LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NUMBER 2023-05

Access Denied: Public Records and Incarcerated People

Andrea Armstrong, Dr. Norman C. Francis Distinguished Professor of Law

19 U. St. Thomas L.J. 220 (2023)

ARTICLE

ACCESS DENIED: PUBLIC RECORDS AND INCARCERATED PEOPLE

ANDREA C. ARMSTRONG*

* Professor of Law, Loyola University New Orleans, College of Law. Yale (J.D.); Princeton (M.P.A). Sincere thanks to Angel Williams and Lale Brown for their research assistance for this essay. The author is also thankful for comments from Katie Schwartzmann, David Marcello, and participants in the Detention Workshop Series held by the Tulane University Murphy Center on Law and the Economy. This essay was written for the University of St. Thomas Law Journal Spring 2022 symposium on "Prisoner Rights and Prison Conditions."

INTRODUCTION

Ten years ago, I received a request from a person incarcerated in a Louisiana prison for assistance in obtaining the police investigative files associated with their criminal case. More requests followed, including assistance in obtaining recent court opinions, non-security related policies and procedures for government agencies, news articles, legislative reports, draft bills and newly enacted legislation, and past versions of now modified laws. Many of these materials are either publicly available on the internet or via public records requests to the government authority. However, in Louisiana, if a person is incarcerated pursuant to a felony conviction and has exhausted their appeals, he or she is deemed ineligible to file public records requests for most matters.[1]

A central question for scholars of incarceration law and policy is, "what are the boundaries of acceptable punishment after a criminal conviction?" Our current system combines removal and exclusion from community with the provision of minimal necessities and lesser rights in forced congregate living.[2] How we, as a society, treat people in custody is the irreducible core of citizenship and belonging. Certain legal rights may never be violated while incarcerated, while other rights are treated as secondary to other institutional and societal priorities like punishment, security, rehabilitation, efficiency, and order. This symposium essay investigates a narrow aspect of the American system of incarceration by analyzing how states limit access to public records by people who are incarcerated. This essay's primary contribution is to identify and categorize the statutory limits on access to public records across all fifty states for people in custody.

All American states provide the public with access to government records under public records laws, also known as freedom of information laws, sunshine laws, and right to know laws. Access is framed as a statutory right created by affirmative law and in some cases is limited to residents or citizens in the state.[3] This right is not unlimited; in fact, all of the state laws protect certain types of records from disclosure, particularly records that include private individual information and security-related information.[4] States have also diminished the cost and effort for the general public to

1. LA. STAT. ANN. § 44:31.1 (2022) (creating exclusion except for materials related to post-conviction relief as specified in the Louisiana Code of Criminal Procedure).

2. Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 267–68 (2011).

3. *See, e.g.*, KY. REV. STAT. ANN. § 61.872(1) (West 2022) (requiring requestor to be a "resident of the Commonwealth"); TENN. CODE ANN. § 10-7-503 (West 2022) (requiring records "be open for personal inspection by any citizen of this state"); State of Tennessee, *Public Records Policy for the Office of the Governor* 2 (July 8, 2019), https://www.tn.gov/content/dam/tn/governorsoffice-documents/governorlee-documents/Governors%20Office%20Public%20Records%20Policy%20adopted%202019%2007%2008.pdf (last visited Nov. 19, 2022) (noting requestor must be a Tennessee citizen).

4. These general access limitations are discussed more fully in Section I.B.

obtain public records through providing online databases and allowing requests and production via email.[5] But people in custody do not retain this right in all fifty states.

Public records access may be particularly meaningful for incarcerated people. Prisons, jails, and detention centers are often physically isolated from their broader communities. People in custody do not have ready access to the internet, media sources (newspapers, television, radio), or books. Their communications with people outside of the facility, whether family and friends, journalists, or elected officials, are monitored and in some cases, subject to censorship. In a variety of ways large and small, people in custody involuntarily reside in "information deserts."[6] Excluding incarcerated people from public records access only strengthens carceral secrecy.[7]

Moreover, people in custody may have a unique claim for access to public records. Several courts have noted that intent and purpose are now irrelevant to government compliance with their state public records laws.[8] Nevertheless, as a normative matter, there is special meaning in recognizing that people in custody use public records laws to access information related to their *own* confinement.

People in custody may want to access their prison disciplinary records to contest violations that resulted in discipline or prevent them from early release.[9] They may seek access to their own medical records, or more broadly, agency policies on medical treatment to advocate for their own healthcare.[10] They may rely on records of their incarceration for proving their rehabilitation in petitions for clemency.[11] People in custody have also used public records laws to request access to facility policies on inclement

5. Michael Shamos, *Privacy and Public Records*, *in* PERSONAL INFORMATION MANAGEMENT 262 (William Jones & Jaime Teevan eds., 2007).

6. *See* Myeong Lee & Brian S. Butler, *How Are Information Deserts Created? A Theory of Local Information Landscapes*, 70 J. ASS'N FOR INFO. SCI. & TECH. 101, 110 (2019) (utilizing the term "information deserts" to describe "material aspects of information inequality or information poverty").

7. Andrea C. Armstrong, *Carceral Secrecy* (forthcoming Winter 2024) (draft on file with author).

8. *See, e.g.*, Phoenix New Times, L.L.C. v. Arpaio, 217 Ariz. 533, 544 (Ariz. Ct. App. 2008); Att'y Gen. v. Dist. Att'y for Plymouth Dist., 141 N.E.3d 429, 439 (Mass. 2020); Democratic Party of Wis. v. Wis. Dep't of Just., 888 N.W.2d 584, 593 (Wis. 2016). *But see* Blankenship v. City of Hoover, 590 So.2d 245, 250 (Ala. 1991) (upholding form for requests that allowed finance department to determine if there was a "legitimate and proper purpose" for the records request).

9. *See* Hickman v. Moya, 976 S.W.2d 360, 360 (Tex. Crim. App. 1998).

10. *See, e.g.*, Moore v. Henry, 960 S.W.2d 82, 84 (Tex. Crim. App. 1996) (holding no mandatory duty of prison officials to provide incarcerated plaintiff with his own medical records under public records law); Giarratano v. Johnson, 521 F.3d 298, 306 (4th Cir. 2008) (upholding denial of agency treatment policies for Hepatitis C from incarcerated plaintiff).

11. *See* Nabelek v. Bradford, 228 S.W.3d 715, 720 (Tex. Crim. App. 2006) (holding that denial of records did not violate incarcerated petitioner's First Amendment rights, despite claim that he needed records for his clemency petition).

weather[12] and items available for purchase from the correctional agency.[13] Incarcerated people may also want to be able to advocate for themselves in the legislature,[14] which is made more difficult when they do not have ready access to proposed bills. Records of new legislative bills or enactments, such as laws potentially impacting parole and good time calculations, may be difficult to quickly obtain outside of the public records process. These types of requests often are intended to hold the correctional agency (and the government) accountable to its own policies and procedures.

Public records access can also be critical for challenging their criminal conviction.[15] Law enforcement and prosecutorial records may be necessary to prove their wrongful conviction, particularly in cases where *Brady*[16] evidence was improperly withheld from the defense. At the same time, people in custody may not have had the resources, including effective trial or appellate counsel, for investigating and challenging the state's case. Even putting aside the quality and availability of counsel, the U.S. Constitution also recognizes a right for the defendant to meaningfully participate in their own defense.[17] As master of the facts in his or her own case, an incarcerated defendant can identify gaps in the investigation and motives of named witnesses.

This intersection between public records law and the carceral state is underdeveloped in the scholarship. First, the majority of public records scholarship focuses on the federal public records law, the Freedom of Information Act,[18] and not state public records law. Of the approximately 2 million people held behind bars in the U.S. in 2022, approximately 300,000 people are detained on federal authority.[19] The rest are incarcerated pursuant to state laws and are held in state, local, and private facilities. Moreover, much of the existing scholarship has focused on the implications for

12. Buehl v. Pa. Dep't of Corr., 955 A.2d 488, 494 (Pa. Commw. Ct. 2008) (holding that agency definition did not fall within general exemption for "personal security" records).

13. Greenhalgh v. Dep't of Corr., 248 P.3d 150, 150 (Wash. Ct. App. 2011).

14. *See, e.g.*, Josie Duffy Rice & Clint Smith, *Justice in America Episode 5: Excluded from Democracy*, APPEAL (Aug. 22, 2018), https://theappeal.org/justice-in-america-episode-5-excluded-from-democracy/ (interview with Norris Henderson, discussing legislative advocacy from behind bars with the Angola Civics Project, a group founded by incarcerated men in prison).

15. *See, e.g.*, Goodrum v. Quarterman, 547 F.3d 249, 252 (5th Cir. 2008), *cert. denied*, 556 U.S. 1130, 1613 (2009) (seeking records to defend against pending charge unrelated to crime for which he was incarcerated).

16. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

17. *See* Faretta v. California, 422 U.S. 806, 820 (1975) (interpreting Sixth Amendment to the U.S. Constitution to include the right to self-representation).

18. 5 U.S.C. § 552; *see also* Christina Koningisor, *Transparency Deserts*, 114 Nw. U. L. REV. 1461, 1465–67 (2020) (noting dearth of scholarship on state and local public records laws).

19. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html.

media, not individual, access.[20] But as described above, individual access can be particularly meaningful for people in custody. Even when public records scholarship has focused on the carceral state, the focus has been either on general public access to information about the prison itself or the difficulties of enforcing transparency vis-à-vis private prisons.[21] The only article to address this gap, which reviewed exclusions and limitations in eight states, was published over twenty years ago.[22] Since that time, additional states have restricted public records access for people in custody.

