached.

#### **N. Personnel matters.**

Meetings of governmental bodies may be closed to discuss the job performance of certain public employees unless the person is an elected or appointed public official, an appointed member of a state or local board or commission, or a public employee who is one of the classification of public employees required to file a Statement of Economic Interests with the Alabama Ethics Commission pursuant to Alabama Code § 36-25-14. Ala. Code § 36-25A-7(a)(1) (Supp. 2005). Meetings



of governmental bodies to discuss personnel matters must otherwise remain open unless they would fall under one of the exceptions to the Alabama Open Meetings Act. Meetings of governmental bodies may not be closed to discuss the salary, compensation, and job benefits of specific public officials or specific public employees unless they would fall under one of the other exceptions to the Alabama Open Meetings Act. Ala. Code § 36-25-A-7(a)(1) (Supp. 2005).

### 1. Interviews for public employment.

Interviews for public employment are not specifically discussed in the Alabama Open Meetings Act. Such a meeting would be presumptively open unless it fell within one of the exceptions to the Act. Ala. Code § 36-25A-1 *et seq.* (Supp. 2005).

### 2. Disciplinary matters, performance or ethics of public employees.

Meetings of governmental bodies may be closed to discuss the job performance of certain public employees unless the person is an elected or appointed public official, an appointed member of a state or local board or commission, or a public employee who is one of the classification of public employees required to file a Statement of Economic Interests with the Alabama Ethics Commission pursuant to Alabama Code § 36-25-14. Ala. Code § 36-25A-7(a)(1) (Supp. 2005).

### 3. Dismissal; considering dismissal of public employees.

Except for statutory provisions such as the following, and the exceptions in the Alabama Open Meetings Act itself, the meetings of entities that are subject to the Alabama Open Meetings Act should be open when dismissal or consideration of the dismissal of public employees is at issue:

a. *Hearing regarding state merit employee's dismissal:* Open upon timely demand in writing by the dismissed employee. Ala. Code § 36-26-27(a) (2001).

b. *Hearing regarding public school teacher's termination:* Open or closed at the option of the teacher. Ala. Code § 16-24-9 (Supp. 2005).

### O. Real estate negotiations.

A meeting of a governmental body may be closed to discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. Ala. Code § 36-25A-7(a)(6) (Supp. 2005). However, if an executive session is convened, in addition to the members of the governmental body, only persons representing the interests of the governmental body in the transaction may be present during the executive session. Also, the material terms of any contract to purchase, exchange, or lease real property must be disclosed in the public portion of a meeting prior to the execution of the contract. *Id.*

A meeting of a governmental body may not be closed pursuant to this real property discussion exception if (1) any member of the governmental body involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property, or (2) a condemnation action has been filed to acquire the real property involved in the discussion. *Id.*

### P. Security, national and/or state, of buildings, personnel or other.

A meeting of a governmental body may be closed to discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, including, without limitation, information concerning critical infrastructure, as defined by federal law, and critical energy infrastructure, as defined by federal law, the public disclosure of which could reasonably be expected to be detrimental to public safety or welfare. Ala. Code § 36-25A-7(a)(4) (Supp. 2005).

### Q. Students; discussions on individual students.

We know of no authority under state law to close an otherwise open meeting simply because the meeting deals with the identity of or information about individual students. Nonetheless, certain student information is confidential under the Buckley Amendment, 20 U.S.C. § 1232g (1974); therefore, public officials will likely avoid discussion in open meeting that would breach the confidentiality of Buckley material, especially since violation of the Buckley Amendment can result in loss of federal education funds.

## IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

### A. When to challenge.

Any person (1) on notice that a public meeting will be closed, (2) denied access to a public meeting, or (3) asked to leave a public meeting may challenge the denial immediately, by

Law-boning directly with the chairperson for the meeting of the public entity, or with the presiding trial court judge if closure of an on-going judicial proceeding is at issue;

Engaging an attorney and having the attorney jaw-bone with the chairperson of the meeting of the public entity or with the attorney for the public entity, or with the presiding trial court judge if closure of on-going judicial proceedings is at issue;

Asking the public entity that is threatening to meet in closed session to file a request for an Alabama Attorney General opinion on the question of closure before proceeding to meet in closed session; or

Filing a complaint in circuit court in the county where the governmental body's primary office is located alleging that the pertinent public officials violated the Alabama Open Meetings Act, Ala. Code § 36-25A-1, *et seq.* (Supp. 2005) by wrongfully closing a public meeting or remaining in attendance at a meeting that was held in executive session in violation of the statute.

Although the Alabama Open Meetings Act allows courts to invalidate the actions taken during a meeting held in violation of the Act, Alabama courts have refused to invalidate decisions that were made in illegally closed meetings under the former open meetings law; therefore, it will be important to move quickly — by jaw-boning, if possible — to *prevent* a meeting's closure, rather than seeking redress after a meeting has been closed in violation of the Alabama Open Meetings Act. *See, e.g. Ex parte Ala. Public Service Commission*, 376 So. 2d 665 (Ala. 1979); *Ex parte Shelby Medical Center Inc.*, 564 So. 2d 63 (Ala. 1990); *Gray v. Birmingham Board of Education*, 641 So. 2d 279 (Ala. Civ. App. 1993); *Hargett v. Franklin County Board of Education*, 374 So. 2d 1352 (Ala. 1979); *Kucik v. Opelika City Board of Education*, 454 So. 2d 967 (Ala. 1984).

### 1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

There is no procedure specifically for expedited review of a request to attend upcoming meetings. The choices are (1) jaw-boning, (2) filing suit immediately and asking for an immediate hearing on a petition for temporary restraining order or preliminary injunction, or (3) if a court closure is at issue, orally requesting an immediate opportunity to be heard in opposition to closure. Pursuant to Rule 65(b) of the Alabama Rules of Civil Procedure, motions for preliminary injunction will be set down for hearing by the court at the "earliest possible time" and will take precedence over all other matters except those older matters of the same character. Hearing on a petition for a temporary restraining order will typically be set within hours of filing, especially if the opposing parties and their attorneys can be notified of the setting.

If a pretrial motion for closure of court proceedings has been filed in a pending case, the motion must be "docketed reasonably in advance of [its] disposition so as to give the public and press an opportunity to intervene and present their objections to the court." *Ex parte Birmingham*

*ham News Co.*, 624 So. 2d 1117, 1134 (Ala. Crim. App. 1993). “When a motion for closure is made at the beginning of or during trial, ‘a preclosure hearing should be granted as a matter of right to persons actually present and subject to removal from the courtroom.’” 624 So. 2d at 1134 (quoting federal case law). Although docketing is not required for closure motions that are made at the beginning of or during trial, “interested members of the press and public must be permitted a hearing within a reasonable time in order to move for access to sealed transcripts of a closed hearing.” 624 So. 2d at 1135 (quoting federal case law).

