State FOIA Laws: A Guide To Protecting Sensitive Water Security Information

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Association of Metropolitan Water Agencies
1620 I Street, NW, Suite 500
Washington, DC 20006
(202) 331-2820 • www.amwa.net

Consultant Services:

Lee M. Zeichner, President
LegalNetWORKS, Inc.
3204 Juniper Lane
Falls Church, VA 22044
(703) 534-2001 • www.legalnet.com

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The safety of the nation's drinking water and wastewater systems is a top priority throughout the country. Key to securing these critical infrastructures is the protection of sensitive information that could be used by domestic or international terrorists to disrupt or destroy these systems. In light of recent actions by utilities to secure their systems by conducting vulnerability and risk assessments, preparing emergency responses to terrorism and complying with government mandates, the Association of Metropolitan Water Agencies (AMWA) prepared this guide to assist utilities in assessing the relevance of their state laws to their particular situations. The document also outlines possible strategies for amending state statutes (if appropriate) and provides legislative language targeting state disclosure exemptions.

All states have enacted laws addressing disclosure of public information. Some specify exemptions within the body of the law, while others have enacted "Catch All" provisions exempting all other statutes. In other cases, court orders expressly exclude information from disclosure. Some states, such as Virginia and Iowa, have already strengthened their laws to protect sensitive information. I hope this guide will help utilities in other states to persuade their state legislators and governors to do likewise.

AMWA, established two decades ago, is an organization of the nation's largest water agencies, which are represented within the association by chief executives. Since AMWA became the water sector's liaison to the federal government in 1998, the association has worked closely with utilities, other water associations and federal agencies on security matters.

Diane VanDe Hei
Executive Director

Association of Metropolitan
Water Agencies

Executive Summary

This guide addresses critical infrastructure protection issues raised by drinking water and wastewater utilities relating to certain security information covered in public disclosure laws. This document offers information that public utilities may use to address open records and freedom of information policies (hereafter "State FOIA"), and to change those policies where necessary for security purposes.

All 50 states provide some access to public records through State FOIA laws and programs. In supporting the rights of citizens, these laws are generally structured to provide governmental transparency – an important policy consideration. However, transparency in government exacts a cost. Open access to vulnerability and risk assessments, for example, provides nefarious elements with a road map for attacking the safe, secure, and reliable supply of services from utilities.

This guide is divided into five parts:

- Part I introduces general themes associated with State FOIA issues. Each state has unique legal and policy traditions for granting access to public records. Planning around these traditions is an important element of any utility strategy. Understanding general principles, as well as commonalities across the states will also aide in crafting various model statutes.

- Part II presents State FOIA models that utilities may use in lobbying their governors and state legislators. These models reflect approaches that already exist in the states and are thus crafted to fit within divergent legal and policy traditions.

- Part III briefly outlines strategies for gaining legislative and political approval.

- Part IV outlines FOIA related amendments recently passed by the states of Virginia and Iowa.

- Part V summarizes general categorization of the FOIA laws and policies of the 50 states and the District of Columbia.

I. General Themes: Open Access and Freedom of Information in the 50 States

In order for drinking water and wastewater utilities to develop a sound State FOIA security strategy, it is important first to assess the legal tradition for the states in which they are doing business. In general, all 50 states provide some legally protected right of access to public records. States have in most cases developed ***statutory*** rights of access, while in other cases the courts develop and analyze the extent of these rights. Finally, in a small number of states, a citizen's right of access to records is incorporated directly into the state's constitution, typically as part of an overarching right of privacy.[1]

State FOIA Laws are not generally superseded or limited by Federal law.[2] As a result, drinking water and wastewater utilities will likely not be able to rely on exemptions in the Federal Freedom of Information Act, or the FOIA exemption recently passed by Congress,[3] for protecting access to information at state levels. Members must also not assume that each state has developed FOIA principles similar to the Federal FOIA law, which the Congress passed in 1966.[4] State FOIA legal traditions are, in most cases, older than the Federal FOIA and distinctive – having developed based on state-based influences and policies.[5]

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[1] ***See, e.g.,*** Montana's constitution, which provides that no person may be deprived of the opportunity to examine documents "except when the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. Ann. Art. II, § 9 (2001).