This essay addresses this gap in the literature by providing a fifty-state overview[23] of access to public records by people in custody, categorizing the ways in which state law excludes incarcerated people, and discussing the variations and implications of these laws. Notably, I only found one instance where a state expanded, rather than limited, access for people in custody, namely, Wisconsin. Even then, the expansion is limited to an extended timeframe for seeking a judicial order to require access to the public record.[24]

In this essay, the aims and arguments are narrow. The primary goal is to map and analyze the landscape of public records access for incarcerated people, leaving normative arguments for a broader research project examining the role of law in carceral secrecy. And although this essay probes whether or not these exclusions and limitations for incarcerated people are justified, I offer no easy answers. Instead, this essay contributes to a broader vein of scholarship that highlights the ways in which the law functions differently for people in custody.[25]

In Part I, I discuss public records generally, including their stated purposes and justifications for exclusion and limits. Part II categorizes the ways in which these state laws intended to increase transparency and accountability nevertheless exclude incarcerated people, based on a review of public records laws in all fifty states. Part III identifies thematic differences

20. *See* Koningisor, *supra* note 18, at 1467 (focusing on impact of state and local laws on media).

21. *See, e.g.*, Tara Parker, *Private Prisons Behind Bars: Why Corrections Corporations Must Abide by Public Information Laws*, 48 TEX. TECH L. REV. ONLINE EDITION 39 (2016) (discussing application to private prisons); Mike Tartaglia, Note, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689 (Oct. 2014) (discussing application to private prisons).

22. James Thomas Snyder, *Restricting Prisoners' Freedom of Information - Balancing Inmate Rights and Public Privacy Concerns*, 2000 L. REV. MICH. STATE U. DETROIT COLL. L. 765, 766 (identifying and individually analyzing legislative intent for eight state statutes restricting access for people behind bars).

23. Existing surveys of this subject by research and policy organizations appear incomplete based on my review. Thus, this essay represents the first fifty-state overview of public records restrictions for people who are incarcerated.

24. WIS. STAT. § 19.37(1m).

25. *See, e.g.*, Dolovich, *supra* note 2; Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 359 (2018); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 517 (2021); Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385 (2022).

in the scope of these limitations. The essay concludes by identifying additional questions for understanding incarceration, including the tension between the rehabilitative and punishment purposes of incarceration.

I. State Public Records Laws

A. *History and Overview*

Statutorily protecting public access to government records is a relatively modern occurrence in the U.S., but with deep roots in the English common law tradition.[26] The common law structured a person's right to access government records according to their motive.[27] Historically, people with a "direct and tangible interest" in specific government records could request access.[28] As states began to codify their public access laws in the early twentieth century, the motive of the requester continued to influence access.[29] A 1953 study on public records access found that ten states still relied on the common law tradition, while the other thirty-eight states provided either general or specific access to public records.[30] Within the states with statutorily protected access, states precluded access by people "with a destructive or other unlawful purpose"[31] or people who were not "taxpayers" or "citizens."[32]

However, states in the twentieth century began to adopt a broader notion of public records access. These states jettisoned restrictions based on imputed motive in favor of access as a right of belonging and citizenship. For example, the Michigan Supreme Court in 1928 explicitly connected public access to a citizen's participation in democracy.[33] The court noted "[i]f there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules."[34] Modern state laws shifted to a "presumption of openness" with

26. While scholars link U.S. state court cases to the common law tradition, it is nevertheless worth noting that in December 1776, Sweden adopted the "Freedom of Print Act," which codified public access to government records. *See* Dwayne Cox, *The Rise of Confidentiality: State Courts on Access to Public Records During the Mid-Twentieth Century*, 68 Am. Archivist 312, 312 (2005); David Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 Commc'n L. & Pol'y 433, 435 (2016) (describing early state cases under the common law, while acknowledging historical precedents); Jonas Nordin, *The Swedish Freedom of Print Act of 1776 - Background and Significance*, 7 J. Int'l Media & Ent. L. 137, 138 (2017) (describing the history and purpose of the Swedish law).

27. Cox, *supra* note 26, at 312.

28. Cox, *supra* note 26, at 312.

29. Cuillier, *supra* note 26, at 446–47 (describing findings by Harold Cross' 1953 study of public records access in the U.S.).

30. Cuillier, *supra* note 26, at 443 (describing study).

31. Cuillier, *supra* note 26, at 446 (citing study).

32. Cuillier, *supra* note 26, at 447 (citing study).

33. Nowack v. Fuller, 219 N.W. 749, 750 (Mich. 1928).

34. *Id.*

specific exclusions for certain records and away from motive-based access.[35]

The federal Freedom of Information Act was first enacted in 1966.[36] All fifty states now have public records laws as well, with many modeling their new or amended state laws on the federal public records laws.[37] The structure of state public records laws are similar; they create "rights to citizens and groups that can request records, define the records that are subject to and exempt from disclosure, provide guidance on allowable fees that can be charged to the person requesting the records, identify procedures for enforcement of the law, and establish sanctions for noncompliance."[38]

Modern public records laws perform several democracy-related purposes. As the U.S. Supreme Court noted, public records laws "ensure an informed citizenry,"[39] an essential element for a participatory democracy.[40] Founding father James Madison explicitly recognized the power of public records access for democratic purposes. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[41] Public records laws also serve as a "check against corruption,"[42] creating incentives for good behavior by government employees through the potential discovery of illegal acts. Kentucky even acknowledges, in its public records law, the possibility of "inconvenience or embarrassment to public officials or others."[43] Yet, unlike other countries, the right to access public records is not considered a constitutional or fundamental right under federal law.[44]

Nevertheless, these laws are an instrument of public control over government actions. Through public records laws, the people can "hold the

35. Cuillier, *supra* note 26, at 458.

36. Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 383, *amended by* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 56 (codified at 5 U.S.C. § 552 (1970)).

37. Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65–66 (1996). *But see* Friends of Frame Park, U.A. v. City of Waukesha, 403 Wis.2d 1, 76 n.8 (Wis. 2022) (noting Wisconsin public records law was not modeled on federal Freedom of Information Act and noting differences between the two).

38. Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 429 (2015).

39. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (discussing federal public records law).

40. *See* N.H. REV. STAT. ANN. § 91-A:1 (2022) ("Openness in the conduct of public business is essential to a democratic society.").

41. Letter from James Madison to W.T. Barry, LIBR. OF CONG. (Aug. 4, 1822), https://www.loc.gov/item/mjm018999/.

42. *Robbins Tire & Rubber Co.*, 437 U.S. at 242.

43. KY. REV. STAT. ANN. § 61.871 (West 2022).

44. Cuillier, *supra* note 26, at 435 (listing countries where the right to access public records is a constitutional right).

governors accountable to the governed."[45] This accountability function of public records law operates through "expos[ing] government activity to public scrutiny," according to the Supreme Court of Ohio.[46] The state of Washington makes this element of government accountability explicit: "The people insist on remaining informed so that they may *maintain control* over the instruments that they have created."[47]

Co-existing with these general democracy-related purposes, all state public records laws include broad exclusions for certain categories of information.[48] These categories of records are deemed non-public and therefore not subject to access under state public records laws. Common categories of exempted records include personnel, law enforcement,[49] personally identifiable health information,[50] and security of critical infrastructure or facilities[51] (including, for example, blueprints for correctional facilities). These exclusions apply to everyone regardless of a person's conviction or custody status.[52]

Plenty of states rely solely on those categorical exemptions to address public records requests filed by people in custody. In states such as Alaska,[53] California,[54] Delaware,[55] Florida,[56] Illinois,[57] Massachusetts,[58]

45. *Robbins Tire & Rubber Co.*, 437 U.S. at 242.

46. State *ex rel.* Gannett Satellite Info. Network, Inc. v. Petro, 80 Ohio St.3d 261, 264 (Ohio 1997).

47. WASH. REV. CODE § 42.56.030 (2022).

48. Professor Koningisor argues that the increasing number of exceptions is related, at least in part, to "successful lobbying efforts of special interest groups." For example, she notes that twelve percent of laws passed in Florida in 2017 were exemptions to Florida public records laws, which contain 1,000 exemptions. Koningisor, *supra* note 18, at 1507.

49. ALASKA STAT. ANN. § 40.25.120 (West 2022).

50. OHIO REV. CODE ANN. § 149.43(A)(1)(hh) (West 2022).

51. *See, e.g.*, ALA. CODE § 36-12-40 (2022) (exempting "security or safety of persons, structures, facilities, or other infrastructures" from public records inspection for all requestors); VT. STAT. ANN. tit. 1, § 317(c)(32) (West 2022).

52. *See, e.g.*, OR. REV. STAT. ANN. § 192.345 (West 2022) (exempting certain records from disclosure). Note that Oregon does not limit public records access on the basis of a person's custody or conviction status.

53. ALASKA STAT. ANN. § 40.25.110 (West 2022) ("[T]he public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.").

54. CAL. GOV'T CODE § 62539(a-b) (West 2022) ("(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law. (b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."). The statutory code implements a broad right to access government information under the California State Constitution. *See* CAL. CONST. art. I, § 3.

55. DEL. CODE ANN. tit. 29, § 10003 (West 2022). ("(a) All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the

Nebraska,[59] Oregon,[60] and Pennsylvania,[61] whether or not a person is incarcerated or convicted of a crime is statutorily irrelevant for accessing public records. This is not to suggest that people in custody in the above states have the same access as the non-incarcerated. There may be practical obstacles to accessing public records and some of those obstacles are greater because of their incarceration. But as a matter of statute, these states do not create a "separate class" of requestors for public records.[62]

Nineteen states restrict access to public records by people in custody either by statute or court decision.[63] Fifteen states take different (but varied)

---

appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.")

56. FLA. STAT. ANN. § 119.07(1)(a) (West 2022) ("Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records."); *see also* Smith v. State, 335 So. 3d 795, 797 (Fla. Dist. Ct. App. 2022) (discussing numerous public requests filed by incarcerated individual and remanding for consideration of his mandamus action to compel records access).

