**MLRC Media Law Conference**

**September 29 – October 1, 2021**

**Newsgathering Boutique**

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1. **Access to Information During a Pandemic and Beyond**

In response to COVID, many state and federal agencies maintained that processing of FOIA/state open records requests would be slowed down or restricted, most particularly because of the difficulty of processing requests offsite or without violating social distancing parameters. For example:

* In March 2020, the FBI announced on their FOIA website (https://efoia.fbi.gov/#home) that it would not be processing electronically-submitted FOIA requests, and that instead all requests should be submitted by standard mail. The FBI explained that its FOIA processors could not work remotely due to security constraints. <https://www.axios.com/coronavirus-fbi-bans-electronic-foia-requests-759f288f-4a0d-4cea-ac118426cd567fd8.html>

The FBI is once again accepting electronic FOIA requests (as well as requests by standard mail), but its website now advises that “Due to the COVID-19 pandemic, the FBI has adjusted its normal operations and is unable to timely process Freedom of Information Act/Privacy Act (FOIPA) requests received via the eFOIPA portal or by standard mail. Given limited staffing to ensure safety, you can expect delays in both the acknowledgement and substantive response to your FOIPA request. We apologize for this inconvenience and appreciate your understanding during this national emergency.” *See* https://efoia.fbi.gov/#home (last visited Sept. 14, 2021).

* The State Department’s processing of FOIA requests also virtually halted early in the pandemic. In a Declaration filed in the U.S. District Court for the District of Columbia on March 25, 2020 the State Department’s Director of the Office of Information Programs and Services estimated that there was currently a 96% reduction in ability to process FOIA requests because of unavailability of the retired foreign service officers (“REAs”) that the State Department uses to review documents in response to FOIA requests. The Director of IPS stated that such REAs were an integral part of the FOIA review process because of the security clearances and specific expertise. However, because many of the REAs were within the age groups at high risk for serious illness from COVID-19, they were not longer being scheduled for work on site, and most REAs were not yet set up for telework, did not have the technological capacity for telework, or did not want to telework. Declaration available at <https://www.politico.com/f/?id=00000171-1bd0-d4a1-ad77-ffd06f650000>.

The State Department advised in August that “To the extent possible, our teleworking employees are processing a limited number of FOIA cases remotely.” Requesters are encouraged to file new requests using an online electronic submission form, as teleworking FOIA employees will not have regular daily access to paper mail or faxes. *See* <https://foia.state.gov/Request/> (last visited Sept. 14, 2021).

* Other federal agencies are also advising requesters to make request electronically, instead of on paper, to speed processing, while also warning of ongoing delays. See Executive Office for Immigration Review at DOJ, <https://www.justice.gov/eoir/freedom-information-act-foia> (last visited Sept. 14, 2021); Department of Health and Human Services, <https://www.hhs.gov/foia/index.html> (last visited Sept. 14, 2021); Department of Education, <https://www2.ed.gov/policy/gen/leg/foia/foiatoc.html> (last visited Sept. 14, 2021).

For more information on practical or official restrictions on FOIA responses early in the Pandemic, see Richard Salame and Nina Zweig, “Public Access to Information Suffers Under Coronavirus,” *Columbia Journalism Review*, March 25, 2020, available at <https://www.cjr.org/analysis/covid-19-pandemic-foia.php>; “Freedom of Information Act (FOIA) Processing Changes Due to COVID-19: In Brief,” Congressional Research Service, March 27, 2020, available at <https://crsreports.congress.gov/product/pdf/R/R46292>.

In short, to greater or lesser degrees depending on the agency and the request, COVID-19 has in many cases exacerbated existing concerns related to delays in processing FOIA requests.

**Working Within a Broken FOIA System**

The Freedom of Information Act, the law first passed in the 1960s that allows requesters to make requests for government documents, is now fifty years old and showing its age. FOIA offices, which process FOIA requests, are understaffed, underfunded, and sometimes undermined by political pressure to not release information that would be embarrassing to the agency or those running it. In this kind of a world, requesters must learn how to best take advantage of what is, admittedly, a largely broken system. Here are some tips and tricks for getting a story out of government records.