## 2. When barred from attending.

If the meeting (or court proceeding) that has been closed is likely to continue for a day or more, it may be possible (1) to get the meeting opened by jaw-boning, (2) to file suit immediately and ask for an immediate hearing on a petition for temporary restraining order, or (3) if a court closure is at issue, to orally request an immediate opportunity to be heard in opposition to closure.

## 3. To set aside decision.

The Alabama Open Meetings Act allows courts to invalidate actions taken during meetings held in violation of the Act if the complaint is filed within 21 days of the date when the action is made public. Ala. Code § 36-25A-9(f) (Supp. 2005). However, under the former open meetings law Alabama courts consistently refused to set aside decisions made at meetings that were wrongfully closed. *See, e.g., Ex parte Shelby Medical Center Inc.*, 564 So. 2d 63 (Ala. 1990). *Citizens For Better Schools v. Greene*, CV 2007-932 (Cir. Ct. of Jefferson County, Ala. Mar. 19, 2008) (declaring vote null and void and imposing fines and awarding attorneys fees based on failure to post preliminary agenda in proper location).

## 4. For ruling on future meetings.

If a public meeting has been closed wrongfully, the best time to attempt to secure an agreement or ruling to keep similar meetings open in the future will be as soon as possible after the wrongful closure.

## 5. Other.

If it is possible to discover what occurred at a closed meeting by obtaining records of action taken at the meeting — minutes, resolutions, votes, etc. — an effort should be made to do so as soon after the closed meeting as possible. *See, e.g., Birmingham News Co. v. Cooper*, 13 Media L. Rep. (BNA) 1655 (Cir. Ct. of Jefferson County, Ala., Equity Div., Oct. 29, 1986) (Ethics Commission met in executive session in violation of former open meetings law; trial court granted TRO, restraining Commission from denying access to records and other information that would disclose the vote(s) taken at the closed meeting); *Birmingham News Co. v. Bell*, 17 Media L. Rep. (BNA) 1597 (Cir. Ct. of Jefferson County, Ala., Jan. 5, 1990) (city council met as committee of the whole and voted for Council officers in attempt to evade requirements of former open meetings law and laws requiring voice vote for election of Council officers; trial court enjoined Council from denying access to record of vote(s) for Council officers) (attorneys’ fee award affirmed in *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991)).

### B. How to start.

#### 1. Where to ask for ruling.

##### a. Administrative forum.

Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

#### (1). Agency procedure for challenge.

Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

## (2). Commission or independent agency.

Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

### b. State attorney general.

The Alabama Attorney General’s office is authorized by state law to issue opinions, upon request, as follows:

[The Attorney General] shall give his or her opinion in writing, or otherwise, on any question of law connected with the interests of the state or with the duties of any of the departments, when requested by the Governor, Secretary of State, Auditor, Treasurer, Superintendent of Education, Commissioner of Agriculture and Industries, Director of Department of Finance, Comptroller, State Health Officer, Public Service Commissioners, Commissioner of Conservation and Natural Resources, or the Director of the Department of Revenue or any other officer or department of the state when it is made, by law, his or her duty so to do, and shall also give his or her opinion to the chairman of the judiciary committee of either house, when required, upon any matter under consideration of the committee.

The Attorney General shall give his or her opinion, in writing or otherwise, as to any question of law connected with the duties of the following county or city officers when requested so to do in writing: judge of probate, clerk of the circuit court, sheriff, city and county boards of education, county commission, register of the circuit court, tax collector, tax assessor, mayor or chief executive officer of any incorporated municipality, city council or like governing body of any incorporated municipality, or any other officer required to collect, disburse, handle, or account for public funds.

Ala. Code § 36-15-1(a) and (b) (2001).

A written opinion from the Alabama Attorney General is advisory, not binding, but it “shall protect such officer and the members of such board, local governing body or agency to whom it is directed or for whom the same is secured from liability to either the state, county or other municipal subdivisions of the state because of any official act or acts heretofore or hereafter performed as directed or advised in such opinion.” Ala. Code § 36-15-19 (2001); *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So. 2d 479 (1942).

Although Alabama’s open meeting law changed on Oct. 1, 2005, the Alabama Attorney General’s office, throughout the course of several changes in administrations, consistently upheld the spirit, the letter, and the rationale of Alabama’s former open meetings law.

### c. Court.

The procedures for filing a motion to intervene to challenge closure of court proceedings or filing suit to challenge closure of other meetings are discussed below.

#### 2. Applicable time limits.

Inapt; Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

#### 3. Contents of request for ruling.

Inapt; Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

#### 4. How long should you wait for a response?

Inapt; Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

#### 5. Are subsequent or concurrent measures (formal or informal) available?

Inapt; Alabama has no administrative forum for consideration of Alabama Open Meetings Act challenges.

### C. Court review of administrative decision.

Alabama has no administrative procedure for consideration of Alabama Open Meetings Act challenges and thus has no provision for court review of administrative decisions. The court procedures described in this section are the only procedures available to adjudicate Alabama Open Meetings Act challenges.

#### 1. Who may sue?

Any media organization, any Alabama citizen, the Alabama Attorney General, or the district attorney for the circuit in which the governmental body is located may file a civil action to enforce the Alabama Open Meetings Act. Ala. Code § 36-25A-9(a) (Supp. 2005). However, no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body for an alleged violation of the Act. *Id.*

#### 2. Will the court give priority to the pleading?

A preliminary hearing on a complaint filed pursuant to the Alabama Open Meetings Act must be held no later than 10 business days after the date of filing of the defendant's initial response to the complaint, or, if no response is filed, no later than 17 business days after the filing of the complaint, "or on the nearest day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties." Ala. Code § 36-25A-9(a) (Supp. 2005).

The general provisions for temporary restraining orders (TROs) and preliminary injunctions, when immediate and irreparable injury can be averred, are available in the appropriate case under Rule 65(b) of the Alabama Rules of Civil Procedure. See *Birmingham News Co. v. Cooper*, 13 Media L. Rep. (BNA) 1655 (Cir. Ct. of Jefferson County, Ala., Equity Div., Jan. 8, 1990) (TRO granted, enjoining defendants from denying access to record of votes taken in wrongfully closed meeting; imminent election of candidates for public office justified granting TRO); *Huntsville Times Co. v. Hunt*, CV 89-2166L (Cir. Ct. of Madison County, Ala., Nov. 9, 1989) (TRO granted enjoining board of trustees of state university from meeting in closed session to discuss five specific topics except when "character or good name" involved).