[2] There are, however, exceptions to this general rule and drinking water and wastewater utilities should check with counsel to determine whether, and the extent to which, state law would recognize Federal FOIA exemptions and exclusions. The New York statute, for example, carves out exclusions for records exempt by the Federal statute as well as the NY legislature. ***Refer to*** N.Y. Pub. Off. Law §87(2)(a) (McKinney 1988).

[3] ***Public Health Security and Bioterrorism Preparedness and Response Act of 2002***, Pub. L. No. 107-188 at §401 (June 12, 2002) (hereafter "Bioterrorism Act"). ("Except for information contained in a certification under this subsection identifying the system submitting the certification and the date of the certification, all information provided to the Administrator under this subsection and all information derived therefrom shall be exempt from disclosure under section 552 of title 5 of the United States Code."). ***Id***. Note, however, that the Bioterrorism Act provides further protection of information by limiting access to the vulnerability assessments and by limiting the purposes for which one might have access.

[4] Pub.L. No. 89-487, 80 Stat. 250, codified in 5 U.S.C. §552 (1977 & Supp. 1988). The Federal FOIA law generally allows access to all public records. Congress allows for exceptions to the general rule based on public policies, such as national security, law enforcement, and economic security (***e.g***., for trade secrets and business proprietary information).

[5] Almost half of the states now have laws that closely model the form adopted by Congress in crafting the Federal FOIA law. This first section examines many of the similarities between the Federal FOIA law and a majority of State FOIA laws. California is typical of a state that has similarities with the Federal FOIA law. ***See, e.g***., California Public Records Act, Government Code §§ 6250-6277 (***Black Panther Party v. Kehoe***, 42 Cal. App. 3d 645, 117 Cal Rptr. 106 (1974)).

Drinking water and wastewater utilities should nonetheless become familiar with the Federal FOIA law as they develop strategies in individual states. The Federal FOIA law continues to influence and inform State FOIA development. In some cases, state jurisdictions will rely on Federal FOIA legal and policy analysis to interpret State FOIA law provisions.[6] In other cases the State FOIA law is patterned after the Federal FOIA law, but has expanded based more on State and local policies and interest group intervention. Finally, certain State FOIA provisions are not modeled after the Federal FOIA, but overlap in significant ways.[7]

a. State FOIA Legal Format

While the state laws vary widely, there are several themes that will help guide counsel and leadership in developing an appropriate model statute and political strategy. Irrespective of the unique legal and policy tradition in the states, almost all states have crafted State FOIA policies around the following questions and principles:

- ***Are the records "public" and, if not, does the State FOIA law cover the information?***

In almost all cases, citizens will not have access to information outside of the public record. Thus, a preliminary and fundamental question to assess is the extent to which information is both a "record" and "public" under the State FOIA law.[8] Even though drinking water and wastewater utility information exists, or has been provided to some office in the state government, does not necessarily mean that the state will treat the data as a record that is publicly available for purposes of the State FOIA law.

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[6] ***See, e.g***., Kentucky, which relies on Federal FOIA analysis when state law does not offer a foundation for assessing the issue. (Attorney general looks to cases interpreting the Federal analogue to KRS 61.878(1)(i)), at 94-ORD-108). An often-cited example of states relying on Federal FOIA policy involves the voluntary submission of sensitive information. Federal FOIA policy provides additional levels of protection for voluntarily provided data based on court interpretations. Refer to judicial interpretations of Exemption 4 of the Freedom of Information Act under cases such as ***Critical Mass Energy Project v. NRC***, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc).

[7] ***See, e.g***., Indiana, which provides for general access to public records, but with specific exemptions. Refer to ***Graninger***, ***Note***: ***Indian Open Public Records: But (b)(6) may be the Exception that Swallows the Rule***, 17 Ind.L.Rev. 555 (1984).

[8] Not all State FOIA laws will define public records. ***See, e.g***., New Hampshire's State FOIA law grants "every citizen […] the right to inspect all public records." R.S.A. 91-A:4, I (statute broadly defines citizen rights and not full extent of public records).