1. **Do you or your organization plan on bringing a lawsuit if necessary?** While FOIA requires that agencies respond to requests within twenty days, that statutory deadline is almost never met. When formulating a request, you have to ask yourself if you intend to sue or not. If you don’t intend to sue, then narrower requests are probably better requests. Although there’s no guarantee that a narrow request will be fulfilled faster than a complex request, there’s a good chance it will be. If, on the other hand, you intend on bringing a lawsuit if the agency does not comply, then a broader request is likely a better request. Indeed, rarely is a single document going to be worth the expense of litigation. A treasure trove of documents may be, though.
2. **Do you know which agency is likely to have the documents you want?** Some agencies (DOJ, DHS, FBI) have large backlogs of requests or are historically very slow in responding to requests. If you believe that another federal agency or a state agency is also likely to have documents that would be relevant to your inquiry, make sure to submit requests to those agencies as well. Some states respond promptly to public-information requests, as do some smaller federal agencies. If you don’t blanket all possible avenues to the requests, you may be doing yourself a disservice.
3. **Public records officers are people, too.** One federal public records officer recently complained that, due to the lack of resources and staff processing FOIA requests, the agency was “tighter than Rick James leather pants.” Public records officers are the gatekeepers of your request; they control when documents go out the door or when they don’t. Because they are overwhelmed, it is important to follow up with the person processing your request and ask for regular updates. (Under FOIA, they are required to give you an estimated date of completion on fulfilling the request, although some agencies have said they can no longer provide an estimate because they are so overwhelmed with requests.) If you have no intention of pursuing litigation, work with the public records officers to narrow requests and home in on the most important bits of the request.
4. **Ask that your request be fulfilled on a rolling basis.** Often a public records officer will have documents ready to go out the door but will hold them back while he or she waits for additional documents to complete the request. At the outset, request in writing that records be produced on a rolling basis so records aren’t just sitting collecting dust while the officer waits to get additional ones.
5. **Do not give up if your request for records is denied or partially denied. Appeal!** Decisions denying requests get overturned on a regular basis. If you don’t appeal denials, you’re potentially leaving records in government file cabinets when they should be in your inbox.
6. **During COVID-19 or other slowdown, consider streamlining or prioritizing request if key information is likely to be in a format processed more quickly by agency.** Many government bodies are working with reduced staff due to COVID-19, and many FOIA personnel are working remotely. If a request may be narrowed or prioritized such that the information sought is subject to processing remotely, you may get your information more quickly.
7. **Take advantage of the vast community of FOIA nerds and the resources they have compiled.** There are a ton of FOIA resources out there to take advantage of. There are several listed in the “Further reading” section below.

*Further reading*: foia.wiki (provides case summaries and other information on how best to appeal adverse decisions); FOIAProject.org (tracks active FOIA litigation); Muckrock.com (clearinghouse for FOIA resources and previously released public records); FOIAMapper.com (provides maps to government agencies to best target requests).

1. **A First Amendment Right of Access to Protests**

The reach of the First Amendment right of access as originally established in *Richmond Newspapers Co. v. Virginia*, 448 U.S. 555 (1980), remains unclear as the Court has not revisited the right in earnest since 1993. While some early courts broadly understood the test—rightly—to provide access beyond criminal judicial proceedings (the facts presented in *Richmond Newspapers* and those cases that followed), others have taken a much more narrow view. Namely, those courts have found that the three-judge plurality and concurring opinions in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), control. Those opinions purported to declare that “[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally.”

The scope of *Richmond Newspapers* came to the fore last summer during widespread protests across the United States. In Oregon, a federal judge issued multiple restraining orders, which enjoined Portland police from “arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a Journalist or Legal Observer (as explained below), unless the Police have probable cause to believe that such individual has committed a crime.” *See Woodstock v. City of Portland*, 20-cv-1035, Dkt. 33 (D. Ore.). In so holding, the court, relying on *Richmond Newspapers*, explained that “‘the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.’ By reporting about the government, the media are ‘surrogates for the public.’”

Further, applying *Richmond Newspapers* and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), the court found that the journalists had raised “serious questions going to the merits”:

[T]he Supreme Court established a two-part test for right of access claims. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering (1) whether the place and process have historically been open to the press and general public and (2) whether public access plays a significant positive role in the functioning of the particular process in question. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating ‘an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’

**The public streets historically have been open to the press and general public, and public observation of police activities in the streets plays a significant positive role in ensuring conduct remains consistent with the Constitution**. Further, there are at least serious questions regarding the police tactics directed toward journalists and other legal observers and whether restrictions placed upon them by the PPB are narrowly tailored.

After additional plaintiffs joined (and a caption change), the court, several weeks later, issued another restraining order, this time against federal defendants. *Index Newspapers v. City of Portland*, No. 20-cv-01035, Dkt. 84 (D. Ore.). On the right of access, the court rejected the government’s arguments that “journalists have no right to stay, observe, and document when the government ‘closes’ streets.” Again relying on *Richmond Newspapers* and Ninth Circuit precedent, the Court emphasized that “the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.” And, the Court held that *Richmond Newspapers* and *Press-Enterprise* was not limited to judicial proceedings:

The Federal Defendants argue that Plaintiffs improperly rely on *Press-Enterprise Co. v. Superior Court*, to articulate the standard to apply in evaluating likelihood of success in Plaintiffs' right of access claim. The Federal Defendants argue that *Press-Enterprise II* applies only to right of access to judicial proceedings. The Ninth Circuit, however, has rejected this precise argument and applied the *Press-Enterprise II* framework to journalists requesting access to cover a government event (a horse roundup [in *Leigh v. Salazar*]). The Government did even mention *Leigh* in its response, despite Plaintiffs’ heavy reliance on *Leigh* in their motion and the Court's citation to *Leigh* in the previous TRO directed against the City. The Court finds that *Press-Enterprise II* applies.

