

# **Public Records Law**

## **Frequently Asked Questions**

### **Is there any constitutional right to view public documents?**

**Article XII, Section 3 provides, in part, as follows:**

No person shall be denied the right to ... examine public documents, except in cases established by law. (Emphasis added)

It should be noted that this provision does not constitute an absolute guarantee, and is not totally self-executing.

### **What is a “Public Record”?**

LSA-R.S. 44:1A (2) (a) provides the definition of “public records” and the definition is rather detailed and lengthy. Suffice it to say that any documentary materials without regard to their physical form or characteristics, which were used, are being used, or which were retained for use by a “Public Body” are public records for the purposes of Title 44 Chapter 1. So the definition is a very broad definition.

### **Who is responsible for making the public records available to the public?**

In order to impose individual responsibility for the production of a public record the law provides that a “custodian” is the person who heads the public body, or a representative specifically designated by the head of the public body. (LSA-R.S. 44:1A (3)) If there is no designated custodian the public agency head is the “custodian” by default.

### **Is there any information of public bodies that cannot be viewed by the public?**

Section 2 of Title 44 exempts records involved in a legislative investigation.

Section 3 of Title 44 exempts most records of law enforcement agencies that pertain to pending criminal litigation that exists or may be reasonably anticipated. An exception to the exception is the initial arrest report (booking report) of a law enforcement officer who has arrested any person. If there is no longer any prospect of prosecution the investigative records must be produced by the law enforcement agency, because at that time the exemption will expire.

Section 4 of Title 44 contains about 5 pages of exceptions which relate to the exemption of the tax records, welfare applications, and applications and disciplinary activities of the many professional licensing boards.

Section 4.1 of Title 44 is a recent provision enacted by Act 882 of 2001. The object of this amendment was to consolidate all of the exceptions to the public records law, which were not included in Title 44 into a single section in Title 44. Section 4.1 enumerates the statutory citations of exceptions that are in other titles of the Revised Statutes. LSA-R.S. 44:4.1B (1) and provides in Section 4.1A that any exception not enumerated in Chapter 1 of Title 44 shall have no effect. Subsection C of Section 4.1 excepts “... writings, records, or other accounts that reflect the mental impressions, conclusions, opinions, or

theories of an attorney or an expert, obtained or prepared in anticipation of litigation or in preparation for trial.

**What about privacy concerns?**

Additionally, Article I, Section 5 of the Louisiana Constitution establishes the right to privacy so that persons are protected, not from all invasions of privacy, but only from “unreasonable” invasions of privacy. There are no legislative provisions that specifically define the parameters of this basic right, for the purposes of public records examinations, and the courts have been faced with the determination of the extent of the right to privacy in a paucity of cases. In those cases the courts have used the right of privacy guaranteed by Article I, Section 5 of the Constitution to limit this right to inspect public records.

**Are there any limitations on who can examine the records?**

Section 31 provides that any person may obtain a copy or reproduction of any public record, except as otherwise provided. Any person over 18 has the right to inspect and copy or get a copy of a public record that is not exempt from examination, and the custodian has the burden of proving that the record is not subject to inspection. The person may apply in person to the custodian of the public body, to inspect, to copy or to reproduce a public record; however, in *Elliot v. District Attorney of Baton Rouge*, (1995) 664 So.2d. 122, the court opined that a person could make a request by letter.

**What information will I be required to give to gain access to the public records?**

When an in-person request is made, the only information that the custodian may obtain from the person requesting the record is his age and identification, but, he can be required to sign a register.

**When can I inspect the documents?**

The custodian must give all reasonable aid and comfort to the person who desires to inspect public records. The inspection must occur during regular office hours unless otherwise authorized by the custodian. If the applicant seeks to examine records after working hours, he must pay the employee’s overtime pay in advance, and such after-hours inspection is subject to the custodian’s discretion.

**What if the record contains both public and private information?**

The custodian may separate exempt matters from the public record and may observe the person who is exercising his right to inspect. Confidential items, exempt items, or items subject to the right of privacy, must be separated or excised to protect the individual’s rights. The custodian shall provide copies of public records at a reasonable charge unless the person is indigent. Indigents may be furnished records free of charge. When a record is requested and a question arises as to whether it is subject to inspection, the custodian must make a determination as to whether it is, or is not, subject to inspection, and must give the applicant a written certificate within 72 hours of the request to inspect.

The custodian has the duty to locate and segregate the record desired. However, if this is unreasonably burdensome, the custodian need only state, in writing, the general location of the record. If the record is immediately available, it must be presented. If it is not immediately available, it must be made available within three days. If records are being

audited, they are subject, nevertheless, to inspection unless the specific document is in active use by the auditor. If the record is absent from the office, the custodian must give the applicant a certificate stating the reason for the absence, its location, who has the record, and when it was taken from the custodian. He must also answer – in the certificate – in detail, any questions posed by the applicant. (LSA-R.S. 44:34).

It should be emphasized that a statutory exemption of a public record (which is neither confidential nor exempt due to privacy) from the requirement of mandatory examination, does not prevent a custodian from making the record available for inspection, it merely allows him to deny a person the opportunity to have access.

**What can I do if there is a violation?**

Pursuant to LSA-R.S. 44:35, if an applicant has been denied the right to inspect a record by final determination of the custodian, or by the passage of five days from his request, he may file a civil suit for mandamus, injunction, or declaratory relief and may receive attorney's fees, costs of court, and damages if his suit is successful. The burden of proof is on the custodian to sustain his denial of the record. Any non-compliance with an order of the court may be punished as a contempt of court.

**If I am successful in my lawsuit, what do I get?**

If the applicant prevails in his case completely, the court must award reasonable attorney fees. If he prevails in part, the court, in its discretion, may award attorney's fees. If the custodian is found to have acted arbitrarily or capriciously, the court may award actual damages. The custodian is personally liable for any damages awarded to the applicant, but is jointly liable with the public body for attorney's fees and costs except where the custodian has withheld the documents on advice of counsel. If the custodian prevails, the court may, in its discretion, award attorney fees which shall be payable by the applicant.

**Are there any criminal sanctions available?**

Section 37 provides that if a custodian or any other person hinders an applicant in his quest for inspection of a public record, that person shall be fined not less than \$100, or not more than \$1,000, for the first offense, and shall be put in jail not less than one month, nor more than six months. Upon a second or subsequent conviction, the fine is increased to not less than \$250 up to \$2,000 and a jail term from two to six months. These are the same penalties that were enacted in the 1940 law, and were considered severe misdemeanors for that time.

The Criminal Code, Title 13 Section 133, provides that whoever commits the crime of filing false public records shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars, or both.

The Criminal Code, Title 13 Section 132, provides that whoever commits the crime of first degree injuring public records shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars or both. Also, whoever commits the crime of second degree injuring public records shall be imprisoned for not more than one year with or without hard labor or shall be fined not more than one thousand dollars or both.

**How long must records be kept?**

Some public records are permanent records and must be kept for all time, such as the conveyance records of real estate transactions at the parish clerk of court's office. (LSA-R.S. 44:36). The general rule for non-permanent records is that the record must be kept for three years; however, this does not prohibit a custodian from microfilming records within the three year period. In some cases of state records, the state archivist may establish a record maintenance schedule in excess of the three-year requirement where maintenance beyond 3 years is deemed necessary.