In the more typical case, the trial court will grant a request for an early hearing (usually within a very few days) on the motion for preliminary injunction, with notice to the individuals and/or agency being sued. The parties often agree to by-pass the preliminary injunction hearing and proceed directly to a hearing on the merits of the request for permanent injunction.

#### 3. Pro se possibility, advisability.

An individual, but not a corporation, may bring suit in Alabama without an attorney, in state court, Ala. Code § 34-3-19 (2002), or in federal court, 28 U.S.C. § 1654. There are no procedural provisions specific to *pro se* litigation. We know of no reported decisions of *pro se* litigation under the Alabama Open Meetings Act or the former open meetings law.

#### 4. What issues will the court address?

##### a. Open the meeting.

If the meeting is on-going, the court may address the question of opening the meeting. See *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423 (Ala.) (First Amendment, not open meetings law, decision), *cert. denied*, 113 S. Ct. 665 (1992); *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim App. 1993).

##### b. Invalidate the decision.

The Alabama Open Meetings Act allows courts to invalidate the actions taken during meetings held in violation of the Act. Ala. Code § 36-25A-9(f) (Supp. 2005). However, under the former open meetings law Alabama courts consistently refused to set aside decisions that were made at wrongfully closed meetings. See, e.g., *Ex parte Ala.*

*Public Service Commission*, 376 So. 2d 665 (Ala. 1979). *Citizens For Better Schools v. Greene*, CV 2007-932 (Cir. Ct. of Jefferson County, Ala. Mar. 19, 2008) (declaring vote null and void and imposing fines and awarding attorneys fees based on failure to post preliminary agenda in proper location)

#### c. Order future meetings open.

There have not yet been any published decisions under the Alabama Open Meetings Act, which became effective on Oct. 1, 2005; however, under the former open meetings law Alabama courts ordered that future meetings dealing with specific matters be open. In *Migliorico v. Birmingham News Co.*, 378 So. 2d 667 (Ala. 1979), the Birmingham City Council held a closed meeting to consider an appointment to the city board of education. When the City Council scheduled another closed meeting, one month later, to fill a vacancy on the Council itself, The Birmingham News Company obtained a court order requiring that meeting to be open to the public. 378 So. 2d at 678. When the trial court later entered a permanent injunction requiring that all meetings of the City Council be open except "when the character or good name of a woman or man is involved," however, the Alabama Supreme Court held that the injunction simply compelled obedience to the former open meetings law and was thus too broad and vague. The Court directed that "[t]he Council should be enjoined from holding executive or secret sessions to consider or discuss the appointment or employment of an individual to a public office or board, except when the individual's 'character or good name,' as defined herein, is involved." 378 So. 2d at 682. See also *Dale v. Birmingham News Co.*, 452 So. 2d 1321 (Ala. 1984) (trial court enjoined Birmingham Board of Education from excluding the public from interviews of applicants for Superintendent of Birmingham School System unless character or good name exception applied; four interviews were completed before the court's injunction and three afterward); *Birmingham News Co. v. Bell*, 17 Media L. Rep. (BNA) 1597 (Cir. Ct. of Jefferson County, Ala., Jan. 5, 1990) (city council permanently enjoined "from conducting the election of Council officers in closed session") (attorneys' fee award affirmed in *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991)); *Birmingham News Co. v. Coleman*, CV 89-723 (Cir. Ct. of Jefferson County, Ala., Bessemer Div., Jan. 8, 1990) (city council members and their successors permanently enjoined "to refrain from meeting in closed session to discuss the purchase of real estate . . . or for any other such or similar purpose, other than any portion of such meeting that shall consist solely of a discussion of the character or good name of a woman or man"); *Tuscaloosa News v. Garrison*, No. CV-1999-408 (Cir. Ct. of Tuscaloosa County, Ala., May 31, 2000) (mayor and city council members permanently enjoined from holding executive or secret sessions to consider, discuss, recommend, or select persons for the board of education except when an individual's character or good name is involved).

#### 5. Pleading format.

A complaint filed pursuant to the Alabama Open Meetings Act must be verified, must state specifically the applicable grounds for the complaint as set out in Section 36-25A-9(b)(1)-(4), and must name in their official capacity all members of the governmental body remaining in attendance at the alleged meeting held in violation of the Act. Ala. Code § 36-25A-9(a) (Supp. 2005).

A petition for injunctive relief, sometimes coupled with a prayer for declaratory judgment, will be the typical style of pleading for civil actions under the Alabama Open Meetings Act. Ala. Code § 36-25A-9(e) (Supp. 2005). If the closed meeting has already taken place, a mootness argument should be countered with the assertion that the wrongful closure is capable of repetition yet evading review.

In the absence of an actual incident of wrongful closure under the former open meetings law, Alabama courts refused to consider a declaratory judgment action that asked for a declaration that certain entities were subject to the open meetings law or that certain kinds of meetings were open under the law. See *Huntsville-Madison County Airport Authority v. Huntsville Times*, 564 So. 2d 904 (Ala. 1990); see also



*In re Joint Petition of Ala. Press Ass'n and Alabama State Bar Ass'n*, No. 195207 (Ala., Nov. 1, 1996) (joint petition for supervisory writ to resolve conflict in Alabama Supreme Court's decision in *Dunn*, 628 So. 2d 519 (Ala. 1993), and the State Bar Association's opinion of general counsel regarding closure of public meetings pursuant to the attorney-client privilege; writ denied without opinion).

If the challenge is to closure of court proceedings, the proper pleading format is a motion to intervene in that court, asking for the immediate opportunity to be heard in opposition to closure. *See, e.g., Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993) (First Amendment, not open meetings law, case).

#### 6. Time limit for filing suit.

An action under the Alabama Open Meetings Act must be brought within 60 days of the date the plaintiff knew or should have known of the alleged violation, and must be brought within two years of the alleged violation. Ala. Code § 36-25A-11 (Supp. 2005). However, for the court to have the option of invalidating the actions taken during the meeting allegedly held in violation of the Alabama Open Meetings Act, the complaint must be filed within 21 days of the date when the actions are made public. Ala. Code § 36-25A-9(f) (Supp. 2005).

As a practical matter, timeliness will not likely be a problem in Alabama Open Meetings Act cases. These actions will typically be brought by members of the news media, who want and often need access to a meeting or to the record of proceedings at a wrongfully closed meeting as quickly as possible.