The defendants sought reconsideration of the court’s TRO and, in subsequent argument, several thorny issues were raised regarding the implementation of the TRO in an area of general upheaval. Thus, the court, *see* Dkt. 108, asked for additional briefing on:

* whether the TRO should be modified to include a requirement that any employee, officer, or agent of any Federal Defendant who leaves the interior of the federal courthouse during a protest while carrying or using any crowd-control device must wear a clearly visible unique identifying code on the front and back of the outside of that person's clothing (with white numbers or letters not less than eight inches in height against a dark background) and a further requirement that a list matching each unique identifying code to the name and unit of that person shall be maintained by counsel for the Federal Defendants but need not be disclosed absent further court order after an opportunity to be heard.
* whether the TRO should be modified to restrict the definition of “Journalist” covered by the TRO to a person who is a professional or authorized journalist and who has been issued a colored and distinctive vest prominently indicating “ACLU Authorized Press” (or other similar words) by the ACLU of Oregon and a further requirement that a list of all persons to whom the ACLU of Oregon has issued such a non-transferable distinctive vest shall be maintained by counsel for Plaintiffs but need not be disclosed absent further court order after an opportunity to be heard.

The court eventually denied the motion for reconsideration on the TRO, extended the TRO through August 20, 2020 and set the case for briefing on the preliminary injunction. *See* Dkt. 126. Finally, on August 20, as the TRO was set to expire, the court issued a 61-page opinion granting the preliminary injunction as to the federal defendants (note: the City of Portland had, by this time, stipulated to an injunction preventing arrests of journalists for failing to obey dispersal orders):

In *Press-Enterprise II*, the Supreme Court established a two-part test for a claim of violation of the right of access. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” The public streets, sidewalks, and parks historically have been open to the press and general public, and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution.

The Federal Defendants argue that they have a strong and overriding government interest in protecting federal property. **The Court agrees that protecting federal property is a strong government interest, but the Federal Defendants must craft a narrowly tailored response to achieve that government interest without unreasonably burdening First Amendment rights. The Federal Defendants simply assert that dispersing everyone is as narrowly tailored as possible and to allow anyone to stay after a dispersal order is not practicable or workable. The record, however, belies this assertion.**

Just eight days later, after the federal defendants appealed the preliminary injunction. *Index Newspapers v. U.S. Marshals*, Case No. 20-35739 (9th Cir. Aug. 24, 2020). The Ninth Circuit, by a 2-1 vote, stayed the district court’s order:

Appellants’ request for an immediate administrative stay of the district court’s August 20, 2020 order pending resolution of the emergency motion is granted. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). Based on our preliminary review, appellants have made a strong showing of likely success on the merits that the district court’s injunction exempting “Journalists” and “Legal Observers” from generally applicable dispersal orders is without adequate legal basis. Given the order’s breadth and lack of clarity, particularly in its non-exclusive indicia of who qualifies as “Journalists” and “Legal Observers,” appellants have also demonstrated that, in the absence of a stay, the order will cause irreparable harm to law enforcement efforts and personnel. The August 20, 2020 order is stayed, temporarily, pending resolution of the emergency motion. This administrative stay preserves the status quo as it existed before the district court’s preliminary injunction and temporary restraining order.

Judge McKeown, the only judge not appointed by President Trump on the panel (one of whom was the first appellate judge appointed without the support of his home state senators), dissented:

I respectfully dissent and would deny the Federal Defendants’ request for an administrative stay. The factual conclusions underlying the entry of a preliminary injunction are reviewed for clear error. In light of the deferential review accorded to the district court’s factual finding at this stage, the district court’s extensive factual findings with respect to journalists and legal observers, including the finding that the injunction would not impair law enforcement operations to protect federal property and personnel, and the fact that a temporary restraining order has been in place since July 23, 2020, the government has failed to meet its burden to demonstrate either an emergency or irreparable harm to support an immediate administrative stay.

This view ultimately prevailed in an October 9, 2020 order. *Index Newspapers v. U.S. Marshals Serv.*, slip op. at 11 No. 20-35739 (9th Cir. Oct. 9, 2020). The court’s 70-page order held, among other things, that the federal defendants had not shown they were likely to succeed on the merits of the First Amendment retaliation claim, which required plaintiffs to show: (1) they were engaged in constitutionally protected activity; (2) the defendants’ actions would chill a person of “ordinary firmness” from continuing to engage in that activity;” (3) and the protected activity was a “substantial or motivating factor” in the defendants’ conduct. The Ninth Circuit focused its analysis on the third element, finding that the district court had described almost four dozen instances that “provide exceptionally strong evidentiary support” for the trial court’s findings that the defendants were targeting journalists in retaliation for their exercise of their First Amendment rights, calling the evidence a “shocking pattern of misconduct.”