57. 5 ILL. COMP. STAT. ANN. 140/3(a) (West 2022) ("Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act."); *see also* Holloway v. Meyer, 726 N.E.2d 678, 683 (Ill. App. Ct., 2nd Dist. 2000) (noting the state public records law "creates a general right of access to public records and includes no specific limitation on an inmate's ability to exercise this right").

58. MASS. GEN. LAWS ANN. ch. 66, § 10(a) (West 2022) ("A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record . . . ."); *see also* Bradley v. Recs. Access Officer, Dep't of State Police, 174 N.E.3d 1212, 1214 (Mass. App. Ct. 2021) (discussing incarcerated plaintiff's public records requests and holding that his status as a criminal defendant was irrelevant to determining access under Massachusetts public records law).

59. NEB. REV. STAT. ANN. § 84-712 (West 2022) ("(1) Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records . . . are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment . . . ."); *see also* Boppre v. Overman, No. A-15-1135, 2016 WL 6872978, at *6 (Neb. Ct. App. Nov. 22, 2016) (noting "the Nebraska public records statutes, as they currently exist, do not limit Boppre's access to such records" but citing other more restrictive states).

60. *See* OR. REV. STAT. ANN. § 192.314 (West 2022) ("Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.338, 192.345 and 192.355.").

61. *See* 65 PA. STAT. AND CONS. STAT. ANN. § 67.701 (West 2022) ("Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act."); *see also* Carey v. Pa. Dep't of Corr., 61 A.3d 367, 370 (Pa. Commw. Ct. 2013), *supp.* No. 1348 C.D. 2012, 2013 WL 3357733 (Pa. Commw. Ct. July 3, 2013) (assessing whether corrections agency properly complied with public records request by incarcerated plaintiff under Pennsylvania's Right to Know Law).

62. Snyder, *supra* note 22, at 766 (noting "[d]uring the 1990s, eight states amended their freedom of information [hereinafter "FOI"] statutes specifically to restrict prison inmates' access to public records for security, privacy, and efficiency purposes. These states have approached this issue in different ways, but each has labeled inmates as a separate class exempt from rights reserved for all other citizens. This new policy changes thirty years of statutory and common law doctrine that considered the status of the requester and the purpose of the FOI request to be irrelevant.").

63. *See* App. for listing by state and source.

statutory approaches: Arizona,[64] Arkansas,[65] Connecticut,[66] Idaho,[67] Kentucky,[68] Louisiana,[69] Michigan,[70] New Jersey,[71] Ohio,[72] South Carolina,[73] Texas,[74] Utah,[75] Virginia,[76] Washington,[77] and Wisconsin[78] all statutorily exclude or limit public records access based on whether or not the person is incarcerated. In addition, four states have interpreted the state's public records law in a way that limits or precludes access by incarcerated people, including Alabama,[79] Florida,[80] Illinois,[81] and West Virginia.[82] To the extent that public records access is intended to serve as a check against arbitrary or authoritarian decision making, exclusionary laws disempower people in custody from participating in that function. Similarly, if public records access performs an important accountability function, people in custody become a group of people that accountability is not owed to.

The exclusions and limitations for incarcerated people draw on a principle well established in the English common law. As Professor Judith Resnik noted, "[c]arving out convicted prisoners from the new guarantees reflected English common law traditions that were followed in many states and that treated prisoners as 'civilly dead'—unable to enter into or enforce contracts, buy property, or use the legal system at all."[83] That principle, which undergirds much of current incarceration law and policy, animates more modern exclusions.

64. ARIZ. REV. STAT. ANN. § 31-221(D)–(E) (2022).
65. ARK. CODE ANN. § 25-19-105(B)(i) (West 2022).
66. CONN. GEN. STAT. ANN. § 1-210(c) (West 2022).
67. IDAHO CODE ANN. § 74-113 (West 2022).
68. KY. REV. STAT. ANN. § 197.025(2) (West 2022).
69. LA. STAT. ANN. § 44:31.1 (2022).
70. MICH. COMP. LAWS ANN. § 15.232(g) (West 2022).
71. N.J. STAT. ANN. § 47:1A-2.2 (West 2022).
72. OHIO REV. CODE ANN. § 149.43(B)(8) (West 2022).
73. S.C. CODE ANN. § 30-4-30 (West 2022).
74. TEX. GOV'T CODE ANN. § 552.028 (West 2022).
75. UTAH CODE ANN. § 63G-2-201 (West 2022).
76. VA. CODE ANN. § 2.2-3703(C) (West 2022).
77. WASH. REV. CODE ANN. § 42.56.565 (West 2022).
78. WIS. STAT. ANN. § 19.32(1) (West 2022).
79. Person v. Ala. Dep't of Forensic Scis., 721 So. 2d 203, 204 (Ala. Civ. App. 1998) (requiring in-person review).
80. Fla. Institutional Legal Servs., Inc. v. Fla. Dep't of Corr., 579 So. 2d 267, 267 (Fla. Dist. Ct. App. 1991); Roesch v. State, 633 So. 2d 1, 2 (Fla. 1993) (imposing fees).
81. Howard v. Weitekamp, 57 N.E.3d 499, 502 (Ill. App. Ct. 2015) (applying DOC statutory limitation to public records law for review of incarcerated person's own "master record"); Holloway v. Meyer, 726 N.E.2d 678, 683 (Ill. App. Ct., 2nd Dist. 2000) (applying facility mail limitations to rights under public records review).
82. State *ex rel.* Wyant v. Brotherton, 589 S.E.2d 812, 816–17 (W. Va. 2003) (requiring incarcerated person to use civil procedure laws to access files for habeas petition filing instead of public records laws).
83. Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 AL. L. REV. 665, 668 (2020).

State voting laws reflect a similar exclusion from participation in the democratic state. Only two states (Maine, Vermont) do not restrict a person's right to vote while serving a sentence for a criminal conviction.[84] (Notably, neither of those states restrict access or eligibility for public records for people in custody.) The majority of states restrict post-conviction voting, though the period of deprivation ranges from denial of voting rights while incarcerated to post-release or post-supervision to lifetime prohibitions.[85] These voting restrictions, which have been upheld by state and federal courts, only apply after conviction. People held in custody pretrial, at least in theory, fully retain their right to vote,[86] even while detained behind bars.

The exclusion from access to public records, however, is relatively recent after the country's shift from motive-based access in the common law to general statutory access by the 1970s. James Thomas Snyder, who published one of the few articles on this topic, writes that the turn towards limiting access for incarcerated persons began in the 1990s.[87] In the twenty years since his article was published, limitations on public records access exist in at least eighteen states. The legislative history of restricted access law, as well as interpreting court decisions, illuminates common concerns and motivations across states to limit access for people in custody.

B. Purposes of Limitation

To be clear, people in custody (and the general public) do *not* have a constitutional right at stake when they are denied access to state public records. The U.S. Supreme Court has held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[88] Even if there was a First or Fourteenth Amendment right to access, the Supreme Court has also held that there is no "constitutional right to obtain all the information provided by [Freedom of Information Act] laws."[89] Accordingly, civil rights lawsuits under 42 U.S.C. § 1983—the

84. Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENTENCING PROJECT 1 (July 2021), https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf.

85. *Id.*; *see* Campaign Legal Center, *Challenging Jail-Based Disenfranchisement: A Resource Guide for Advocates* 1, https://campaignlegal.org/sites/default/files/2019-12/Jail%20Voting%20Advocacy%20Manual.pdf (last visited November 18, 2022) (discussing the practical barriers that contribute to low voter turnout in jails, such as difficulties securing an absentee ballot, isolation from public resources that would inform votes, etc.).

86. O'Brien v. Skinner, 414 U.S. 524, 534 (1974).

87. Snyder, *supra* note 22, at 766 (discussing the following eight states: Connecticut, Louisiana, Michigan, New Jersey, Ohio, Texas, Virginia, and Wisconsin).

88. Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978).

89. McBurney v. Young, 569 U.S. 221, 232 (2013) (emphasis added).

traditional federal vehicle for challenging conditions of confinement—by incarcerated plaintiffs have generally failed.[90]

Incarcerated plaintiffs primarily make two types of Section 1983 claims[91] challenging their exclusion or limited access: 1) the failure to provide access to records is a direct violation of the Fourteenth Amendment's Equal Protection Clause; 2) the defendants retaliated against the incarcerated plaintiff for filing a public records request in violation of the First Amendment. Both of these claims fail because, as noted in the prior paragraph, the underlying activity (requesting public records) is not constitutionally protected and therefore government action is evaluated under a less demanding standard of review.

Courts apply a rational basis level of review in these cases challenging denial of public records requests or documents.[92] The rational basis standard asks whether the government act is rationally related to a legitimate government objective. Federal circuit and district courts have found that the exclusion of people in custody from general public records requests, i.e., not involving records directly related to their cases, is constitutionally permissible. In so doing, these opinions also reveal the purposes served through restricted access for people in custody.

1. Efficiency and Cost

Across several states, government agencies have invoked "preserving scarce government resources" to limit or exclude incarcerated people from general public access to records. As in other rational basis review cases, preservation of resources is generally accepted as a legitimate government purpose.[93] Courts have concluded that "prisoners are more likely to abuse the open records process"[94] and that their requests are "burdensome and frivolous."[95] The Seventh Circuit has analogized public records requests by people in custody to litigation filed by incarcerated people, noting their

90. Brennan v. Aston, No. 17-CV-01928, 2020 WL 4808657, at *21 (W.D. Wash. June 8, 2020), *report and recommendation adopted*, No. 17-CV-01928, 2020 WL 4785458 (W.D. Wash. Aug. 18, 2020).

91. Incarcerated plaintiffs have also unsuccessfully argued that their exclusion from public records eligibility is equivalent to a denial of access to courts (through the inability to secure new evidence) and thus a due process violation. *See, e.g.*, Holt v. Howard, 806 F.3d 1129, 1133 (8th Cir. 2015) ("[A] prisoner must establish [that] the state has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury, that is, the hindrance of a nonfrivolous and arguably meritorious underlying legal claim.").