This is especially significant for drinking water and wastewater utilities. States do not generally treat all information held by public utilities as public records for purposes of the State FOIA law. Thus, as an initial area of due diligence and review, utilities should focus in particular on the State FOIA law and its treatment of public utilities.[9]

This preliminary question is additionally relevant for purposes of assessing an appropriate security strategy. An approach that classifies drinking water and wastewater utility data outside of "public records," as defined in a state, would be an aggressive State FOIA strategy. Structuring the State FOIA model in this manner places utility information outside the jurisdiction, custody, or reach of the State FOIA law.

- ***If the information is part of the public record, what is the general rule with regard to public access under the State FOIA law? What conclusions should drinking water and wastewater utilities draw from the general rule?***

Assuming that the information could be part of the public record, as defined, drinking water and wastewater utilities should next assess the general rule with regard to public access under the State FOIA law for the jurisdiction in which they are conducting business. The Federal FOIA statute generally treats public records as publicly available unless exempted under the terms of the Federal statute, some other statute passed by Congress,[10] or judicial decisions that exempt the information from disclosure (***e.g***., Court orders). Thus, at the Federal level, public records are generally subject to disclosure.

Similarly, State FOIA laws generally provide that citizens may access public records. This is an important conclusion for purposes of crafting both a model and political strategy. In many state jurisdictions, there are long and serious traditions that support a citizen's right of access to public records.[11] Thus,

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[9] In Florida, for example, the state government has determined that records kept in connection with a "publicly owned and operated utility" are public records subject to the State FOIA law. Fla. Stat. § 119.07(1), § 366-093(1) (1995). In contrast, New York's Committee on Open Government has expressed an opinion that public utilities are not governmental entities or "agencies" under the Freedom of Information Law ("FOIL") – thus, public utility records would not generally be subject to disclosure. Comm. Open Gov't, FOIL-AO-3019 (1983), FCIL-AO-1049(1979). In addition, Arizona does not generally treat public utility records as public under the Arizona State FOIA law "except matters specifically required to be open to public inspection." A.R.S. § 40-204(C).

[10] These other statutes are known as catch-all exemptions and are discussed in greater detail below.

[11] In Texas, for example, the government has recognized a common law right of access to government information since the turn of the century. (***Jenkins v. State***, 75 S.W. 312 (Tex. Crim. App. 1903). The courts have recently reaffirmed this strong public policy in favor of open government absent specific legislative intervention and intent. See ***Gill v. Snow***, 644 S.W.2d 222,

drinking water and wastewater utilities should assume that public record information is accessible unless there are legal and policy reasons to exempt the information from discovery by citizens in the state jurisdiction.

- ***If public records are generally available, (1) in what manner and (2) to what extent does the State FOIA allow for exceptions, exemptions, or exclusions?***[12]

Drinking water and wastewater utilities should assess both the manner and the extent to which State FOIA laws exempt information from the general, open-access principle. Both of these inquires are critical for purposes of crafting a functional State FOIA exemption. As discussed above, each of the states has a different legal and policy tradition with regard to open-access issues. There is no one-size-fits-all model. As a result, drinking water and wastewater utilities should focus carefully on the particular manner and extent to which states have developed departures from a general open-access rule.

Drinking water and wastewater utilities can assume that there are at least two types of exemptions.[13] The first type includes exempted public-record categories identified directly in the text of the State FOIA law. In most cases, these categories incorporate public policies that would be undermined by open access to all public records – such as records that would disclose or impair -

- An official government agency investigation,
- Details of a police investigations,
- A person's reputation or personal security,[14]
- Trade secrets, financial records, or certain business proprietary information,
- Medical records.

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224 (Tex. App.-Fort Worth 1982) ("…[A]ll information kept by the government is of legitimate public concern unless the legislature rules the need of confidentiality is outweighed by the public's right to know."). ***Id***.

[12] For purposes of this guide, we do not distinguish between the terms ***exception, exclusion, and exemption.*** Both Federal and state law provide different meanings for these terms. However, in this guide, the terms refer to departures from the general rule that all public records are accessible to citizens.