In February 2021, the Ninth Circuit stayed the appeal after the government sought a stay “[d]ue to the recent change in administration” and “new leadership” at the federal government agencies involved in the case. Back in the trial court, in June 2021, the federal government asked the trial court to dissolve the injunction entirely and deem the matter moot because the events of last summer have dissipated, there exists no retaliatory animus at present, and the preliminary injunction is no longer needed (Dkt. 209). The Plaintiffs opposed the motion (Dkt. 220), arguing the federal defendants were seeking an impermissible advisory opinion about a live controversy and to validate the government’s practice of using force on journalists for doing their jobs. The government replied in support of its motion on August 11, 2021 (Dkt. 230), and the motion remains pending. Meanwhile, the government sought – and obtained – a further stay in the appellate court pending resolution of the June motion in the trial court.

In refusing to stay enforcement of the trial court injunction, the Ninth Circuit summarily acknowledged constitutionally protected activity was at stake. Citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995), the court acknowledged a First Amendment right to film the activities of police officers during a public protest. In so doing, the Ninth Circuit acknowledged that the First, Third, Fifth, Seventh and Eleventh Circuits had similarly recognized the right to record police. (citing *Fields v. City of Philadelphia*, 862 F.3d 353, 359–60 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)).

More recently, in the midst of the Derek Chauvin trial and in the face of renewed unrest spurred by former police officer Kimberly Potter killing Daunte Wright, a federal court in Minnesota granted a group of journalists’ motion for a temporary restraining order. *Goyette v. City of Minneapolis*, No. 20-cv-1302 (D. Minn. Apr. 16, 2021). Among other things the TRO in *Goyette* prohibited the defendants from “arresting, threatening to arrest, or using physical force … directed against any person whom they know or reasonably should know is a Journalist” and it stated that “such persons shall not be required to disperse following the issuance of any order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse.” *Id.* at 19. The TRO remains in effect while the plaintiffs’ motion for a preliminary injunction is pending (a hearing on the motion was held July 28, 2021).

1. **The Right to Record Police Activity**

The right to record police mentioned in passing by the Ninth Circuit in the Portland matter has been the subject of controversy across the country this past year and is front and center at the United States Supreme Court.

Last summer, Kian Kelley-Chung, an independent journalist, was arrested while filming a racial justice protest in Washington, D.C. Officers seized his cell phone, two cameras and their storage media, including all images they contained, and forced the journalist to spend the night in jail before being released without charges the following day. Kelley-Chung claims the police kept his cell phone and camera equipment for 10 weeks. Kelly-Chung sued the District and the Metropolitan Police Department under the First and Fourteenth Amendments. *Kelly-Chung v. Acting Chief Contee, et al.*, Case No. 1:21-cv-00116 (D. D.C. Jan. 13, 2021). In the Complaint, Kelly-Chung argued the police “swept up newsgatherers and photo-journalists as part of dragnet arrests, typically made without probable cause, for the purposes of quelling legitimate protest activity, along with the press’ coverage of it.” He claimed he was arrested simply for practicing his profession after repeatedly identifying himself as a journalist to the officers. The parties settled the matter on undisclosed terms in March 2021, after which Kelley-Chung dismissed the suit. Press reports concerning the settlement indicate Kelly-Chung received financial compensation but no apology. Margaret Barthel, *Independent Journalist Arrested for Filming BLM Protest Settles Suit with D.C. Police,* npr.org, (Apr. 19, 2021).

In August, a Florida appeals court ruled that a woman arrested while filming the detention of her teenage son by law enforcement did not violate Florida’ wiretap law when she recorded the confrontation. Sharron Tasha Ford had been summoned to the scene to retrieve her son after police said he snuck into a movie theater without a ticket. Ms. Ford approached the scene with her cell phone camera rolling. An officer told her it was illegal to record the audio of a police encounter. She continued recording and was arrested for obstruction and intercepting oral communications (Florida’s wiretap statute is an all-party consent statute and imposes criminal liability for violating it).

Ms. Ford sued the City of Boynton Beach, and the case proceeded in state court on her false arrest claim. The trial court granted summary judgment to the City, finding it had probable cause to arrest Ms. Ford for the obstruction and wiretapping charges. The trial court found that the recorded officers had a “subjective and reasonable expectation of privacy in their communications.” The Fourth District Court of Appeal initially upheld the arrest. But on rehearing, the court withdrew its earlier decision and held that officers do not have a reasonable expectation of privacy in their communications. *Ford v. City of Boynton* Beach, Case No. 4D19-3664 (Fla. 4th DCA Aug. 4, 2021). Specially concurring, Judge Martha Warner, who had chided the court’s earlier decision to uphold the arrest, recalled the percipient witness footage of George Floyd’s death in touting the importance of cell phone videos for public accountability of law enforcement. Under those circumstances, she wrote, recording police activities are not subject to the officer’s right to privacy. Importantly, the appellate court found that the First Amendment right to record police, an issue raised only by the amici in the appeal, was not preserved. The Court declined to address it.