92. *Id.* at 1132–33.

93. *See* Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW, 485 U.S. 360, 373 (1988).

94. Voss v. Carr, 2020 WL 1234433, at *9 (W.D. Wis. Mar. 13, 2020), *aff'd*, No. 20-2015, 2022 WL 2287560 (7th Cir. June 24, 2022), *reh'g denied*, No. 20-2015, 2022 WL 3007624 (7th Cir. July 28, 2022) (citing cases).

95. *Id.*

"proclivity for frivolous suits" given the "ample time on their hands."[96] Courts have not, however, interrogated state evidence or the reasons why people in custody may be more likely to file.[97]

It is impossible to assess whether people in custody actually file more public records requests or whether their requests are more likely to be frivolous. States do not generally publish statistics on public records requests, disaggregate requests by the type of requester, or the scope of the requests filed.[98] Incarcerated people are not the only category of people who may have "ample time on their hands." People who are un- or underemployed, for example, may have similarly unstructured time. But even assuming it is true that people in custody file a higher number of requests than non-incarcerated people and that their requests are broader in scope, it is worth thinking about why.

People in custody may be more likely to file a public records request precisely because they are incarcerated. First, carceral spaces create a barrier between the free world and the facility, frustrating a free flow of information from the outside. Prisons, jails, and detention centers are a type of "informational desert," where information is harder to access due to practical obstacles and facility-specific policies and procedures. To the extent that people in custody have access to the internet via tablets, kiosks, and shared computers, that access is subject to significant restrictions. As a practical matter, people in custody cannot simply "google" information. Even if they can electronically access the information, that information is difficult to store or retain. They cannot save the found information electronically (shared computer, low tablet storage space, no PDF software, etc.). They also do not have ready access to printers. To the extent there are printers available behind bars, they are usually located in the law library, to which they may only have limited access (staffing, hours, etc.). Many facilities will charge a fee per printed page, further raising the cost.

---

96. Lewis v. Sullivan, 279 F.3d 526, 528–29 (7th Cir. 2002). *But see* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1567 (2003) (disputing argument that cases were trivial based on review of data and actual complaints filed).

97. *See, e.g.*, Giarratano v. Johnson, 521 F.3d 298, 304 (4th Cir. 2008) (holding "Giarratano's conclusory allegation about the lack of a rational relationship between VFOIA's prisoner exclusion and any legitimate state interest is insufficient to plausibly state a claim for relief in light of the strong presumption in favor of the legislation's rationality and the readily apparent justification for the legislation").

98. *But see* Liz Wagenseller, *2021 Annual Report*, PA. OFF. OF OPEN RECS. 3 (Mar. 14, 2022), https://www.openrecords.pa.gov/Documents/AnnualReport2021.pdf (noting almost 50% of public records requests were filed by "everyday citizens" and 11.2% were filed by "inmates"). In comparison, it is possible to examine the frequency of incarcerated plaintiff complaints filed in federal court. *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html (discussing impact of the Prison Litigation Reform Act on civil rights filings challenging conditions of confinement and filing trends over 1970–2018); *see also* Schlanger, *supra* note 96 (focusing on cases filed in federal court by incarcerated plaintiffs in particular).

Facilities have broad authority and discretion to control the flow of information into and out of a prison or jail. Facility staff may ban or redact information that is deemed a threat to internal order or security.[99] They can ban or limit access to certain information sources, such as the internet or cable television. Even when people behind bars are allowed to have the information, the facility barrier slows the arrival of information, such that it is not quickly accessible for people in custody. In addition, modes of information, such as computers, facility periodical subscriptions, and televisions, are shared among incarcerated people, a practical consequence of congregate living. Thus, there might also be delays to information as information modes are shared among larger populations.

Second, as noted by Professor Margo Schlanger, a person's relationship with the law is fundamentally different when incarcerated.[100] It is all-encompassing in the sense that law is what keeps someone involuntarily confined while also regulating their daily life (work, food, visits, discipline).[101] Excavating the reasons why might lead to alternative methods to address governmental resource constraints.

2. Potential Improper Use or Motive

Another stated purpose for creating a separate class of requesters is concern about "improper purposes."[102] As with efficiency concerns, these claims are reviewed under a rational basis test. Courts have noted similar concerns about incarcerated plaintiffs using litigation to harass "their accusers, the guards, and others who caused or manage their captivity."[103] Some states have argued that public records access can also be used to "hamper security or interfere with prosecutions."[104] This rationale is reminiscent of the motive-based common law tradition of limiting access to people with a direct and specific interest.[105] In general, modern state public records laws do not inquire into motive or intent for the request. Thus, in those states that exclude or limit, the statute creates an irrebuttable presumption of improper intent based primarily on a person's custody or conviction status.

---

99. *See* Turner v. Safley, 482 U.S. 78, 91 (1987) (upholding censorship of correspondence); Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (upholding censorship of incoming correspondence and publications).

100. Schlanger, *supra* note 96, at 1574.

101. For foundational analysis on how the significance of law is different for different populations, see Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMANS. 343 (1990).

102. Voss v. Carr, 2020 WL 1234433, at *9 (W.D. Wis. Mar. 13, 2020), *aff'd*, No. 20-2015, 2022 WL 2287560 (7th Cir. June 24, 2022), *reh'g denied*, No. 20-2015, 2022 WL 3007624 (7th Cir. July 28, 2022) (citing cases).

103. Lewis v. Sullivan, 279 F.3d 526, 528–29 (7th Cir. 2002).

104. Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 460 (2011).

105. *See* discussion *supra* p. 225.

For the majority of states, the general exclusions for certain types of records, regardless of custody or conviction status, perform a similar function. It is therefore worth asking why the general exceptions are sufficient in some states, but not others.

State public records laws are complex statutory instruments, often with numerous exceptions modifying blanket and broad authority. The exceptions vary and may include limitations on certain types of records, the agency from whom records can be requested, and the person eligible to request access. The complicated nature of these public records laws—even those that do not distinguish among requestors—can also facilitate an agency's broad invocation of exceptions. In Alabama, for example, a state agency claimed the general security exemption prevented the disclosure of prison incident reports to a non-incarcerated person.[106] Even though the Alabama Supreme Court ultimately found that the records should be public,[107] the case also demonstrates the ways in which agencies interpret broad and general exemptions for public records laws.

Beyond the statutory limitations and exclusions, there are also a number of practical obstacles that also limit access to records for all people, including fees for copies of records, the volume of requests for a particular agency (and the accompanying workload for government employees), and the sometimes-extended timeframes for providing the records. Though having a law degree is not a required element for requesting public records, it can certainly help—particularly when the agency responds with a blanket exemption or redaction to the request. Within this already challenging universe of access to public documents, surveying public records laws across all fifty states reveals additional limitations and exclusions for people in custody for conviction of a crime.

II. Exclusions and Limitations for Incarcerated People[108]

States do not limit access to public records in the same way. State public records laws explicitly and implicitly limit access in a variety of ways, including broad exclusions from eligibility to file requests; limitations regarding specific types of information; assigning gatekeeping functions to the state correctional authority; and requiring in-person review.

106. Allen v. Barksdale, 32 So. 3d 1264, 1266–67 (Ala. 2009).

107. *Id.* at 1273.

108. While the focus of this essay is exclusions and limitations for incarcerated people, it is worth noting that provisions of state public records law that restrict access by incarcerated people also, in some states, restrict people committed to institutions, such as psychiatric hospitals. Wis. Stat. Ann.§ 19.32(3) (West 2022) ("'Requester' means any person who requests inspection or copies of a record, except a committed or incarcerated person. . . .").

A. Ineligible to File

In some states, a person in custody is—by definition—ineligible to file a public records request. This exclusion encompasses varying types of custodial facilities, including local jails, state and federal prisons, and other detention facilities. Custody status (what type of facility) is usually consistent with a person's conviction status (pretrial or convicted). Thus, people held in jails are more likely to be pre-trial, with the accompanying legal presumption of innocence. Jails may also hold people serving sentences of less than a year for misdemeanor crimes. People in prison are generally serving a sentence for a criminal conviction.

This broad articulation of the exclusion, which focuses primarily on custody status, i.e., whether or not a person is in custody, is common among exclusion states. It is also similar to 1950s era state limitations on public records access for "citizens" or "taxpayers."[109] In Texas, the government is not required to comply with a public records request from a person who is confined in a municipal or county jail or a facility operated by (or under contract with) the Texas Department of Criminal Justice.[110] In Virginia, "any person incarcerated in a state, local or federal correctional facility" is specifically excluded from "any rights" under the state public records law.[111] Wisconsin follows a similar approach in excluding incarcerated people from the definition of an eligible "requestor," but does allow incarcerated people to request records that are specific to that person or their minor children.[112] Kentucky stands alone by excluding people in custody (whether jail or prison) *and* excluding people who are on "active supervision," i.e., not in custody.[113] However, the exclusion of people either in custody or on

109. *See* Cuillier, *supra* note 26, at 447.

110. TEX. GOV'T CODE ANN. § 552.028 (West 2022) (limiting access for people in a "secure correctional facility"); TEX. PENAL CODE ANN. § 1.07 (West 2022) (defining "secure correctional facility").

111. VA. CODE ANN. § 2.2-3703(C) (West 2022). The Fourth Circuit Court of Appeals upheld the constitutionality of the "Virginia Prisoner Exclusion Provision." Fisher v. King, 232 F.3d 391, 399 (4th Cir. 2000).