[13] A third type, not explored in this guide, is the extent to which exemptions are mandatory or discretionary. Where citizens request information from the state governments, state authorities will have to determine the extent to which an exemption exists and applies. Where FOIA exemptions are discretionary, State FOIA administrators have leeway to withhold or issue the information; in contrast, where exemptions are mandatory, there is little if any authority to release the information.

[14] These are three of the four categories exempt in the body of the Pennsylvania State FOIA law – 65 Pa. Cons. Stat. §§ 66.2-66.3.

With regard to this type of exemption, drinking water and wastewater utilities should assess the extent to which existing exemptions fully capture relevant drinking water and wastewater utility information. Where such information is not clearly protected, utilities should assess whether the particular state allows for new exemptions in the body of the State FOIA law. As the chart below indicates, many states have implemented legislation incorporating a significant number of exemptions:

State	Number of Exemptions
Oregon	88
Virginia	77
Utah	51
Kansas	44
Maryland	32
Arkansas	15

The second type of exemption is a so-called catch-all category (hereafter "Catch All"). The Catch All category, which is typically added to the exemption portion of a FOIA statute, exempts all other statutes or court orders that expressly exclude records or information from disclosure.[15] This Catch All is used by states to provide flexibility in defining new exemptions without having to amend the State FOIA statute.

The Federal FOIA law also includes a Catch All category.[16] In fact, the recent exemption for drinking water and wastewater utility vulnerability assessments in the Bioterrorism bill is typical of Federal FOIA exemptions created by Congress; that is, in passing the Bioterrorism bill, Congress manages to exempt certain information from Federal FOIA coverage without having to amend the Federal FOIA statute. There are over 40 Catch All exemptions in the Federal law, covering such diverse topics as Federal tax returns sent to the Internal Revenue Service, census information, and certain corporate disclosures to the Securities Exchange Commission.[17] These Catch All categories are also known as FOIA non-disclosure exemptions.

As a matter of strategy, the extent and manner in which states allow for exemptions are critical for counsel to assess. Strategies can include:

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[15] ***See, e.g***., Michigan's Freedom of Information Act, MCLA § 15.243(1)(d) (Michigan's FOIA includes multiple exemptions, such as records subject to attorney-client privilege and contract bids as well as a catch-all exemption.).

[16] See 5 U.S.C. §552(b)(3) (2001).

[17] ***See, e.g.***, 26 U.S.C. § 6103 (2001) (Federal FOIA exempts taxpayer returns).

- Where state jurisdictions allow for multiple exemptions: Drinking water and wastewater utilities can embark on a strategy to promote a FOIA exemption for sound public policy purposes. In some cases, the exemption is part of the State FOIA statute.

- Where state jurisdictions include a statutory Catch All: Similar to the strategy above, drinking water and wastewater utilities can argue for an exemption based on the existence of the Catch All in the body of the State FOIA statute. The existence of the Catch All supports adding exemptions to the body of law for public policy purposes.

- Where state jurisdictions do not include multiple exemptions or a Catch All: Strategies for these state jurisdictions are the most challenging. Drinking water and wastewater utilities in these jurisdictions should examine the law for categories that are traditionally afforded special treatment under state law, such as census information, hospital and medical information, bank records, or school and university files. As preliminary matter, utilities should also examine the extent to which public utility information is somehow exempted from State FOIA coverage. Additional strategies are discussed below.

b. Coverage of Relevant Security Information

In large measure, the issues discussed above relate to the form of the FOIA model proposed. A secondary, but equally important consideration is the scope of coverage for the State FOIA proposal.

Drinking water and wastewater utilities have identified the importance of securing security-related information from potential terrorists. Some information is easy to identify and set forth in a State FOIA exemption. Clearly, certain security information should be captured in a proposed model, including:

- All relevant risk assessment information, including vulnerability assessment results and sources of threat data,

- Plans to prepare for, and to mitigate, terrorist activity,

- Emergency response and recovery plans,

- Security plans and procedures,

- Training, awareness, and other preparedness materials,

- Corporate governance and audit records relating to security, and

- Continuity of operations, business continuity, and disaster recovery plans.