#### 7. What court.

A complaint to enforce the Alabama Open Meetings Act should be filed in the circuit court of the county where the governmental body's primary office is located. Ala. Code § 36-25A-9(a) (Supp. 2005).

#### 8. Judicial remedies available.

Remedies available under the Alabama Open Meetings Act include declaratory judgment, injunction, invalidation of actions taken during the meeting held in violation of the Act, and civil penalty up to \$1,000. Ala. Code § 36-25A-9(e)-(g) (Supp. 2005). A final order issued against a defendant under the Alabama Open Meetings Act must state specifically upon which claim in Section 36-25A-9(b)(1)-(4) the ruling is based. Ala. Code § 36-25A-9(g) (Supp. 2005).

The typical remedy requested in cases under the former open meetings law was an order enjoining the public entity and/or officials from wrongfully closing a particular meeting or type of meeting in violation of the law. Such an injunction must not simply "direct obedience to the 'sunshine laws.'" *Migliorico v. Birmingham News Co.*, 378 So. 2d 677, 682 (Ala. 1979). Such an injunction must also comply with the requirements of Rule 65(d)(2) of the Alabama Rules of Civil Procedure, "which requires an injunction to contain (1) reasons for its issuance, (2) specific terms, and (3) a reasonably detailed description of the acts sought to be restrained." 378 So. 2d at 682.

An action under the Alabama Open Meetings Act may contain a request for access to records of the wrongfully closed meeting — especially where such records would enable the plaintiff and the public to learn what occurred at the wrongfully closed meeting. *See, e.g., Birmingham News Co. v. Cooper*, 13 Media L. Rep. (BNA) 1655 (Cir. Ct. of Jefferson County, Ala., Equity Div., Oct. 29, 1986) (record of votes at wrongfully closed meeting ordered produced under former open meetings law); *Birmingham News Co. v. Bell*, 17 Media L. Rep. (BNA) 1597 (Cir. Ct. of Jefferson County, Ala., Equity Div., Feb. 12, 1990) (record of votes at wrongfully closed meeting ordered produced under former open meetings law) (attorneys' fee award affirmed in *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991)); *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993) (transcripts of wrongfully closed pretrial proceedings ordered produced, with redaction of grand jury material; First Amendment, not open meetings law, decision).

Resolution of Alabama Open Meetings Act cases by consent order should be available, especially when the trial judge displays an understanding of the law and a willingness to enforce the law and the parties can stipulate to the undisputed facts in the case. *See, e.g., Birmingham News Co. v. Folsom*, CV 88-1591 G (Cir. Ct. of Montgomery County, Ala., Nov. 30, 1989) (former open meetings law); *Birmingham News Co. v. Ward*, CV 90-9338 (Cir. Ct. of Jefferson County, Ala., Feb. 20, 1991) (former open meetings law); *Mobile Press Register Inc. v. Andrews*, CV 92-1929 (Cir. Ct. of Mobile County, Ala., June 29, 1992) (former open meetings law). *See also Birmingham News Co. v. Coleman*, CV 89-723 (Cir. Ct. of Jefferson County, Ala., Bessemer Div., Jan. 8, 1990) (permanent injunction entered by trial court based upon stipulation of parties that city council met in a closed session that included discussion of purchase of real property, which discussion did not involve the character or good name of a woman or man) (former open meetings law).

#### 9. Availability of court costs and attorneys' fees.

The Alabama Open Meetings Act contains no reference to award of costs; therefore, Alabama Open Meetings Act cases are governed by Rule 54(d) of the Alabama Rules of Civil Procedure, which reads as follows: "Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

Although the Alabama Open Meetings Act contains no provision for an award of attorneys' fees, at least one such award has been made under the current law, and one such award was made and upheld.... upheld on appeal, under the former open meetings law. Later trial court and appellate decisions confirmed that such awards were sometimes appropriate in cases under the former open meetings law. *See Citizens For Better Schools v. Greene*, CV 2007-932 (Cir. Ct. of Jefferson County, Ala. Mar. 19, 2008) (declaring vote null and void and imposing fines and awarding attorneys fees based on failure to post preliminary agenda in proper location) *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991) (award of attorneys' fees upheld; citizens of city benefited from action to stop an improper practice); *Slawson v. Alabama Forestry Commission*, 631 So. 2d 953, 959 (Ala. 1994) (award of reasonable costs and fees in Open Meetings Law case "is appropriate when the trial court determines that a case will result in benefit to the general public"; remanded for determination by trial court); *Tuscaloosa News v. Garrison*, CV-99-408, Order (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001) (portion of fees granted; case involved both public records and open meetings issues). *But see Horn v. City of Birmingham*, 718 So. 2d 691 (Ala. Civ. App. 1997) (affirming the trial court's judgment denying attorneys' fees on the ground that the "common benefit" was to a limited group or locale and not to the general public). In *Calhoun County Commission v. Hooks*, 728 So. 2d 625 (Ala. Civ. App. 1997), the trial court awarded the plaintiffs attorneys' fees under the "common benefit" theory. However, the Court of Civil Appeals reversed that portion of the judgment awarding attorneys' fees because, it found, there had been no "evasive," "reprehensible," or "patently unlawful conduct" by the defendant, and the defendant had not acted in bad faith. Therefore, the court said, there was no equitable basis for "fee shifting." No other case in Alabama has required such a degree of conduct by the defendant when awarding attorney fees under the common benefit theory.

One potential hurdle in obtaining attorneys' fees in open meetings cases is section 14 of the Alabama Constitution of 1901. Section 14 provides for state immunity from civil suit and has been interpreted to extend to state agencies. Although the Alabama Supreme Court has not addressed this issue, the Alabama Court of Civil Appeals recently reversed an award of attorneys' fees in a declaratory judgment action (not an open-government case) based on section 14 of the Alabama Constitution. *Ala. Dep't of Environmental Management v. Town of Lowndesboro*, 2005 Ala. Civ. App. LEXIS 172 (Ala. Civ. App. Apr. 8, 2005). The court held that prior Alabama Supreme Court cases awarding attorneys' fees in cases against state agencies were not binding precedent because the issue of section 14 state immunity had not

been addressed. *Id.* at \*38, 42. The court further held that section 14 bars an award of attorneys' fees even when the underlying action is not barred by the state-immunity provision. *Id.* at \*56-58 (citing *Haley v. Barbour County*, 885 So. 2d 783 (Ala. 2004) (holding that civil contempt sanctions against state official were barred by section 14 of the Alabama Constitution). It is important to note, however, that section 14 immunity does not extend to municipalities. *Id.* at \*47.