But the U.S. Supreme Court has squarely been asked to address the First Amendment right to record police in a case out of the Tenth Circuit styled *Frasier v. Evans*. In *Fraiser*, the Plaintiff found himself a bystander in a confrontation between police and a suspected drug dealer. Law enforcement sought Frasier’s help in removing a sock from the suspect’s mouth, but when additional officers arrived on the scene, they pushed Frasier back. Petitioner moved about ten feet away from the altercation and recorded it on his tablet computer. The video captured the officers punching the suspect in the face several times, his face hitting the cement ground, as his arms were pinned behind his back. The officers were also captured pushing the suspect’s pregnant girlfriend to the ground. When Frasier was returning to his vehicle, an officer approached him and asked him to bring his identification and video footage to the officer’s patrol car. Frasier was aware that what he captured showed police misconduct and did not oblige the police. He lied in his witness statement, attesting that he only had a Snapchat photo, and that it had been deleted when he “snapped” it out. Officers seized his tablet but could not find the video. They returned it to Frasier and let him go. Frasier later shared the video with the Denver Police and a local media outlet.

Frasier sued Denver police officers and others after he was detained, questioned and threatened with arrest for recording the officers beating another man during an arrest. After initially granting the officers’ motion to dismiss on qualified immunity grounds, the trial reconsidered on summary judgment and held the officers were not entitled to qualified immunity because the department had a long-standing policy to permit such recordings. The officers appealed the denial of qualified immunity, and the Tenth Circuit reversed, finding the right to record police was not “clearly established” by the time Frasier recorded the incident. The Tenth Circuit declined to rule on whether there even is a First Amendment right to record the police in public spaces, leaving the question unresolved in Tenth Circuit law.

In July 2021, Frasier petitioned the U.S. Supreme Court for a writ of certiorari. *Frasier v. Evans*, Case No. 21-57 (U.S. Jul. 8, 2021). The petition asks the Court to acknowledge that the right to record the police is clearly established under the First Amendment. The petition chronicles the circuit split over whether the right to record police is clearly established by the First Amendment such that officers are not entitled to qualified immunity against claims premised upon the violation of that right. Like the Tenth, the Third, Fifth circuits had granted qualified immunity to officers accused of retaliating against individuals who recorded them performing their duties, while the First Circuit has denied qualified immunity to officers in right to record retaliation claims. *Fields v. City of Philadelphia*, 862 F.3d 353, 362 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 82- 85 (1st Cir. 2011); *Kelly v. Borough of Carslisle*, 622 F.3d 248, 262 (3d Cir. 2010). Led by the Reporters Committee for Freedom of the Press, 44 media organizations submitted an amicus brief urging the high court to recognize the right to record as clearly established. The officers’ response to the petition is due September 30, 2021.

1. **Marsy’s Law and the Access Issues It Raises**

**What is Marsy’s Law, and which states have adopted it?**

The Victim’s Rights Bill, commonly known as Marsy’s Law, was inspired by Marsalee (Marsy) Ann Nicholas, a college student who was stalked and killed by her ex-boyfriend in 1983. Her brother, Dr. Henry T. Nicholas III, has since led the charge for victims’ rights reform since his mother was confronted by Marsy’s accused murderer in a grocery store about a week after her death; the family was never informed that the accused had been released on bail. Under Marsy’s Law for All, Dr. Nicholas began a national campaign to pass a victims’ rights bill in each state.

In 2008, he succeeded, and California became the first state to add a version of Marsy’s Law to its constitution. As of January 2021, another 11 states have adopted some form of Marsy’s Law, including Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio,[[1]](#footnote-1) Oklahoma, South Dakota, and Wisconsin. At least 30 other states have victims’ rights language already in their constitutions, but efforts to enhance those rights continue. Voters in Montana approved a proposed amendment in 2016, but the state supreme court struck it down on procedural grounds.[[2]](#footnote-2) Similarly, the Pennsylvania Commonwealth Court in early 2021 struck down a proposed Marsy’s Law amendment as unconstitutional for including too many subjects for voter approval within one provision.[[3]](#footnote-3)

The goal of Marsy’s Law is laudable: to protect victims’ rights and give them a voice in the criminal process. Generally, Marsy’s Law includes a slew of rights that require victims, among other things, be notified of key hearing dates, kept free of intimidation or harassment if the accused is release, and be heard at hearings that could implicate a right of the victim.

But one particular provision is troublesome for access to records and criminal justice reporting. Some states’ versions include a provision that impacts information that may be released to the public. For example, California’s law includes a provision granting victims the right to “prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.”[[4]](#footnote-4)

While California’s law limits the prohibition on disclosure to “confidential” information, some states, including South Dakota,[[5]](#footnote-5) North Dakota,[[6]](#footnote-6) and Florida,[[7]](#footnote-7) have a much broader disclosure provision targeting *any* information that can be used “to harass or locate” a victim or a victim’s family. As discussed below, these provisions are wreaking havoc on access, as agencies differ in their interpretation of who is victim, whether the victim must affirmatively invoke the right, and what information may be withheld.