There are, however, additional categories that do not relate directly to security, but nonetheless offer terrorists a roadmap for inflicting damage on water and wastewater utilities. These include:

- Engineering and architectural drawings,

- Details covering information assets and network systems, such as digital processing controls,

- Employee details,

- IT and other vendor outsourcing agreements and plans, and

- Other planning materials not directly related to security (***e.g.***, strategic deployment of capital assets).

As a strategic matter, drinking water and wastewater utilities should analyze whether a ***concise*** FOIA exemption ("all security and risk assessment information") or a longer, more comprehensive proposal is preferable in light of the legislative, policy, and judicial traditions in the state at question. One strategy could be to identify each of the possible information resources that warrant protection. This approach, assuming the statute is approved, clarifies in advance how drinking water and wastewater utilities should plan information exchanges with state governments.

While useful for planning and identifying multiple areas of concern, a comprehensive FOIA proposal could (paradoxically) limit the full breadth of the statute where items are not explicitly covered. Several of the most robust Federal FOIA statutes narrowly define processes as one approach for managing this tension. A "process" definition of drinking water and wastewater concerns might cover, for example – "all information labeled and delivered as risk assessment or security information." Delivering the information fulfills a ***process*** requirement, which limits the amount of government discretion in analyzing whether specific types of information requested are protected based on the statute. In sum, having the government administrator analyze whether a process has been met is preferable to applying definitions to drinking water and wastewater utility documents and materials.

A recently proposed State FOIA statute in Massachusetts provides many of the categories that are of concern to drinking water and wastewater utilities, rather

than focusing squarely and specifically on water-related issues, and this, too, is a useful approach.[18] Categories in the proposed Massachusetts law include:

- Blueprints, plans, and schematic drawings which relate to internal layout and structural elements,
- Security measures,
- Emergency preparedness threat or vulnerability assessments, or
- Other records relating to the security or safety of persons, structures, facilities, utilities, transportation or other infrastructures located within the Commonwealth.

The proposed models in Part II gravitate between these divergent approaches.

[18] Refer to *Safeguarding Certain Records to Ensure Public Safety Act*, House No. 5195, Senate No. 1730 (Filed on June 26, 2002).

II. Model Legislation

Drinking water and wastewater utilities should consider how best to propose legal and policy adjustments to State FOIA principles. The evolving security environment requires an assessment of security information relating to facilities including security and risk assessment planning and implementation. This type of information, if made public through State FOIA laws, could significantly undermine safety, security, and service reliability.

In assessing an appropriate model, utilities should focus on the unique legal and policy traditions in relevant state jurisdictions. As discussed in Part I, there are at least four issues:

State FOIA Topic	Drinking Water and Wastewater Utilities: Strategic Considerations
The state's policy toward "public records" and how the states treat records associated with public utilities.	To what extent can the State FOIA proposal "exclude all drinking water and wastewater utility information" from the "public record?" This approach places information outside of the State's custody for purposes of FOIA analysis.
The general rule for access to public records.	To what extent is drinking water and wastewater utility information generally accessible under State FOIA principles?
The manner and extent that the State's FOIA law allows for exemptions in cases where citizens have access to public records. ***Cases in which FOIA exemptions are permitted based on the text of the State FOIA statute – that is, inclusion or exclusion of a "Catch All" provision that allows the legislature to create non-disclosure exemptions statutes that are distinct from the State FOIA statute.***	How should drinking water and wastewater utilities choose an appropriate State FOIA model? Are sources of utility information generally exempt under the terms of the existing State FOIA law? If not, and if the State jurisdiction traditionally allows for new exemptions, can drinking water and wastewater utilities justify an exemption based on sound public policy arguments? Is it less onerous to amend the text of the FOIA statue or to create a Catch All exemption, similar to the new Bioterrorism non-disclosure exemption in Federal law? Privacy interests will likely be far more sensitive to amending the State FOIA statute than adding an additional exemption pursuant to a Catch All provision.
Information that the exemption covers.	Should drinking water and wastewater utilities broadly define the information to be covered by the FOIA exemption or should the model exemption carefully list each of the security and non-security related items?