112. WIS. STAT. ANN. § 19.32(3) (West 2022). For access to records about an incarcerated person's minor children, the person must not have been "denied physical placement" and the "record is otherwise accessible to the person by law." *Id.*

113. KY. REV. STAT. ANN. § 197.025(2) (West 2022). Kentucky does allow for records requests that pertain solely to the person in custody or on active supervision; thus, this exclusion appears to target public records requests to the Department of Corrections (DOC) that are not specific to individuals in custody or on active supervision. For example, this exclusion would apply to public records requests for DOC policies and procedures, which would be relevant in civil rights litigation alleging Eighth Amendment violations. Eighth Amendment litigation on conditions of confinement requires evidence of "deliberate indifference," i.e., that the prison official knew of, and disregarded, a substantial risk of harm. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).

active supervision only applies to records requested from the Kentucky Department of Corrections.[114]

Michigan, Arkansas, South Carolina, Louisiana, and Utah emphasize a combination of conviction and custody to exclude access. In Michigan, an eligible "[p]erson does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility."[115] Similarly, Arkansas denies public records access to a "person who at the time of the request has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility."[116] South Carolina's broad right to access "does not extend to individuals serving a sentence of imprisonment"[117] and in Utah, agencies are not required to acknowledge or respond to requests from people in custody after conviction.[118] Louisiana is slightly more narrow by also considering the type of criminal conviction. Like other states, Louisiana includes a broad right for "any person of the age of majority" to "inspect, copy, or reproduce"[119] or "obtain a copy or reproduction"[120] of any public record. However, the term "person" does not include individuals incarcerated for a *felony* conviction when the request is broader than the legal basis for post-conviction relief.[121]

B. Limits on Types of Records

Several states, including those who limit eligibility and those that do not, specifically limit access by incarcerated people to certain types of records. For states that limit eligibility, states may still preserve a narrow category of records that are available. For states where an incarcerated person is not categorically excluded, the limitation may only apply to certain types of records.

---

114. KY. REV. STAT. ANN. § 197.025(2) (West 2022) (limiting requests from the "department" which is defined as the Department of Corrections in KY. REV. STAT. ANN. § 197.010(3) (West 2022)). Kentucky law also prohibits hand delivery of a public records request for the Department of Corrections from a "confined inmate." KY. REV. STAT. ANN. § 197.025(4) (West 2022).

115. MICH. COMP. LAWS ANN. § 15.232(g) (West 2022).

116. ARK. CODE ANN. § 25-19-105(B)(i) (West 2022). The Eighth Circuit held that habeas proceedings (including the ability to conduct discovery) provide a "safety valve" for this broad eligibility exclusion. Holt v. Howard, 806 F.3d 1129, 1133 (8th Cir. 2015).

117. S.C. CODE ANN. § 30-4-30 (West 2022).

118. UTAH CODE ANN. § 63G-2-201 (West 2022).

119. LA. STAT. ANN. § 44:31(B)(1) (2022).

120. *Id.* § 44:31(B)(2).

121. *Id.* § 44:31.1 (citing LA. CODE CRIM. PROC. ANN. art. 930.3 for the legal grounds for post-conviction relief, including conviction; violates state or federal constitution; exceeded judge's jurisdiction; violates double jeopardy; violates prosecutorial timelines; underlying statute found unconstitutional; results in ex post facto application; or is proven factually innocent); *see also* Hilliard v. Litchfield, 822 So. 2d 743, 746 (La. Ct. App. 2002) (holding incarcerated plaintiff "was a 'person,' under the Public Records Act, when he made his request for the initial reports in a letter dated May 24, 2000 because Hilliard's appellate remedies were not exhausted until the Louisiana Supreme Court denied his application for reconsideration on June 16, 2000").

For states where incarcerated people are ineligible, several states *allow* requests that are related to their criminal matter. In Louisiana, a person serving a sentence for a criminal conviction is generally not allowed to file a public records request *unless* the request relates to efforts to obtain post-conviction relief.[122] Similarly, in Kentucky, people who are otherwise ineligible to file a public records request with the Department of Corrections may still obtain records if "the request is for a record which contains a specific reference to that individual."[123]

There are similar provisions in states where incarcerated people are generally eligible to file public records requests. In Ohio, people incarcerated for a criminal conviction are generally prohibited from obtaining public records *relating* to criminal investigations or prosecutions *unless* the request relates to a "justiciable claim" in their case.[124] In New Jersey, a person convicted of an indictable offense, regardless of custody status, may not obtain via public record request any records relating to the victim (or their family) in their criminal case, unless necessary for the convicted person's defense.[125]

Several states limit access by incarcerated people to their own records of incarceration. While "[a]ll records of prisoner care and custody"[126] are subject to the Arizona public records act, an incarcerated person's access is limited to their own "automated summary record file."[127] Other states, including Illinois, are similar. In Illinois, where incarcerated people retain eligibility to file public records requests, people in custody are nevertheless generally prohibited from accessing their "master record files."[128]

In Utah, state public records law takes a multi-pronged approach, adopting limits on eligibility (custody and conviction) combined with limitations on type and quantity. An individual in custody following a conviction may file up to five public records requests within a calendar year for records that specifically reference him or her.[129] For all other requests by

122. LA. STAT. ANN. § 41:31.1 (2022).

123. KY. REV. STAT. ANN. § 197.025(2) (West 2022).

124. OHIO REV. CODE ANN. § 149.43(B)(8) (West 2022).

125. N.J. STAT. ANN. § 47:1A-2.2 (West 2022) (information that is excluded includes "a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history, or any other identifying information"). Note that some of this information may also be exempted from disclosure to the general public under § 47:1A-5.

126. ARIZ. REV. STAT. ANN. § 31-221(C) (2022) (all records are public except records that reveal "identity of a confidential informant," "endanger life" or "safety" of another, or "jeopardize an ongoing criminal investigation").

127. *Id.* § 31-221 (D)–(E).

128. Howard v. Weitekamp, 57 N.E.3d 499, 502 (Ill. App. Ct. 2015); *see also* IDAHO CODE ANN. § 74-113 (West 2022) (restricting currently and formerly incarcerated people from the general right to inspect and amend records concerning oneself for records maintained by the custodial authority).

129. UTAH CODE ANN. § 63G-2-201 (West 2022) (limiting right to access, but allowing exception for attorneys representing the individual).

convicted individuals in custody, agencies are not required to "respond to, or provide a record."[130]

C. Creating Practical Obstacles

Some states have created practical obstacles or barriers to access public records. Only one of these obstacles specifically names people in custody, namely, Washington's limitation on damages. The remaining identified obstacles may apply to all requestors, but present specific difficulties for people in custody, as in Alabama, which requires in-person access. Similarly, the fees for copying the public records may, as a practical matter, prevent access for people who are incarcerated due to their inability to review in person (thereby minimizing fees) and their low prison wages.[131] More broadly, even if a person is eligible and can request copies by mail and pay for those records, a prison or jail's internal facility rules may limit receipt of otherwise public records, as in Washington.

1. Limited Damages for Incarcerated Plaintiffs

In 2011, Washington adopted a new limitation that denies monetary damages to a person serving a criminal sentence unless a court finds the public records were denied to him or her in "bad faith."[132] This limitation could be significant, since courts have discretion to order fines of up to one hundred dollars a day for each day the person was improperly denied the records, in addition to costs and attorney fees.[133] This damages limitation could have several secondary effects, including reducing government responsiveness and curtailing the ability of an incarcerated person to obtain counsel to challenge denied access, ultimately reducing the "value of the right" itself.[134]

The limited damages waiver essentially creates a higher intent standard that solely applies to agency decisions denying records to incarcerated people. For a non-incarcerated requestor, "no showing of bad faith is necessary before a penalty is imposed on an agency and an agency's good faith reli-

130. *Id.*

131. Not all states pay wages for forced labor after conviction and even where a state does pay wages, in 2017, the maximum average daily wage was $3.45. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/.

132. WASH. REV. CODE ANN. § 42.56.565(1) (West 2022).

133. *Id.* § 42.56.550(4) ("Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.").

134. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (discussing remedial abridgement in civil rights cases).

ance on an exemption does not insulate the agency from a penalty."[135] Damages for improper withholding create an incentive for agencies to "adher[e] to the goals and procedures dictated by the statute."[136] By removing this incentive solely for requests by incarcerated people, the Washington state law implicitly permits improper good faith denials without consequences.

In addition, the damages limitation may impact the willingness of attorneys to litigate improper denials of public records to incarcerated people. By providing for attorney fees and damages, federal and state laws incentivize private enforcement of laws to further the public good.[137] Removing this incentive is likely to have the same impact as attorney fee limitations in the federal Prison Litigation Reform Act ("PLRA"), which sought to limit prison conditions litigation and the ability of courts to order relief.[138] After the PLRA was enacted, federal court filings challenging conditions of confinement steeply declined.[139]

2. In Person Inspection

Alabama provides a general right to "[e]very citizen" to "inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."[140] This broad access does not statutorily exclude people in custody.[141] However, this statute has been interpreted to allow, but not require, mailing copies of the requested document.[142] Eric Person filed a public records request while incarcerated in an Alabama prison.[143] The agency responded in writing, stating that "those documents are available for inspection in the office here in Auburn between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday."[144] When Mr. Person challenged the in-person inspection as an effective denial of his right under the public records law, the court found that the agency had in fact complied by offering an

135. Yousoufian v. Off. of Ron Sims, 229 P.3d 735, 744 (Wash. 2010).

136. *Id.*

137. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1432 (2000).

138. *See, e.g.*, Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CALIF. L. REV. 999, 1003–13 (2001) (discussing PLRA provisions).

139. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 155 (2015).

140. ALA. CODE § 36-12-40 (2022).

141. *Ex parte* Gill, 841 So. 2d 1231, 1233 (Ala. 2002) (noting "[n]o statute denies this right to inmates or felons").

142. Person v. Ala. Dep't of Forensic Scis., 721 So. 2d 203, 204 (Ala. Civ. App. 1998); *accord Ex parte* Gill, 841 So. 2d at 1234 (noting the public records law "does not authorize a citizen to shift to the custodian of public writings the tasks of inspecting them and identifying the ones to be copied" nor does it "entitle inmates to any relief from their incarceration or to any transportation to the custodian's office to accomplish those tasks").