When an award of attorneys' fees is granted, it is not an "all-or-nothing" proposition. It is in the trial court's discretion to award a portion of the attorneys' fees. See *Tuscaloosa News v. Garrison*, CV-99-408, Order (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001) (portion of fees granted; case involved both public records and open meetings issues).

#### 10. Fines.

The Alabama Open Meetings Act is enforced by civil action and does not provide for any fines. See Ala. Code § 36-25A-9 (Supp. 2005).

#### 11. Other penalties.

The Alabama Open Meetings Act provides that "[f]or each meeting proven to be held in violation of this act for one or more reasons, the court shall impose a civil penalty. The maximum penalty for each meeting shall not exceed one thousand dollars (\$1,000) or one half of the defendant's monthly salary for service on the governmental body, whichever is less. With regard to claims related to improper discussions during executive sessions, monetary penalties may only be assessed against defendant members of a governmental body who voted to go into an executive session and who remained in the executive session during a discussion determined by the court not to have been authorized by this act." Ala. Code § 36-25A-9(g) (Supp. 2005).

### D. Appealing initial court decisions.

#### 1. Appeal routes.

An appeal from a decision of a state circuit court judge on a petition for equitable relief (injunction or declaratory judgment, for example) is to the Supreme Court of Alabama pursuant to Alabama Code §§ 12-22-6 and 12-2-7 (1995) and Rule 4 of the Alabama Rules of Appellate Procedure. For review of a closure action taken in a criminal court proceeding, the appropriate procedure is to file a petition for writ of mandamus in the Alabama Court of Criminal Appeals. Ala. Code § 12-3-11 (1995); *but see Ex parte Courtroom Television Network*, No. 1920991 in the Supreme Court of Alabama, April 12, 1993 (Alabama Supreme Court took case when Court of Criminal Appeals was not available to do so). The trial court judge and all parties in the case below must be served with the writ of mandamus papers.

Appellate review of the denial or award of attorneys' fees is in the Alabama Court of Civil Appeals if the amount involved does not exceed \$50,000 and in the Alabama Supreme Court if the amount involved exceeds \$50,000. Ala. Code § 12-3-10 (1995); *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991) (challenge of attorneys' fee award of \$4,451.65; see *Birmingham News Co. v. Bell*, CV 89-9468-MC (Cir. Ct. of Jefferson County, Ala., Equity Div., Feb. 12, 1990)).

#### 2. Time limits for filing appeals.

Under Rule 4(a) of the Alabama Rules of Appellate Procedure, a notice of appeal must be filed with the clerk of the trial court within forty-two days (six weeks) of the date of entry of the order appealed from. The rule requires filing within fourteen days (two weeks) if appeal is taken from an "interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or modify an injunction." Ala. R. App. P. 4(a)(1).

"In the interest of expediting decision, or for other good cause shown," the appellate courts may suspend the rules "in a particular case on application of a party or on its own motion," but the "appellate court may not extend the time for taking an appeal." Ala. R. App. P. 2(b).

A petition for writ of mandamus must be filed within two weeks of the trial court's order denying the injunctive relief sought. Ala. R. App. P. 4(a)(1). If the appellate court "is of the opinion that the writ should not be granted, it shall deny the petition." Ala. R. App. P. 21(b). Otherwise, it will order that an answer to the petition be filed, set dates for briefs to be due, and schedule oral argument at its discretion. A proceeding on petition for writ of mandamus "shall be given preference over ordinary civil cases." *Id.*

### 3. Contact of interested amici.

Because court decisions on public meetings issues may have far-reaching consequences, press groups and others may have an interest in filing a friend-of-the-court brief in these cases. The filing of *amicus curiae* briefs is permitted by Rule 29 of the Alabama Rules of Appellate Procedure only with leave of the appellate court. Typically, the *amicus* brief is filed conditionally with the motion for leave.

*Amicus* briefs must follow the form prescribed for the brief of an appellee in Rule 28(b) of the Alabama Rules of Appellate Procedure, and the brief must be filed within the time allowed to the party whose position on the appeal the *amicus curiae* brief will support. The motion for leave must identify the interest of the applicant and must state the reasons why the brief of an *amicus curiae* is desirable. Under Rule 29, an *amicus curiae* may participate in oral argument only upon motion and leave of the court and, unless additional time is granted, must share the time of the party whose position the *amicus curiae* supports.

*Amicus curiae* participation at the appellate level has been permitted, to substantial benefit, in the following cases for access to meetings under Alabama's former open meetings law and federal constitutional law:

- a. *Ex parte Consolidated Publishing Co.*, 601 So. 2d 423 (Ala.), *cert. denied*, 113 S. Ct. 665 (1992);
- b. *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993);
- c. *Ex parte Courtroom Television Network*, No. 1920991 in the Supreme Court of Alabama, April 12, 1993, and April 13, 1993;
- d. *Miglionico v. Birmingham News Co.*, 378 So. 2d 677 (Ala. 1979); and
- e. *Bell v. Birmingham News Co.*, 576 So. 2d 669 (Ala. Civ. App. 1991) (challenge to attorneys' fee award).

Press groups, members of the media and others interested in access to public meetings may also participate at the trial court level — either by moving to participate as *amicus curiae* or by moving to intervene. Unlike a party who intervenes, a party who participates as an *amicus curiae* cannot add parties, raise new issues, or otherwise control the litigation. *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 74, 300 So. 2d 106, 111 (1974). "The *amicus curiae* may, with permission of the court[,] file briefs, argue the case and introduce evidence." *Id.*

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

## V. ASSERTING A RIGHT TO COMMENT.

### A. Is there a right to participate in public meetings?

We know of no law that broadly confers upon the public a right to comment in public meetings. However, there are statutes governing specific organizations that provide that the public must be given an opportunity to comment at public meetings. Those statutes are as follows:

*Alabama Forever Wild Land Trust*: The Board of Trustees must hold a public meeting annually to present information on the Forever Wild Land Trust to the public and to give the public an opportunity to have a dialogue with the Board regarding its plans and operations. Ala.

Const. Amend. No. 453 § 5(d).

*City Boards of Commissioners:* All meetings of city boards of commissioners are open to the public “and every citizen of the municipality shall have a right to be heard on any subject relating to the business or conduct of the municipality.” Ala. Code § 11-44-127 (1989).

*County Boards of Education:* County boards of education each must hold an annual meeting to give the public an opportunity to present to the board matters relating to the allotment of public school funds or any other matter relating to the administration of the public schools of the county. Ala. Code § 16-8-3 (2001).