South Dakota has already taken action to ameliorate some of the confusion. Voters approved Marsy’s Law in 2016, and two years later approved an amendment to the law that requires victims to opt into the protections. Moreover, it narrowed the definition of “victim” to encompass only a person against whom a crime or delinquent act is committed. The change gives law enforcement the freedom to release information to help solve crimes, including, for example, the name of a bank at which a robbery occurred, which was previously secret.

In North Dakota, voters approved the Marsy’s Law amendment in 2016. Since then, as discussed in more detail below, the Attorney General’s office has laid out some guidance for the interpretation and implementation of Marsy’s Law, including its view that names, in general, are not protected under Marsy’s Law and cannot be withheld on that basis alone.

In Florida, Marsy’s Law has presented access issues related to both law enforcement and court records. Agencies throughout the state interpret the law’s requirements differently. Victim names and other potentially identifying information are routinely exempted from records.

In Tennessee, a proposal to amend the constitution with Marsy's Law language failed in a 6-5 vote in a House subcommittee last year after sharp opposition from law enforcement and district attorneys, but the sponsor said she plans to try again in 2022. But a recent court decision, *Scoop Media Group v. Montgomery County*, No. MC-CH-CV-MG-20-2 (Aug. 7, 2020), made clear that the current victims’ rights language in the Tennessee constitution does not require court clerks to redact victims’ names and addresses from court records that are indisputably public records.

**What issues have arisen?**

In Florida, Marsy’s Law is sometimes used to block access to the names of police officers who claim to have been victimized while on duty. In April 2021, a Florida appellate court ruled that the names of two police officers who shot and killed civilians in the line of duty were “victims” under Florida’s Marsy’s Law; their names could be secret. In each instance, the police officers responded to a call for service and fatally shot the alleged assailants after they brandished weapons to the officers. Under Florida’s Marsy’s Law, a crime victim is defined as a “person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed.” The court in *Florida Police Benevolent Association v. City of Tallahassee, Florida*, 314 So. 3d 796 (Fla. 1st DCA 2021), ruled that police officers could be “victims” under this definition: “A police officer meets the definition of a crime victim under article I, section 16 when a crime suspect threatens the officer with deadly force, placing the officer in fear for his life. That the officer acts in self-defense to that threat does not defeat the officer’s status as a crime victim.” *Id.* at 801. The case, currently awaiting a decision on whether the Florida Supreme Court will accept jurisdiction, is believed to be the first in the nation to address this issue.

The ruling wreaks havoc on news reporting about use of force incidents. An officer can claim victim status when faced with any threat. This warping of Marsy’s Law is well documented. A *ProPublica/USA Today* investigation revealed that, prior to the recent Florida decision, at least half of Florida’s 30 largest police agencies applied Marsy’s Law to shield the names of on-duty officers involved in use-of-force incidents.[[8]](#footnote-8) For example, it was used to shield an officer’s name when he claimed battery after a hospitalized suspect, who was cuffed with one hand to his bed, swung with his free arm causing the wire of his pulse monitor to hit the officer’s shoulder. The officer pepper-sprayed the man. Moreover, officers sustained no injuries in at least half of the use-of-force incidents in which they characterized themselves as victims. In other cases, officer injuries were minor, such as a scraped knee or bruised finger.[[9]](#footnote-9)

Marsy’s Law’s overbroad application to protecting identifying information and liberally imparting “victim” status is also crippling the public’s right to know basic information about local crime events. For example, the Sarasota County Sheriff’s Office withheld the name and location of a daycare where an employee was charged with abuse, alleging that naming the facility could have identified children to the public.[[10]](#footnote-10) Marsy’s Law has also been used to withhold the name of a school where a sexual assault was reported.[[11]](#footnote-11) The Florida Highway Patrol also withholds the names of all individuals involved in vehicle accidents in press releases.[[12]](#footnote-12) Some agencies refuse to provide even block level crime information.