143. *Person*, 721 So. 2d at 204.

144. *Id.*

opportunity to inspect the records.[145] In interpreting the statute, the court held that the Alabama public records law "does not require the Department to copy or to send the requested information."[146] This creates obvious difficulties for a person who has been judicially ordered to be confined in a jail or a prison. Incarcerated people are not free to come and go as they please. By allowing agencies to require in-person inspection to select records for copy, the Alabama public records law creates a unique barrier to access for people in custody.

3. Internal Facility Rules

Another practical obstacle is the carceral facility's own internal regulations, policies, and procedures. Even if a person in custody is eligible to request public records while incarcerated, actual receipt of those records may be prohibited by facility mail and security policies. For example, in Washington state, people in custody are not statutorily excluded from requesting public records. The Washington Department of Corrections received and responded to an incarcerated person's request for the training records of a correctional officer.[147] However, the prison did not deliver the mailed records to the incarcerated plaintiff under a departmental policy prohibiting department employee records for incarcerated people.[148] Instead, the records could be forwarded to a non-incarcerated person or destroyed.[149] The Washington Supreme Court ultimately found that while the state corrections agency has limited discretion on compliance with the public records law, it has broad discretion acting in its "custodial capacity" to deny delivery of public records when considering "legitimate penological interests, including prison security and order."[150] Similarly in Illinois, a state appellate court upheld the authority of corrections authorities to withhold mail containing public records requested by incarcerated plaintiffs.[151]

4. Fees

Obtaining copies of public records often also entails paying fees associated with the reproduction or retrieval costs.[152] Statutory requirements for

145. *Id.*
146. *Id.* at 205.
147. Livingston v. Cedeno, 186 P.3d 1055, 1056 (Wash. 2008) (en banc).
148. *Id.*
149. *Id.*
150. *Id.* at 1058.
151. Holloway v. Meyer, 726 N.E.2d 678, 683 (Ill. App. Ct. 2000).
152. Tae Ho Lee, *Public Records Fees Hidden in the Law: A Study of Conflicting Judicial Approaches to the Determination of the Scope of Imposable Public Records Fees*, 21 COMMC'N L. & POL'Y 251 (2016); *see also* Fla. Institutional Legal Servs., Inc. v. Fla. Dep't of Corr., 579 So. 2d 267, 269 (Fla. Dist. Ct. App. 1991) (affirming denial of challenge to rule allowing "special service charges" for public records request due to nature or volume of records brought by legal advocacy organization).

reproduction fees do not appear to be specific to people in custody but apply generally to any eligible requestor. While a full review of the public records fee structures[153] across states and localities is beyond the scope of this essay, a few examples suffice to establish fee requirements as a potential practical obstacle[154] for people in custody to request public records.

In Louisiana, for example, the fees for obtaining public records vary across localities and can be prohibitively expensive for larger requests.[155] The cost may also be prohibitive given the generally low rate of wages paid by facilities for incarcerated labor, to the extent that wages are paid at all.[156] As Justice Kogan noted in a Florida Supreme Court case discussing mandatory fees for an incarcerated plaintiff seeking public records relevant for his appeal, "Florida's public records law now has been rendered into a tool useful only to those who have money."[157]

Incarcerated people also cannot circumvent public records fees like the general public. Agencies may charge fees for reproduction or copying of public records, but a free person can review the records in person, thus avoiding the reproduction fee. Reviewing in person can also reduce the amount of the fee. For example, an agency may produce all records related to a particular topic, but by reviewing in person, a requestor can select a subset of records produced for reproduction, thereby lowering the associated fees.

D. Requiring Additional Review or Permission

Several states require other government bodies to weigh in on the restricted access by people who are incarcerated, such as the Department of Corrections or judges in state courts. This "gatekeeping" function encompasses a range of tasks that may include notification, restricting delivery, or making specific findings on the request by the person in custody. Challenges to these "gatekeeping" decisions are generally reviewed under an "abuse of discretion" standard.[158]

---

153. For a discussion on the types of fees associated with public records requests, see Lee, *supra* note 152.

154. *See* Roesch v. State, 633 So. 2d 1, 2 (Fla. 1993) (affirming lower court holding that incarcerated plaintiff "was not entitled to receive copies of documents under the Public Records Act without paying for them").

155. *See* East Baton Rouge Parish Sheriff Office, Invoice (Nov. 15, 2022) (fees included postage and $1/page for pages 1-25, .50/page thereafter, total $48.42); St. Tammany Parish Sheriff Office, Invoice (Nov. 10, 2022) (fees included $15 per criminal incident report (up to 20 pages) and .50/page for all other criminal reports, total $42); Ouachita Parish Sheriff's Office, Invoice (Nov. 23, 2021) ($1.25/page for first 50 pages require redaction and review, .25/page thereafter, total $127). All invoices on file with author.

156. *See* Andrea C. Armstrong, *Beyond the 13th Amendment—Captive Labor*, 82 OHIO STATE L.J. 1039, 1050–53 (2021) (discussing wages for incarcerated labor).

157. *Roesch*, 633 So. 2d at 3 (Kogan, J., dissenting).

158. *See* State v. Lather, No. S-08-036, 2009 WL 1875232, at *2 (Ohio Ct. App. 2009).

1. Review by Correctional Agency

Government agencies in Connecticut rely on the state Department of Corrections for requests by people in custody. Connecticut General Statute § 1-210(c) provides that the agency receiving the request from a "person confined in a correctional institution or facility" must notify the Commissioner of Corrections before issuing the record.[159] The Commissioner must then determine whether the requested record is statutorily exempt from the state Freedom of Information Act in the subsection listing potential safety risks to residents, staff, and the correctional facility itself.[160] If determined to be exempt, the Commissioner may withhold the record from the person in custody upon delivery of the requested records from the agency.[161]

2. Review by Court or Judge

Several states turn to the judicial arm of the state to perform the gatekeeping function. In Washington, an agency may petition the court to enjoin a public records request from a person serving a conviction in a correctional facility. Courts may issue an injunction, for example, when the requested records could be used to harass or intimidate an agency, its employees, or the correctional facility (including other residents).[162] A judge may also enjoin requests that "may assist criminal activity."[163] Courts will review affidavits and declarations in a summary hearing and will assess the burden and likely impact of the disclosure, the purpose of the request, and other requests by the person serving a sentence, among other factors.[164]

159. CONN. GEN. STAT. ANN. § 1-210(c) (West 2022).

160. *Id.* § 1-210(b)(18) (including "(A) Security manuals, including emergency plans contained or referred to in such security manuals; (B) Engineering and architectural drawings of correctional institutions or facilities or Whiting Forensic Hospital facilities; (C) Operational specifications of security systems utilized by the Department of Correction at any correctional institution or facility or Whiting Forensic Hospital facilities, except that a general description of any such security system and the cost and quality of such system may be disclosed; (D) Training manuals prepared for correctional institutions and facilities or Whiting Forensic Hospital facilities that describe, in any manner, security procedures, emergency plans or security equipment; (E) Internal security audits of correctional institutions and facilities or Whiting Forensic Hospital facilities; (F) Minutes or recordings of staff meetings of the Department of Correction or Whiting Forensic Hospital facilities, or portions of such minutes or recordings, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision; (G) Logs or other documents that contain information on the movement or assignment of inmates or staff at correctional institutions or facilities; and (H) Records that contain information on contacts between inmates, as defined in section 18-84, and law enforcement officers . . . .").

161. *Id.* § 1-210(c). Note that for cases concerning a person detained for federal immigration violations in a state correctional facility, a state court found that the Commissioner may defer to a reasonable federal agency finding on whether the record is restricted. Comm'r of Corr. v. Freedom of Info. Comm'n, 52 A.3d 636, 654 (Conn. 2012).

162. WASH. REV. CODE ANN. § 42.56.565(2) (West 2022).

163. *Id.*

164. *Id.* at § 42.56.565(3) ("(a) Other requests by the requestor; (b) The type of record or records sought; (c) Statements offered by the requestor concerning the purpose for the request; (d) Whether disclosure of the requested records would likely harm any person or vital government

Ohio's approach also relies on the courts to make findings for a person serving a sentence requesting access to records concerning their criminal prosecution. Ohio limits access to records concerning criminal investigations or prosecutions for people who are serving a sentence for a criminal conviction.[165] However, if the record requested is 1) otherwise public and 2) the sentencing judge (or their successor) finds the records to be "necessary to support what appears to be a justiciable claim of the person," the agency is required to provide the record.[166]

In New Jersey, the court's role is much more limited. New Jersey does not limit eligibility for public records requests but does exclude people with convictions for an indictable offense from requesting information related to the victim of the crime. In cases where the information is related to a convicted person's defense, the requestor can request the court's determination that the information is necessary for his or her defense.[167]

III. Variations in Scope of Exclusions

Across these various types of limitations on public records access by people in custody, statutory analysis also indicates varying approaches in the scope of exclusions. Some states limit records for all incarcerated people, whether detained pre-trial or serving a sentence for conviction. States also vary on whether the government body has the discretion to comply with a public records request from an incarcerated person or whether the exclusion is mandatory. Lastly, states vary in their acknowledgment of the requestor's appeal rights. Analysis of these variations highlights inconsistencies about the purposes of these limitations and exclusions.

A. Pre-trial / Jail v. Convicted / Prison

The U.S. Constitution, as interpreted by the courts, differentiates between people who are detained pre-trial and people who are incarcerated after a conviction for a criminal offense. The most pronounced textual differentiation is visible in the Thirteenth Amendment, which prohibits slavery and involuntary servitude unless the person has been legally convicted.[168] Thus, people serving a sentence can be forced to work, while those detained pre-trial generally cannot.[169] Similarly, the Eighth Amendment's prohibi-

interest; (e) Whether the request seeks a significant and burdensome number of documents; (f) The impact of disclosure on correctional facility security and order, the safety or security of correctional facility staff, inmates, or others; and (g) The deterrence of criminal activity.").