*State Board of Education:* Before adopting or rejecting any textbook, which must be done at a public meeting, the State Board of Education must allow members of the public a reasonable time to be heard concerning any book recommended for adoption or rejection. Ala. Code § 16-36-61(d) (2001).

*State Board of Pardons and Paroles:* Any interested person has a right to present his or her views to the board. Ala. Code § 15-22-23(c)(8) (Supp. 2005).

*Political parties:* The public may attend, but cannot participate in a mass meeting or beat meeting of a political party. Ala. Code § 17-16-43(b) (1995).

*Public corporations:* Any public corporation adopting rules or procedures for the implementation or enforcement of the powers conferred upon it by the Legislature must have a public hearing and “afford the public and interested parties an opportunity to offer written comments, and to present testimony and evidence in support of their respective positions as to the proposed resolutions, ordinances, remedies or procedures and may have counsel to represent them at their own expense.” Ala. Code § 11-89C-4(b)(1) (Supp. 2005).

**B. Must a commenter give notice of intentions to comment?**

We know of no law requiring a commenter to give notice of his intentions to comment at a public meeting.

**C. Can a public body limit comment?**

We know of no law allowing or prohibiting a public body from limiting comment.

**D. How can a participant assert rights to comment?**

Not specified.

**E. Are there sanctions for unapproved comment?**

We know of no law providing for sanctions for unapproved comment.

## Statute

### Open Records

*Ala. Code § 36-12-40 (Supp. 2005). Rights of citizens to inspect and copy public writings; exceptions.*

Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute. Provided, however, registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state shall be exempted from this section. Provided further, any parent of a minor child shall have the right to inspect the registration and circulation records of any school or public library that pertain to his or her child. Notwithstanding the foregoing, records concerning security plans, procedures, assessments, measures, or systems, and any other record relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation information concerning critical infrastructure (as defined at 42 U.S.C. § 5195c(e) as amended) and critical energy infrastructure information (as defined at 18 C.F.R. § 388.113(c)(1) as amended), the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section. Any public officer who receives a request for records that may appear to relate to critical infrastructure or critical energy infrastructure information, shall notify the owner of such infrastructure in writing of the request and provide the owner an opportunity to comment on the request and on the threats to public safety or welfare that could reasonably be expected from public disclosure of the records.

### Open Meetings

*Alabama Open Meetings Act - Ala. Code §§ 36-25A-1 through 36-25A-11 (Supp. 2005).*

*Ala. Code § 36-25A-1. Purpose; short title.*

(a) It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3. No executive sessions are required by this chapter to be held under any circumstances. Electronic communications shall not be utilized to circumvent any of the provisions of this chapter.

(b) This chapter shall be known and may be cited as the “Alabama Open Meetings Act.”

*Ala. Code § 36-25A-2. Definitions.*

As used in and for determining the applicability of this chapter, the following words shall have the following meanings solely for the purposes of this chapter:

(1) **Deliberation.** An exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the body immediately following the discussion or at a later time.

(2) **Executive session.** That portion of a meeting of a governmental body from which the public is excluded for one or more of the reasons prescribed in Section 36-25A-7(a).

(3) **General reputation and character.** Characteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude, or suspected criminal activity, not including job performance.

(4) **Governmental body.** All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties, or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term “governmental body” does not include any of the following:

- a. Legislative party caucuses or coalitions.



b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.

c. Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.

(5) Job performance. The observed conduct or actions of a public employee or public official while on the job in furtherance of his or her assigned duties. Job performance includes whether a person is meeting, exceeding, or failing to meet job requirements or whether formal employment actions should be taken by the governmental body. Job performance does not include the general reputation and character of the person being discussed

(6) Meeting.

a. Subject to the limitations herein, the term meeting shall only apply to the following:

1. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body at a time and place which is set by law or operation of law.

2. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body during which the body, committee, or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.

3. The gathering, whether or not it was prearranged, of a quorum of a governmental body or a quorum of a committee or a subcommittee of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee, or subcommittee at a later date.

b. The term “meeting” shall not include:

1. Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers so long as the governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the governmental body at a later date.

2. Occasions when a quorum of a governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body.

(7) Open or public portion of a meeting. The open or public portion of a meeting is that portion which has not been closed for executive session in accordance with this chapter, for which prior notice was given in compliance with this chapter, and which is conducted so that constituents of the governmental body, members of the media, person interested in the activities of the governmental body, and citizens of this state could, if they desired, attend and observe.

(8) Professional competence. The ability of an individual to practice a profession within the profession’s acceptable standards of care and responsibility. A profession is a vocation requiring certification by the State of Alabama or passage of a state licensing examination that may only be granted to or taken by persons who have completed at least three years of college-level education and obtained at least a college-level degree.

(9) Public employee. Any person employed at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations and authorities, who is paid in whole or in part from state, county, or municipal funds. A public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee’s income.

(10) Public funds. Taxes or fees charged or collected by a governmental body or from the sale of public property including, but not limited to, matching funds from the federal government or income derived from the investment of taxes or fees.

(11) Public official. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal levels of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations.

(12) Quorum. Unless otherwise provided by law, a quorum is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in subdivision (6)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions (6)a.1. and 2., beginning on the date of certification of the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions (6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.

*Ala. Code § 36-25A-3. Notice requirements.*

(a) Unless otherwise specified by law and as provided herein, any governmental body subject of his chapter, except for an advisory board, advisory commission, advisory committee, task force, or other advisory body created solely to make recommendations on public policy issues and composed of persons who do not receive compensation for their service from public funds, shall post notice of all meetings, as defined in Section 36-25A-2(6)a.1., at least seven calendar days prior to the meeting as follows:

(1) The respective houses of the Alabama Legislature shall develop rules consistent with the Constitution of Alabama of 1901, providing for access to and prior notice of all sessions and standing committee and standing subcommittee meetings and all meetings of permanent and joint legislative committees.

(2) Any governmental body with statewide jurisdiction shall submit notice of its meeting to the Secretary of State. The Secretary of State shall post the notice on the Internet for at least seven calendar days prior to the day of the meeting. The Secretary of State shall also send electronic mail notifications to anyone who has registered with the Secretary of State to receive notification of meetings. The Secretary of State may promulgate reasonable rules and regulations necessary for the uniform receipt and posting of notice and of registration for electronic mail notification. The Secretary of State shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the Secretary of State that members of the public may use to view notices of meetings posted by the Secretary of State. Any governmental body with less than statewide jurisdiction may also submit notice to the Secretary of State for posting on the website. Nothing shall prevent a governmental body subject to this subsection from posting notice in an additional manner.