The following models respond to the issues above:

Model & Strategy	***Amend State FOIA Statute to include the following -***
Outside of the Public Record Define water and wastewater utility information as outside of the "Public Record."	***Chapter [__]: Section [__]. Confidentiality of risk assessment reports. All risk assessment reports, and information derived therefrom, provided by drinking water and wastewater utilities shall not be public record and shall be maintained by the*** [**NAME OF STATE-BASED DEPARTMENT OR AGENCY OR UTILITY**] ***in a manner which will assure their confidentiality.*** [**OPTIONAL**: ***Whoever violates any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both***.]
States with Catch-All Exemptions or high number of exemption categories in the body of the State FOIA law Utilize the Catch-all Exemption, or leverage State FOIA tradition of adding exemptions in the body of the FOIA law, to add drinking water or wastewater utility exemption.	***Chapter [__]: Section [__]. Confidentiality of risk assessment reports. All risk assessment reports, and information derived therefrom, provided by drinking water and wastewater utilities shall be exempt from disclosure under [***[**INSERT State FOIA STATUTE CITATION**]***.*** **Or more extensive listing:** ***Chapter [__]: Section [__]. Confidentiality of security information. All security information from drinking water and wastewater utilities shall be exempt from disclosure under*** [**INSERT State FOIA STATUTE CITATION**]***. Security information includes …***[**For relevant categories of information, refer to list from § 1b, above].**
Common Law States: No Catch All and Few Exemptions[19] Develop non-statutory State FOIA program. Will require administrative or judicial solution.	In these cases, developing a model statute will likely not provide a viable solution. Common law states will often use balancing tests, administered by State FOIA administrators and/or adjudicated in the courts. Developing written materials to demonstrate that the public interest requires safeguarding the information is an important strategic option.

[19] Drinking water and wastewater utilities in common law jurisdictions should carefully check to see if the state has implemented legislation incorporating a Catch All provision. A typical example is Wisconsin, which is a common law state with regard to State FOIA issues. However, Wisconsin does have a Catch All provision written into the State FOIA law. ***Refer to*** Wis. Stat. §19.36(1) (1988).

Model & Strategy	***Amend State FOIA Statute to include the following -***
Leverage State FOIA laws that recognize FOIA exemptions adopted at the Federal level, such as the recently signed Bio-Terrorism bill. ("New York Model")	**REFER to relevant Federal exemption, such as the Bioterrorism Act's exemption.** The Federal Bioterrorism Act exemption is structured to capture all information provided as part of a defined process – in the legislation, all vulnerability assessment information as well as information generated as a result of performing the vulnerability assessment. The language, without the Federal FOIA references, would read: ***Chapter [__]: Section [__]. All information provided to the*** [**NAME OF STATE-BASED DEPARTMENT OR AGENCY**] ***under this subsection and all information derived therefrom shall be exempt from disclosure under*** **[INSERT State FOIA STATUTE CITATION].** **[For relevant categories of information, refer to list from Part I (b) above].** States might also choose to cite directly to the Federal law, but would need to check with counsel as to whether additional adjustments would be needed to enjoy full FOIA protection under the State FOIA law.
For States that utilize Federal FOIA law to analyze state FOIA principles. "Voluntarily Provided" are favorable terms under Federal FOIA jurisprudence. Where entities voluntarily participate in the regulatory process, public policy favors protecting information for purposes of Federal FOIA exemption analysis."	***Chapter [__]: Section [__]. Confidentiality of risk assessment reports. All risk assessment reports, and information derived therefrom, voluntarily provided by drinking water and wastewater utilities shall be exempt from disclosure under [***INSERT State FOIA STATUTE CITATION***].*** Note that the term "voluntary" might need further definition. A number of definitions exist in Federal FOIA law and counsel should be queried for the most appropriate given the circumstances in each state. One possible definition covers "submittal of information in the absence of an agency's exercise of legal authority to compel access to or submission of such information."

III. Strategies for Implementing State FOIA Models

Drinking water and wastewater utilities must cooperate closely with various state and local equities and stakeholders. Of course, since the legislative branch is principally responsible for FOIA law in the states, developing processes to raise awareness within the legislative branch is an absolute priority. Understanding legal and policy traditions is imperative so that arguments are carefully tailored to match existing legislative traditions.

