The Year, So Far, in FOI Law: Novel Evasions and Efforts to Undermine

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The new year has brought with it interesting efforts to circumvent and undermine freedom-of-information (FOI) laws. The very nature of these laws—often unfunded mandates that threaten exposure of embarrassing or incriminating information—can foment hostility between requester and public body. So, yes, FOI resistance is common, but this year is off to an especially ignominious start.

In Arizona, two state legislators refused to turn over records related to requests for emails and text messages about their travel to Washington, D.C., for the January 6 attack on the Capitol. Gallo and asked the court for a declaratory judgment and for sealing of the proceedings. Landry also made an appeal to constitutional privacy, which, if accepted, would have the effect of expanding privacy protections far beyond the state FOI law’s existing exemptions.

Recently, too, the Kentucky House voted to amend the state’s Open Records Act. What began as a modest amendment regarding financial disclosures became a major overhaul the night before the scheduled vote, giving many legislators less than 24 hours to read the bill. The new
The requests were denied under a flimsy assertion and a novel concern.

First, they said the communications are on personal devices and thus not subject to the Arizona Public Records Law. This is a weak argument, as nearly all FOI laws, including Arizona’s, make records on a public official’s private devices disclosable if s/he was acting in an official capacity. They were both public advocates of the “Stop the Steal” movement, and the trip was expressly political.

Second, the legislators claimed the FBI’s ongoing investigations posed the “threat of criminal prosecution,” which gave rise to “Constitutional rights that may overcome the duty to disclose.” So far, there has been no further discussion of that threat superseding FOI law, but it sounds suspiciously close to denying a request in order to avoid self-incrimination.

Meanwhile, in Louisiana, the state attorney general, Jeff Landry, has sued reporter Andrea Gallo over a public records request. Gallo sought information regarding harassment complaints against one of Landry’s top deputies. Landry initially denied the request but later

language includes a residency requirement, meaning that news organizations filing requests would have to be based in Kentucky or affiliated with a news organization in Kentucky. The bill also includes a provision establishing a legislative panel as the final arbiter of access to legislative records. This is a response to a Kentucky Supreme Court decision, in 2019, vesting such oversight in the judiciary. It remains unclear whether the bill will pass, and the governor has not yet weighed in.

FOI laws will forever produce novel evasions and denials. When weighing the potential negative consequences of disclosure against the safety of nondisclosure, and the exceedingly rare odds of a penalty for noncompliance, the incentives are clear.

The press and public alike must remain vigilant in preserving one of the stronger mechanisms for achieving governmental transparency and accountability.

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