The same is true in other states. For example, during the first two years after Marsy’s Law took effect in North Dakota, most of the officers involved in eight shootings invoked the right to withhold their names under Marsy’s Law.[[13]](#footnote-13) But agencies across the board applied the law differently, so much so that the Attorney General’s office released general guidance. In fact, he determined that names, generally, should not be withheld at all. Rather, when a name is deemed important enough to redact, the basis must be separate laws, like those that shield the names of minors or victims of sexual assault.[[14]](#footnote-14)

Names of on-duty police officers involved in shootings or other instances of use of force are critical for transparency and police accountability. Without a name, the public is unable to evaluate, not only the officer’s job history, but also the agency’s treatment and discipline of its officers. Knowing officer names enables the public to review officer personnel files and complaint histories to determine patterns of using force, types of force used, the demographics of the civilians against whom force is used, and any discipline imposed. For example, after the death of George Floyd, records revealed that the officer who killed him, Derek Chauvin, had previously been involved in another fatal shooting and had received at least 17 complaints during his time as a police officer, for which he received minimal discipline.[[15]](#footnote-15) New York City police officer David Afandor, who was removed from duty for using a banned chokehold, had previously faced criminal charges for allegedly pistol-whipping a teenager and had eight other complaints against him, ranging from discourteous language to use of physical force and refusing to seek medical treatment.[[16]](#footnote-16)

**What can we do?**

In states that have adopted Marsy’s Law, implementing statutes that iron out some of the ambiguities are critical. Agencies across each state need guidance on when and how to apply redactions, and legislation could help provide uniformity in the application of Marsy’s Law. In addition, access advocates must be willing to challenge the applications of Marsy’s Law in court in the hopes that courts will provide much-needed guidance.

If Marsy’s Law has not been enacted in your state, keep an eye out for constitution revision campaigns and legislation. Marsy’s Law provisions that impact access to records and information in records can be buried in victims’ rights lists. The experience in Florida provides many stories to tell legislators about how poorly drafted Marsy’s Law provisions can undermine transparency – particularly in an age where police misconduct and systemic racial injustice is at the forefront of the national conscious.

1. **Ride-Along Controversy Spurs a New Law Targeting Docuseries**

In the wake of a Texas motorist’s death during a violent arrest, media ride-alongs have become a subject of increased scrutiny, litigation, and a new state law. On March 28, 2019, Javier Ambler died as a result of his encounter with sheriff’s deputies in Williamson County, Texas (which is near Austin). The deputies attempted to stop Ambler for failing to dim his lights to oncoming traffic. Ambler continued driving, and a 22-minute chase ensued, ending when Ambler crashed into a tree. After he exited his car, two deputies tased him repeatedly. Ambler warned officers that he had congestive heart failure, but they continued to use physical force against him. Ambler’s death was ruled a homicide, caused by congestive heart failure and hypertensive cardiovascular disease in combination with excessive forcible restraint.

The incident was filmed by a production company, which had a contract with the Williamson County Sheriff’s Office to accompany officers and film their encounters with members of the public. Footage from these ride-alongs was telecast on a cable network’s “live” docuseries about law enforcement across the country. In addition to Williamson County, the series featured officers from California, Oklahoma, Michigan, Kansas, and other states.

Even though no footage of the Ambler incident was ever broadcast on the docuseries, some politicians and community leaders argued that the agreement between the production company and Williamson County had caused excessive force incidents to increase, as deputies allegedly engaged in physical confrontations with suspects in order to be featured in the docuseries. During the 2021 session, the Texas legislature responded to these concerns by passing H.B. 54, which was dubbed “Javier Ambler’s Law.” In May 2021, Governor Greg Abbott signed the bill into law.

The new statute purports to bar certain types of television production companies from riding along with law enforcement officers and filming them. The statue provides that “[a] law enforcement agency may not authorize a person to accompany and film a peace officer acting in the line of duty for the purpose of producing a reality television program.” Gov’t Code § 614.232. A “reality television program” is defined as a “nonfictional television program that features the same live subjects over the course of more than one episode primarily for entertainment purposes.” *Id.* § 614.231(2). The law does not apply to “reporting on a matter of public concern by a journalist as defined by Article 38.11, Code of Criminal Procedure.” *Id.* § 631.231(2). That definition, drawn from the state’s reporter’s privilege law, provides (in relevant part) that “journalist means a person, including a parent, subsidiary, division, or affiliate of a person, who for a substantial portion of the person’s livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider[.]” Tex. Code Crim. Proc. § 38.11(2). In light of the breadth of the “journalist” exception, it remains to be seen how H.B. 54 will affect docuseries producers’ ability to record law enforcement in public settings. The law’s restrictions on such recording, as well as its differential treatment of “news” and “entertainment,” raise potential First Amendment problems.

In addition to new legislation, the controversy over ride-alongs in Williamson County has spurred new litigation. Another motorist beaten by sheriff’s deputies, Ramsey Mitchell, has sued the officers, the county, the production company, and the cable distributor for various tort claims arising out of his encounter. Mitchell had been pulled over during a routine traffic stop, but his demeanor and profuse sweating led officers to suspect that he was impaired. When they attempted to arrest him, he tried to flee, resulting a several officers tackling him to the ground and trying for several minutes to subdue him. Mitchell was tased and punched repeatedly, and he claims to have suffered severe injuries from the altercation.

Although the production company was not involved in Mitchell’s arrest on a public street, he claims that the officers who used force against him were motivated by a desire to star in the series. Mitchell cites various statistics that he argues supports his allegations that the series led to a spike in excessive force incidents. Against the production company and telecaster, Mitchell alleges claims for negligence, gross negligence, and civil conspiracy. Briefing on the media defendants’ motions to dismiss for failure to state a claim is complete.