(3) A municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the city hall, provided, however, that a corporation a majority of whose governing board is appointed or elected by a municipality and that has a principal office separate from the city hall may, in lieu of posting notice in the city hall, post notice of each meeting on a bulletin board at a place convenient to the public in the principal office of the corporation or other instrumentality.

(4) A local school board shall post notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the board.

(5) Any other governmental body shall post notice of each meeting in a reasonable location or shall use a reasonable method of notice that is convenient to the public. Any change of the location or method for posting notices of meetings shall not take effect until the change has been approved at an open meeting by the members of the governmental body and announced to the public at an open meeting.

(6) If practicable, a governmental body other than those with statewide jurisdiction, in addition to the posting requirements, shall provide direct notification of a meeting, as defined in Section 36-25A-(6)a., to any member of the public of news media covering that governmental body who has registered with the governmental body to receive notification of meetings. A governmental body may promulgate reasonable rules and regulations necessary for the uniform registration and payment for direct notice and for the distribution of the notices. The governmental body may choose to transmit a notice using electronic mail, telephone, facsimile, the United State Postal Service, or any other method reasonably likely to provide the requested notice. The actual cost of issuing notices, if there is one, may be required to be paid in advance by the person requesting notice by the governmental body. Direct notice to person who have registered with the governmental body shall, at a minimum, contain the time, date, and place of the meeting.

(b) Unless otherwise specified by law directly applicable to the govern-

mental body, notice of a meeting, as defined in Section 36-25A-2(6)a.2. and 3. as well as meetings called pursuant to Section 11-43-50 shall be posted as soon as practicable after the meeting is called in no event less than 24 hours before the meeting is scheduled to begin, unless such notice (i) is prevented by emergency circumstances requiring immediate action to avoid physical injury to person or damage to property; or (ii) relates to a meeting to be held solely to accept the resignation of a public official or employee. In such situations, notice shall be given as soon as practical, but in no case less than one hour before the meeting is to begin. At the same time general notice is given, special notice shall be directed to any person who has registered to receive direct notices pursuant to the provisions of subsection (a)(6).

(c) Posted notice pursuant to this section shall include the time, date, and place of meeting. If a preliminary agenda is created, it shall be posted as soon as practicable in the same location or manner as the notice given pursuant to this section. A governmental body may discuss at a meeting additional matters not included in the preliminary agenda. If a preliminary agenda is not available, the posted notice shall include a general description of the nature and purpose of the meeting.

(d) County commissions which provide proper notice in conformance with Section 11-3-8 shall not be required to comply with subsections (a), (b), and (c) of this section, nor shall committees or subcommittees of such commissions so long as the committees also comply with the notice procedures applicable to the full commission in Section 11-3-8.

(e) Governmental bodies may give, but shall not be required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session under this chapter or existing state law.

(f) A governmental body is authorized, but not required, to provide notice in addition to that specified in this section and to provide notice for gatherings which are not meetings as defined in Section 36-25A-2(6).

*Ala. Code § 36-25A-4. Maintenance of records.*

A governmental body shall maintain accurate records of its meetings excluding executive sessions, setting forth the date, time, place, members present or absent, and action taken at each meeting. Except as otherwise provided by law, the records of each meeting shall become a public record and be made available to the public as soon as practicable after approval.

*Ala. Code § 36-25A-5. Rules of parliamentary procedure; voting.*

(a) Unless otherwise provided by law, meetings shall be conducted pursuant to the governing body's adopted rules of parliamentary procedure not in conflict with laws applicable to the governmental body.

(b) Unless otherwise permitted by this chapter or directed by provisions in the Constitution of Alabama of 1901, or other existing state law applicable to the governmental body, all votes on matters before a governmental body, including, but not limited to, votes to appropriate or to authorize a governmental body's designated employee, within limits prescribed by the governmental body without further authorization of the governmental body, to spend public funds, to levy taxes or fees, to forgive debts to the governmental body, or to grant tax abatements, shall be made during the open or public portion of a meeting for which notice has been provided pursuant to this chapter. Voice votes may be allowed. Unless permitted by this chapter, existing statute, or constitutional amendment, no votes shall be taken in executive sessions. Unless otherwise directed by provisions in the Constitution of Alabama of 1901, other existing state law applicable to a governmental body, a governmental body may not vote by secret ballot.

*Ala. Code § 36-25A-6. Recording of meeting.*

A meeting of a governmental body, except while in executive session, may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic, or video reproduction provided the recording does not disrupt the conduct of the meeting. The governmental body may adopt reasonable rules for the implementation of this action.

*Ala. Code § 36-25A-7. Executive sessions.*

(a) Executive sessions are not required by this chapter, but may be held by a governmental body only for the following purposes:

(1) To discuss the general reputation and character, physical condition, professional competence, or mental health of individuals, or, subject to the limitations set out herein, to discuss the job performance of certain public employees. However, except as provided elsewhere in this section, discussions of the job performance of specific public officials or specific public employees may not be discussed in executive session if the person is an elected or appointed

public official, an appointed member of a state or local board or commission, or a public employee who is one of the classification of public employees required to file a statement of economic interests with the Alabama Ethics Commission pursuant to Section 36-25-14. Except as provided elsewhere in this section, the salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

(2) When expressly allowed by federal law or state law, to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body.

(3) To discuss with their attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action, or to meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body. Prior to voting to convene an executive session under this exception the governmental body shall receive a written opinion or oral declaration reflected in the minutes from an attorney licensed to practice law in Alabama that this exception is applicable to the planned discussion. Such declaration shall not otherwise constitute a waiver of the attorney-client privilege. Notwithstanding the foregoing, if any deliberation begins among the members of the governmental body regarding what action to take relating to pending or threatened litigation based upon the advice of counsel, the executive session shall be concluded and the deliberation shall be conducted in the open portion of the meeting or the deliberation shall cease.

(4) To discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, including, without limitation, information concerning critical infrastructure, as defined by federal law, and critical energy infrastructure information, as defined by federal law, the public disclosures of which could reasonably be expected to be detrimental to public safety or welfare. Provided, however, that when the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure shall be given notice and an opportunity to attend the session.

(5) To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint. Provided, however, that prior to such discussions a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the Attorney General or assistant attorney general shall advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session.