165. Ohio Rev. Code Ann. § 149.43(8) (West 2022).

166. *Id.*

167. N.J. Stat. Ann. § 47:1A-2.2(b) (West 2022).

168. U.S. Const. amend. XIII.

169. *But see* Andrea C. Armstrong, *Unconvicted Incarcerated Labor*, 57 Harv. C.R.-C.L. L. Rev. 1 (2022) (discussing the origin, application, and expansion of the judicially created "housekeeping" exception to the Thirteenth Amendment for people civilly detained and people detained pre-trial for "personally related" chores).

tion on "cruel and unusual punishment," which governs conditions of confinement, only applies to those being "punished," i.e., people who have been convicted.[170] A person detained pre-trial would rely on the due process guarantees under both the Fifth and Fourteenth Amendments to challenge their conditions of confinement.

Not all laws include this differentiation. The federal PLRA, which structures and shapes civil litigation challenging conditions of confinement in federal courts, does not distinguish by conviction status (pre-trial v. convicted) or by type of facility (jail v. prison).[171] Neither does the federal Prison Rape Elimination Act ("PREA"), which prohibits sexual abuse and sexual harassment in correctional facilities and applies the same auditing standards to jails and prisons.[172]

In general, restrictive public records laws—similar to voting laws—distinguish between people held pre-trial and people who have been convicted.[173] For example, in Louisiana, the public records exclusion is limited to people who have exhausted their appellate remedies, and thus only applies to people who have been convicted.[174] Similarly, people incarcerated for a conviction in Louisiana are also ineligible to vote.[175]

In contrast, Virginia applies its public records exclusion to any person incarcerated, regardless of their conviction status or holding facility.[176] Virginia's exclusion of people detained pre-trial from public records access appears intentional. The exclusion is followed by a clause that acknowledges the exclusion should not burden an incarcerated person's constitutional rights and specifically references the "right to call for evidence in their favor in a criminal prosecution."[177] At the same time, a person detained pre-trial in Virginia retains the right to vote.[178] Kentucky similarly prohibits public records access for any person who is "confined in a jail or

170. U.S. CONST. amend. VIII.

171. 42 U.S.C. § 1997e.

172. 34 U.S.C. § 30301. PREA does distinguish in its auditing standards between lockups, youth detention facilities, and prisons/jails.

173. *See, e.g.*, ARK. CODE ANN. 25-19-105(B)(i) (West 2022) (excluding a person from requesting a record who, at time of request, "has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility"); ARK. CONST. amend. LI, § 11(a)(4) (canceling voter eligibility for people convicted of felony crimes and who have not "discharged their sentence or been pardoned").

174. LA. STAT. ANN. § 44:31.1 (2022). Note that Louisiana's exclusion also differentiates between the type of criminal conviction and only excludes those convicted of a felony offense.

175. *Id.* § 18:102(A)(1)(a).

176. VA. CODE ANN. § 2.2-3703(C) (West 2022).

177. *Id.*

178. VA. CONST. art. II, § 1 (limiting voting for people convicted of a felony). It is also important to note that though a person may be legally eligible to vote, detention pre-trial creates significant obstacles for exercising that right. *See* Aaron Mendelson, *No Simple Solution to Helping Voters in Jail Cast Ballots*, PEW CHARITABLE TR. (Sept. 15, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/15/no-simple-solution-to-helping-voters-in-jail-cast-ballots.

any facility,"[179] but bars only those with convictions from voting.[180] Wisconsin's public records law also appears to include people detained pre-trial. Wisconsin restricts access for any person incarcerated, defined as a person in a "penal facility,"[181] which includes county jails, and county and municipal detention facilities.[182] Like Virginia and Kentucky, Wisconsin does not exclude people detained pre-trial from voting.[183]

This disconnect—in some states—between voting and public records access is confusing. When we compare eligibility for state public records access and voting, it is clear that in some states, if you are detained pre-trial, you can vote but are not eligible to request public records available to the general public. Conversely, there are states where a person is ineligible to vote due to their conviction, but eligible to file a public records request.

The U.S. Supreme Court has upheld the right to vote as a fundamental right and therefore restrictions on that right are subject to a higher level of judicial scrutiny than the right to access public records. And perhaps it is this specific constitutional protection for voting that explains why there might be more significant barriers to public records access than voting. However, public records access has also been justified as a statutory right to ensure an informed voting populace. Accordingly, we would expect to see similar restrictions given the intertwined nature of the rights.

B. Mandatory v. Discretionary Exclusion

In some states, the public records exclusion uses mandatory language and in others, compliance with a public records request from a person in custody is discretionary. Compare, for example, the eligibility exclusions in Virginia and Texas. In Virginia, the exclusion appears mandatory by exempting people in custody from "any rights" created by the Virginia Freedom of Information Act.[184] In contrast, the eligibility exclusion in Texas is discretionary.[185] A state appellate court affirmed the plain reading of the statute, which neither prohibits nor requires compliance with a public records request from an incarcerated person.[186] Similarly, within the cate-

179. KY. REV. STAT. ANN. § 197.025(2) (West 2022).

180. KY. CONST. § 145; KY. REV. STAT. ANN. § 116.025(2) (West 2022) ("Any person charged with or indicted for a crime, whether or not in custody for same, who has not yet been convicted of the offense and who is not otherwise ineligible to vote, may vote . . . .").

181. WIS. STAT. ANN. § 19.32(1c) (West 2022).

182. *Id.* § 19.32(1e).

183. WIS. CONST. art. III, § 2(4)(a).

184. VA. CODE ANN. § 2.2-3703(C) (West 2022).

185. Harrison v. Vance, 34 S.W.3d 660, 663 (Tex. App. 2000) (joining "sister courts in holding disclosure of information is discretionary when that information is requested by an individual imprisoned or confined in a correctional facility, regardless of whether such information pertains to the individual requesting it").

186. Hickman v. Moya, 976 S.W.2d 360, 361 (Tex. Crim. App. 1998), *cert. denied*, 527 U.S. 1009 (1999) (holding "[a] governmental body is not required to furnish requested information to an inmate but is not *prohibited* from disclosing information to an inmate pertaining to the inmate.

gory of states that limit access by the type of record, some states have mandatory limitations, while others employ discretionary limitations. Illinois, for example, uses mandatory "shall not" language to prohibit access by an incarcerated person to their "master record."[187] In contrast, the language of Ohio's limited scope exclusion for incarcerated people is permissive. In Ohio, a government agency "is not required to permit" an incarcerated person serving a sentence access to records concerning criminal investigations or prosecutions, even though incarcerated people are generally eligible to file public records requests on other matters.[188] Thus, Ohio law enforcement and district attorney offices may, at their discretion, provide the investigative or prosecutorial records requested. If the access is denied, the incarcerated person's only recourse to obtain these types of records in Ohio is to petition the sentencing judge.[189]

On the one hand, discretion by the responding agency provides a potential, albeit unpredictable, vehicle for access to public records. But it is unclear if agencies actually utilize this discretion and to what extent. For example, though the Texas statutory exclusion is discretionary, the Texas Department of Criminal Justice maintains on its website that "some individuals are not eligible to use the PIA to obtain information. Examples of these are inmates and people acting as agents for an inmate."[190]

More broadly, the use of discretionary language implicates the purpose of the exclusions. Courts have pointed to conservation of government resources and agency efficiency as legitimate reasons to exclude incarcerated people from public records access.[191] A clear statement of access or exclusion provides notice to a potential requestor about his or her eligibility or

---

Thus it is discretionary with Appellee whether to furnish the requested information to Appellant, or to not furnish him the requested information."); *see also* TEX. GOV'T CODE ANN. § 552.028 (West 2022) ("(a) A governmental body is not required to accept or comply with a request for information from: (1) an individual who is imprisoned or confined in a correctional facility; or (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter. (b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.").

187. Howard v. Weitekamp, 57 N.E.3d 499, 502 (Ill. App. Ct. 2015).

188. OHIO REV. CODE ANN. § 149.43 (B)(8) (West 2022); *see also* State *ex rel.* Daugherty v. Mohr, No. 11AP-5, 2011 WL 6294495, at *2 (Ohio Ct. App. Dec. 15, 2011) (discussing claim by incarcerated person for improper denial of public records concerning prison policies on "triple-cell[ing]").

189. OHIO REV. CODE ANN. § 149.43 (B)(8) (West 2022); *see also* State *ex rel.* Summers v. Fox, 169 N.E.3d 625, 635–38 (Ohio 2020) (holding that public records requests by incarcerated person's father for investigative records were not subject to judge's review since county failed to prove father was acting as designee for his son).

190. Tex. Dep't of Crim. Just., *Executive Administration Services: Public Information Act*, https://www.tdcj.texas.gov/divisions/es/exec_services_public_information_act.html (last visited Oct. 12, 2022).

191. *See* State *ex rel.* Russell v. Thornton, 856 N.E.2d 966, 968–69 (Ohio 2006) ("The General Assembly clearly evidenced a public-policy decision to restrict a convicted inmate's unlimited access to public records in order to conserve law enforcement resources.").

access. However, discretionary language introduces uncertainty and costs to the records request process.

An incarcerated person may attempt to file a public records request without knowing whether or not he or she is eligible. The agency will then have to exercise its discretion exercised on a case-by-case basis. The permissive language may also prompt an incarcerated person to appeal an agency's denial to a court in an attempt to clarify the rule for themselves or others. The litigation of that appeal may entail additional costs as incarcerated plaintiffs seek evidence for an agency's abuse of discretion. Thus, the discretionary language may actually create additional costs for the agency (individualized decisions, defense of denials) and for the courts (petitions to appeal the denial in their case).

The mandatory language raises a different problem, namely, the assumption of improper motive. Only incarcerated people are assumed to have an improper motive in states applying mandatory exclusion language. For all other requestors, states have eschewed the common law tradition of motive-based access in favor of open public records access. While mandatory language may be more efficient for government agencies, discretionary approaches at least allow an opportunity for incarcerated people to demonstrate a specific interest or need for the records, particularly in the area of appellate rights.