1. In Ohio, lawmakers in June 2021 introduced a bill that put the Marsy’s Law amendment into action with workable statutory provisions, including requiring a “Marsy’s Card” be provided to crime victims. *See* Jen Balduf, *Kettering state rep introduces Ohio crime victims ‘bill of rights’*, Journal-News, June 8, 2021, <https://www.journal-news.com/local/kettering-state-rep-introduces-ohio-crime-victims-bill-of-rights/2BZP5MQJU5ARNHIQPRZWJ4Z2HA/>. [↑](#footnote-ref-1)
2. *Montana Ass'n of Counties v. Att'y Gen*., No. 17-0358 (Mt. 2017).  [↑](#footnote-ref-2)
3. Mick Stinelli, *Pa. Commonwealth Court declares Marsy’s Law unconstitutional, referendum votes invalid*, Pittsburgh Post-Gazette, (Jan. 7, 2021), <https://www.post-gazette.com/news/crime-courts/2021/01/07/marsys-law-pennsylvania-court-unconstitutional-ruling-amendment-votes-invalid-commonwealth/stories/202101070127>. [↑](#footnote-ref-3)
4. Cal. Const. Art. I, § 28(b)(4) [↑](#footnote-ref-4)
5. S.D. Const. Art. 6, § 29(5) [↑](#footnote-ref-5)
6. N.D. Const. Art. I, § 25(e) [↑](#footnote-ref-6)
7. Marsy’s Law prevents “the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.” Fla. Const. Art. I, § 16(b)(5). [↑](#footnote-ref-7)
8. *See* Kenny Jacoby and Ryan Gabrielson, USA Today & ProPublica, “*Marsy’s Law was meant to protect crime victims. It now hides the identities of cops who use force.*”, Oct. 29, 2020, <https://www.usatoday.com/in-depth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001/>. [↑](#footnote-ref-8)
9. *See also* Eliot Kleinberg, The Palm Beach Post, “PBSO deputies who shot, killed a man invoke crime-victims law to bar release of their names,” <https://www.palmbeachpost.com/story/news/crime/2020/10/30/pbso-deputies-who-killed-man-use-crime-victims-law-bar-release-their-names/6076712002/>. [↑](#footnote-ref-9)
10. *See* Herald-Tribune, “*Venice daycare worker accused of child abuse*,” Feb. 1, 2019, <https://www.heraldtribune.com/news/20190201/venice-daycare-worker-accused-of-child-abuse>. [↑](#footnote-ref-10)
11. *See* Anne Schindler, First Coast News, “*JSO begins stripping names of officers in police shootings from its ‘transparency’ page, citing Marsy’s Law*,” <https://www.jacksonville.com/story/news/2021/05/06/jso-strips-names-officers-police-shootings-its-transparency-page/4977203001/>. [↑](#footnote-ref-11)
12. *See* Eliot Kleinberg, The Palm Beach Post, “*Former Boca Raton officer, 58, killed in motorcycle crash,*” <https://www.palmbeachpost.com/story/news/local/2020/08/05/former-boca-raton-officer-58-killed-in-motorcycle-crash/112822078/>; Editorial Board, South Florida Sun Sentinel, “*Under Marsy’s Law, darkness descends on the ‘Sunshine State*’, Editorial”, May 27, 2021, <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-marsys-law-victims-names-florida-highway-patrol-20210527-2mr24nj4wrgwlof6dqcks53l5e-story.html> (FHP withheld name of 17-year-old who electrocuted herself after running over a power line). [↑](#footnote-ref-12)
13. April Baumgarten, *Marsy’s Law often invoked to withhold officers’ names*, The Bismarck Tribune, July 22, 2018, <https://bismarcktribune.com/news/state-and-regional/marsy-s-law-often-invoked-to-withhold-officers-names/article_8b7afae6-f7d7-5757-bccc-4f7320f8e78f.html#:~:text=According%20to%20a%20Herald%20analysis,voters%20approved%20the%20constitutional%20measure.&text=The%20officers'%20names%20were%20released%20two%20days%20later>. [↑](#footnote-ref-13)
14. *See* North Dakota Office of Att’y Gen., Guidance On Marsy’s Law, at 4 (Aug. 1, 2017), <https://attorneygeneral.nd.gov/sites/ag/files/documents/MarsysLaw-Guideance.pdf>. [↑](#footnote-ref-14)
15. *See Thousands of Complaints Do Little to Change Police Ways*, New York Times, May 30, 2020, <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>. [↑](#footnote-ref-15)
16. See NYPD officer in ‘chokehold’ video had prior brutality case, FOX 23 NEWS, June 22, 2020, <https://www.fox23.com/news/nypd-officer/U6TS7B2WYJJPZRV563LQGRBJOA/>. [↑](#footnote-ref-16)