(6) To discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. Provided, however, that the material terms of any contract to purchase, exchange, or lease real property shall be disclosed in the public portion of a meeting prior to the execution of the contract. If an executive session is utilized pursuant to this exception in addition to the members of the governmental body, only persons representing the interests of the governmental body in the transaction may be present during the executive session. This real property exception shall not apply if:

a. Any member of the governmental body involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property.

b. A condemnation action has been filed to acquire the real property involved in the discussion.

(7) To discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other state or foreign nations or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act. Provided, however, that prior to such discussions a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matter or information of the character defined or described in the Alabama Trade Secrets Act advises the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or upon the location, retention, expansion, or upgrading of a public employee or business entity in the area

served by the governmental body if disclosed outside of an executive session, or would disclose information protected by the Alabama Trade Secrets Act.

(8) To discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Provided, however, that prior to such discussions a person representing the interests of a governmental body involved in such negotiations advises the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session.

(9) To deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court, or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public.

(b) A governmental body desiring to convene an executive session, other than to conduct a quasi-judicial or contested case hearing, shall utilize the following procedure:

(1) A quorum of the governmental body must first convene a meeting as defined in Section 36-25A-2(6)a.1. and 2.

(2) A majority of the members of the governmental body present must adopt, by recorded vote, a motion calling for the executive session and setting out the purpose of the executive session, as provided in subsection (a). If subsection (a) requires an oral or written declaration before the executive session can begin, such oral or written declaration shall be made, prior to the vote.

(3) The vote of each member shall be recorded in the minutes.

(4) Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

*Ala. Code § 36-25A-8. Immunity from suit.*

In addition to any existing applicable immunity, members of a governmental body and any of its employees participating in a meeting conducted in conformance with this chapter shall have an absolute privilege and immunity from suit for any statement made during the meeting which relates to an action pending before the governmental body.

*Ala. Code § 36-25A-9. Enforcement; hearings; penalties and remedies.*

(a) Enforcement of this chapter may be sought by civil action brought in the county where the governmental body's primary office is located by any media organization, any Alabama citizen, the Attorney General, or the district attorney for the circuit in which the governmental body is located; provided, however, that no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body for an alleged violation of this chapter. The complaint shall be verified, shall state specifically the applicable ground or grounds for the complaint as set out in subdivisions (1) through (4) of subsection (b), and shall name in their official capacity all members of the governmental body remaining in attendance at the alleged meeting held in violation of this chapter. Members of a chapter shall serve an initial response to the complaint within seven business days of personal service of the complaint. A preliminary hearing on the complaint filed shall be held no later than 10 business days after the date of the filing of the defendant or defendants' initial response to the complaint or, if no response is filed, no later than 17 business days after the filing of the complaint, or on the nearest day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties.

(b) In the preliminary hearing on the complaint, the plaintiff shall establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting. Additionally, to establish a prima facie case the plaintiff must present substantial evidence of one or more of the following claims:

(1) That the defendants disregarded the requirements for proper notice of the meeting pursuant to the applicable methods set forth in Section 36-25A-3.

(2) That the defendants disregarded the provisions of this chapter during a meeting, other than during an executive session.

(3) That the defendants voted to go into executive session and while in executive session the defendants discussed matters other than those subjects

included in the motion to convene an executive session as required by Section 36-25A-7(b).

(4) That, other than a claim under subdivisions (1) through (3), the defendants intentionally violated other provisions of this chapter.

(c) If the court finds that the plaintiff has met its initial burden of proof as required in subsection (b) at the preliminary hearing, the court shall establish a schedule for discovery and set the matter for a hearing on the merits. If, at the preliminary hearing, the plaintiff has presented its prima facie case that an executive session appears to have been improperly conducted as set out in subsection (b)(3), the defendants shall bear the burden of proof at the hearing on the merits to prove by a preponderance of the evidence that the discussions during the executive session were limited to matters related to the subjects included in the motion to convene an executive session required in Section 36-25A-7(a).

(d) During a proceeding involving claims brought under subsection (b)(3), the court shall conduct an in camera proceeding or adopt another procedure as necessary to protect the confidentiality of the matters discussed during the executive session, and if there is a determination that the executive session was authorized by this chapter, the matters shall not be disclosed or utilized in any other legal proceeding by any individual or attorney who attends the in camera portion of the proceedings.

(e) Upon proof by a preponderance of the evidence of a defendant's violation of this chapter, the circuit court shall issue an appropriate final order including, if appropriate, a declaratory judgment or injunction. Prior to a final determination of the merits, temporary restraining orders or preliminary injunctions may be issued upon proper motion and proof as provided and required in the Alabama Rules of Civil Procedure. A final order on the merits shall be issued within 60 days after the preliminary hearing unless a longer period is consented to by all parties and the court.

(f) The court may invalidate the action or actions taken during a meeting held in violation of this chapter, provided that the complaint is filed within 21 days of the date when the action is made public, the violation was not the result of mistake, inadvertence, or excusable neglect, and invalidation of the governmental action taken would not unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of the governmental body; provided further, however, that any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting.

(g) A final order issued against a defendant shall state specifically upon which claim or claims in subdivisions (1) through (4) of subsection (b) the ruling is based. For each meeting proven to be held in violation of this chapter for one or more reasons, the court shall impose a civil penalty. The maximum penalty for each meeting shall not exceed one thousand dollars (\$1,000) or one half of the defendant's monthly salary for service on the governmental body, whichever is less. With regard to claims related to improper discussions during executive sessions, monetary penalties may only be assessed against defendant members of a governmental body who voted to go into an executive session and who remained in the executive session during a discussion determined by the court not to have been authorized by this chapter. Penalties imposed against a member of a governmental body found to have acted in violation of this chapter shall not be paid by nor reimbursed to the member by the governmental body he or she serves.

(h) A governmental body is authorized to pay for or provide for the legal expenses of present or former members of the body named as defendants in a proceeding under this chapter.

*Ala. Code § 36-25A-10. Limitation period.*

An action under this chapter must be brought within 60 days of the date that the plaintiff knew or should have known of the alleged act which brings rise to the cause of action; provided, however, that any action under this chapter must be brought within two years of the alleged act which brings rise to the cause of action.

*Ala. Code § 36-25A-11. Repealer and construction.*

Section 13A-14-2 is repealed. All specific references in the Code of Alabama 1975 to Section 13A-14-2 shall be considered a reference to this chapter and where expressly excluded or included from application of Section 13A-14-2, the exclusion or inclusion from application shall remain as it applies to these new sections. The Code Commissioner, when appropriate, shall implement these changes in the Code of Alabama 1975. Nothing in this chapter shall be construed to repeal or amend any portion of the Code of Alabama 1975, in effect on October 1, 2005, except as expressly provided herein.