Similarly, working closely with state governors and other executive leadership will foster sensitivity to State FOIA issues and concerns. Leadership may provide an essential ingredient to successful strategy. Many of the affected critical infrastructures have experienced intense political pushback at the Federal level. Blue Ribbon panels have consistently recommended that Congress develop FOIA solutions.[20] However, privacy communities, stakeholders in the environmental community, and others who adopt a purist view where open-government issues are raised, have exerted significant pushback. Raising awareness about security issues and cultivating leadership roles and responsibilities could prove essential in certain state jurisdictions.

In most cases, drinking water and wastewater utilities will be able to identify a legislative and executive process in which to propose a model FOIA exemption. In some limited cases, however, states require courts to assess whether citizens will have access to information.[21] In these limited cases, identifying an appropriate vehicle will present a more complex challenge. Options include:

- Developing an appropriate test case,
- Stressing awareness and education without pressing for legal results, and/or
- Developing coalitions amongst other similarly situated utilities.

An additional option is to work closely with institutions that can provide support for State FOIA issues. All states now have Homeland Security points of contact and institutions. These political units are all working closely with the Federal government on security-related issues. Drinking water and wastewater utilities should consider how best to coordinate within each state jurisdiction and to benefit from the political influence and awareness within these institutions.

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[20] ***See, e.g.,*** President's Commission on Critical Infrastructure Protection, ***Critical Foundations: Protecting America's Infrastructures*** at 31 (October 1997).

[21] ***See, e.g***., Montana, which includes citizen access to information as part of the state's constitution. For Montana, and states with similar legal processes, alternative strategies must be employed. Mont. Const. Ann. Art. II, § 9 (2001).

IV. Virginia and Iowa: Recent FOIA-related Amendments

Several states have initiated a process of reviewing and altering state FOIA laws and policies. In some cases, the reviews are in response to citizen requests for engineering and structural drawings of plant facilities after September 11; in other cases, September 11 has raised awareness about general threats to critical infrastructures, especially those provided by utilities. Finally, in specific cases, reviews being conducted by the states involve significant concerns for drinking water and wastewater utilities.

Two recently adopted State FOIA laws could be used as models for drinking water and wastewater utilities. Both the Iowa and Virginia state legislators have amended their respective FOIA laws in the aftermath of the September 11 attacks. Both incorporate language that is sufficiently specific to address many of the security concerns that apply irrespective of location and jurisdiction.

In April of this year, the Iowa legislature pushed through an additional exemption to their Open Records law.[22] This statute specifically covers safety and security information in the custody of municipal water facilities – including vulnerability assessments -- and protection of such data from open records examination under Iowa law. The full text of the exemption is printed below:

Recently adopted Iowa FOIA Exemption

C 85, Sec. 2. Section 22.7, Code Supplement 2001, is amended by adding the following new subsection:

NEW SUBSECTION. 43. Records of a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A, where disclosure could reasonably be expected to jeopardize the security or the public health and safety of the citizens served by a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A. Such records include but are not limited to vulnerability assessments and information included within such vulnerability assessments; architectural, engineering, or construction diagrams; drawings, plans, or records pertaining to security measures such as security and response plans, security codes and combinations, passwords, passes, keys, or security or response procedures; emergency response protocols; and records disclosing the configuration of critical systems or infrastructures of a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A. This subsection is repealed effective June 30, 2007.

The Virginia State Assembly similarly amended the State FOIA law earlier this year.[23] The Virginia model is similar to the Iowa statute in that the exemption

[22] Refer to *C 85, Sec. 2. Section 22.7, Code Supplement 2001.*

[23] For a review of each of the exemptions in Virginia law, refer to § 2.2-3705. (Exclusions to application of "chapter" – *i.e.*, State FOIA law). The recent changes to Virginia law also include state open-meeting laws and policies. See, e.g., § 2.2-3711(Closed meetings authorized for certain limited purposes relating to terrorism).

explicitly and clearly includes engineering and architectural drawings; perhaps as importantly, the statute also includes operational records, such as training and emergency response materials. In sum, the law includes the following:

- Plans to prevent or respond to terrorist activity, to the extent such records set forth specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public, or the security of any governmental facility, building, structure, or information storage systems; and

- Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building, structure, or information storage systems.