Conclusion

Mapping the variety of ways in which a minority of states limit public records access by incarcerated people reveals a lack of consensus among states. To varying degrees, exclusionary states apply the disfavored common law motive-based test solely to incarcerated people, reserving the presumption of open access for the general public. More broadly, are these limitations simply another example in a long list of restricting the rights and participation of people in custody in our democratic society or do these limitations perform a unique function unrelated to other restrictions? Why have the majority of states not adopted these limitations and are more states likely to enact similar exclusions or limitations? And though this essay catalogued the types of documents requested by people in custody, how important is this statutory right within the context of confinement in facilities that face serious challenges in honoring the limited constitutional rights of incarcerated people in carceral spaces?

Despite the many questions raised by this more fulsome understanding of public records access and incarceration, these laws underscore a broader tension between the rehabilitative and punishment goals of incarceration. If rehabilitation is the goal, as evidenced by programming and vocational training in prisons, why deny incarcerated people access to yet another tool of democracy? But if punishment is the primary goal, then why do some

states only limit certain types of records instead of the broad exclusion typical of voting rights?

Part of the answer, I believe, lies in the purpose of the public records laws themselves. A recurring purpose among the reviewed statutes is it allows individuals to hold their government accountable. States, to varying degrees, have withheld the ability of incarcerated people to hold state agencies accountable. The prevalence of restrictions on accessing Department of Corrections records in particular is consistent with the limitations on prison conditions litigation enacted under the Prison Litigation Reform Act. In so doing, these states' laws shift the burden of accountability of carceral institutions to free individuals.

APPENDIX

State	Public Records Statute: Access	Limited?	Eligibility	Limited Scope	Gatekeeping	Practical Obstacle
Alabama	ALA. CODE § 36-12-40 (2022).	Y				Person v. Ala. Dep't of Forensic Scis., 721 So. 2d 203, 204 (Ala. Civ. App. 1998).
Alaska	ALASKA STAT. ANN. § 40.25.110 (West 2022).	N				
Arizona	ARIZ. REV. STAT. ANN. § 39-121.01 (2022).	Y		ARIZ. REV. STAT. ANN. § 31-221(D) (2022).	ARIZ. REV. STAT. ANN. § 31-221(F) (2022).	
Arkansas	ARK. CODE ANN. § 25-19-105 (West 2022).	Y	ARK. CODE ANN. § 25-19-105(a)(1)(B)(i) (West 2022).	Holt v. Howard, 806 F.3d 1129, 1133 (8th Cir. 2015).		
California	CAL. GOV'T CODE § 6253(a-b) (West 2022).	N				
Colorado	COLO. REV. STAT. ANN. § 24-72-204 (West 2022); COLO. REV. STAT. ANN. § 24-72-304 (West 2022) (Inspection of criminal justice records).	N				
Connecticut	CONN. GEN. STAT. ANN. § 1-210 (West 2022).	Y			CONN. GEN. STAT. ANN. § 1-210(b)-(c) (West 2022); Comm'r of Corr. v. Freedom of Info. Comm'n, 52 A.3d 636, 654 (Conn. 2012).	

State	Public Records Statute: Access	Limited?	Eligibility	Limited Scope	Gatekeeping	Practical Obstacle
Delaware	DEL. CODE ANN. tit. 29, § 10003 (West 2022).	N				
Florida	FLA. STAT. ANN. § 119.07 (West 2022).	Y				Fla. Institutional Legal Servs., Inc. v. Fla. Dep't of Corr., 579 So. 2d 267, 267 (Fla. Dist. Ct. App. 1991); Roesch v. State, 633 So. 2d 1, 2 (Fla. 1993).
Georgia	GA. CODE ANN. § 50-18-71 (West 2022).	N				
Hawaii	HAW. REV. STAT. § 92F-11 (2022).	N				
Idaho	IDAHO CODE ANN. § 74-102 (West 2022).	Y		IDAHO CODE ANN. § 74-113 (West 2022).		
Illinois	5 ILL. COMP. STAT. ANN. 140/3(a) (West 2022).	Y		Howard v. Weitekamp, 57 N.E.3d 499, 502 (Ill. App. Ct. 2015).		Holloway v. Meyer, 726 N.E.2d 678, 683 (Ill. App. Ct. 2000).
Indiana	IND. CODE ANN. § 5-14-3-3 (West 2022).	N				
Iowa	Iowa Code Ann. § 22.2 (West 2022).	N				
Kansas	KAN. STAT. ANN. § 45-218 (West 2022).	N				

State	Public Records Statute: Access	Limited?	Eligibility	Limited Scope	Gatekeeping	Practical Obstacle
Kentucky	KY. REV. STAT. ANN. § 61.872 (West 2022).	Y	KY. REV. STAT. ANN. § 197.025(2) (West 2022).	KY. REV. STAT. ANN. § 197.025(2) (West 2022).	KY. REV. STAT. ANN. § 197.025(4) (West 2022).	
Louisiana	LA. STAT. ANN. § 44:31 (2022).	Y	LA. STAT. ANN. § 44:31.1 (2022).			
Maine	ME. REV. STAT. ANN. tit. 1, § 408-A (West 2022).	N				
Maryland	MD. CODE ANN., GEN. PROVIS. § 4-103 (West 2022).	N				
Massachusetts	MASS. GEN. LAWS ANN. ch. 66, § 10(a) (West 2022).	N				
Michigan	MICH. COMP. LAWS ANN. § 15.233 (West 2022).	Y	MICH. COMP. LAWS ANN. § 15.231 & 232(g) (West 2022).			
Minnesota	MINN. STAT. ANN. § 13.03 (West 2022).	N				
Mississippi	MISS. CODE ANN. § 25-61-5 (West 2022).	N				
Missouri	MO. ANN. STAT. § 610.23 (West 2022).	N				
Montana	MONT. CODE ANN. § 2-6-1003 (West 2022).	N				
Nebraska	NEB. REV. STAT. ANN. § 84-712 (West 2022).	N				

State	Public Records Statute: Access	Limited?	Eligibility	Limited Scope	Gatekeeping	Practical Obstacle
Nevada	NEV. REV. STAT. ANN. § 239.010 (West 2022).	N				
New Hampshire	N.H. REV. STAT. ANN. § 91-A:4(I) (2022).	N				
New Jersey	N.J. STAT. ANN. § 47:1A-1 (West 2022).	Y		N.J. Stat. Ann. § 47:1A-2.2 (West 2022).		
New Mexico	N.M. STAT. ANN. § 14-2-1 (West 2022).	N				
New York	N.Y. PUB. OFF. LAW § 87-88 (McKinney 2022).	N				
North Carolina	N.C. GEN. STAT. ANN. § 132-6 (West 2022).	N				
North Dakota	N.D. CENT. CODE ANN. § 44-04-18 (West 2022).	N				
Ohio	OHIO REV. CODE ANN. § 149.43 (West 2022).	Y	OHIO REV. CODE ANN. § 149.43(A)(8) (West 2022).	OHIO REV. CODE ANN. § 149.43(A)(1)(h) (West 2022).		OHIO REV. CODE ANN. § 149.43(B)(8) (West 2022).
Oklahoma	OKLA. STAT. ANN. tit. 51, § 24A.5 (West 2022).	N				
Oregon	OR. REV. STAT. ANN. § 192.314 (West 2022).	N				
Pennsylvania	65 PA. STAT. AND CONS. STAT. § 67.701 (West 2022).	N				

State	Public Records Statute: Access	Limited?	Eligibility	Limited Scope	Gatekeeping	Practical Obstacle
Rhode Island	38 R.I. GEN. LAWS ANN. § 38-2-3 (West 2022).	N				
South Carolina	S.C. CODE ANN. § 30-4-30 (West 2022).	Y	S.C. CODE ANN. § 30-4-30 (West 2022).			
South Dakota	S.D. CODIFIED LAWS § 1-27-1 (2022),	N				
Tennessee	TENN. CODE ANN. § 10-7-503 (West 2022).	N				
Texas	TEX. GOV'T CODE ANN. § 552.021 (West 2022).	Y	TEX. GOV'T CODE ANN. § 552.028 (West 2022); Hickman v. Moya, 976 S.W.2d 360, 360 (Tex. Crim. App. 1998); Moore v. Henry 960 S.W.2d 82, 84 (Texas Crim. App. 1996).			
Utah	UTAH CODE ANN. § 63G-2-201 (West 2022).	Y	UTAH CODE ANN. § 63G-2-201 (West 2022).			
Vermont	VT. STAT. ANN. tit. 1, § 316 (West 2022).	N				
Virginia	VA. CODE ANN. § 2.2-3704 (West 2022).	Y	VA. CODE ANN. § 2.2-3703(C) (West 2022); Giarratano v. Johnson, 521 F.3d 298, 306 (4th Cir. 2008).			

State	Public Records Statute: Access	Limited?	Eligibility	Limited Scope	Gatekeeping	Practical Obstacle
Washington	WASH. REV. CODE § 42.56.070 (2022).	Y				WASH. REV. CODE § 42.56.565 (2022); Livingston v. Cedeno, 186 P.3d 1055, 1056 (Wash. 2008).
West Virginia	W. VA. CODE ANN. § 29B-1-3 (West 2022).	Y		State *ex rel.* Wyant v. Brotherton, 589 S.E.2d 812 (W. Va. 2022).		
Wisconsin	WIS. STAT. ANN. § 19.35 (West 2022).	Y	WIS. STAT. ANN. § 19.32(1) (West 2022); WIS. STAT. ANN. § 19.32(3) (West 2022).			WIS. STAT. ANN. § 19.37(1m) (West 2022).
Wyoming	WYO. STAT. ANN. § 16-4-202 (West 2020).	N				