The Virginia Model additionally "authorizes" the custodian of the records to require citizen-applicants to provide certain "legal" data with a request for information.[24] This includes both name and a legal address within the Commonwealth. While these data points might seem logical, and even essential to fulfilling a FOIA request, not all jurisdictions require background information from the requestor. Transparency and open government principles keep applicant information to an absolute minimum: arguably, such information should not be necessary, and might even discourage citizens from seeking to learn more about government activities. However, the events of September 11 support changes to State FOIA laws that authorize records custodians to gather minimal applicant background information.

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[24] Refer to § 2.2-3704. (Public records to be open to inspection; procedure for requesting records and responding to request; charges – amendment to this section grants custodian authority to request additional details on requestor).

V. Categorization of State FOIA Laws

Each of the 50 states and the District of Columbia handles State FOIA issues in three primary ways:

- Include a Catch All exemption clause in their state code;
- List specific FOIA exemptions in the state law/code; and
- Remain silent on State FOIA exemptions and defer to open records jurisprudence – often from the State constitutions and from the courts in that jurisdiction. Administrative processes treat each request on a case-by-case basis, using administrative processes to "balance" various interests at issue.

The following chart indicates the states that utilize a Catch All exemption clause, the states that spell out more than nine FOIA exemptions in their state code, the states that spell out just a few (less than nine) FOIA exemptions in their state code, and the states that rely on their Constitutional open records policy.

Four Classes of State FOIA Statutes		
Categories		**States**
I	Includes a Catch All exemption clause	1. Alabama 2. Alaska 3. Arkansas 4. California 5. Colorado 6. Connecticut 7. Florida 8. Georgia 9. Hawaii 10. Idaho 11. Illinois 12. Indiana 13. Kansas 14. Kentucky 15. Maine 16. Maryland 17. Massachusetts 18. Michigan 19. Minnesota 20. Mississippi 21. Missouri 22. Montana 23. Nebraska

		24. Nevada 25. New Hampshire 26. New Jersey 27. New Mexico 28. New York 29. North Dakota 30. Pennsylvania 31. Rhode Island 32. South Carolina 33. South Dakota 34. Texas 35. Utah 36. Virginia 37. Washington 38. West Virginia 39. Wisconsin
II	More than nine FOIA exemptions	1. Arkansas (14) 2. California (approx 23) 3. Colorado (approx 17) 4. Connecticut (20) 5. Delaware (14) 6. District of Columbia (10) 7. Florida (30) 8. Georgia (approx 33) 9. Idaho (63) 10. Illinois (approx 37) 11. Indiana (approx 32) 12. Iowa (44) 13. Kansas (approx 130) 14. Kentucky (12) 15. Louisiana (approx 50) 16. Maine (11) 17. Maryland (approx 33) 18. Massachusetts (12) 19. Michigan (25) 20. Missouri (18) 21. Nebraska (14) 22. New York (10) 23. North Dakota (approx 24) 24. Ohio (approx 33) 25. Oklahoma (approx 15) 26. Oregon (approx 55) 27. Rhode Island (23) 28. South Carolina (23) 29. Tennessee (approx 20)

		30. Texas (approx 30) 31. Utah (approx 55) 32. Virginia (77) 33. Washington (approx 32) 34. Wyoming (20)
III	Nine or fewer FOIA exemptions	1. Alabama (2) 2. Alaska (6) 3. Arizona (2)[25] 4. District of Columbia (9) 5. Hawaii (5) 6. Minnesota 7. Mississippi (7) 8. Montana (3)[26] 9. Nevada (1) 10. New Hampshire (4) 11. New Jersey (2) 12. New Mexico (8) 13. North Carolina (7) 14. Pennsylvania (4) 15. South Dakota (1) 16. West Virginia (8) 17. Wisconsin (9)
IV	Constitutional open records policy only	1. Montana 2. North Dakota

[25]Arizona has no statutory disclosure exemptions. Ariz. Rev. Stat. §§ 39-121 et seq. (2001).

[26] Montana's Constitution has an open records provision that serves as the basis for the open records statute. The only constitutional exemption is related to privacy rights. Mont. Const. art. II, § 9.