



Overview of Louisiana's Public Records Law

By Davis B. Allgood

The Louisiana Public Records Law (LPRL), La. R.S. 44:1, *et seq.*, provides a useful addition to almost any Louisiana lawyer's toolbox. Lawyers invoke the LPRL in widely varied contexts to discover how the government is affecting their clients. Business attorneys for clients in regulated industries, criminal defense attorneys searching for exculpatory information, lawyers for landowners with zoning concerns, these and many others routinely and profitably use the LPRL. For litigation attorneys, the LPRL provides a valuable adjunct to traditional discovery — they need not show relevance nor endure the extended delays of the discovery process to obtain information.

The LPRL's Purpose and Construction

Louisiana's Constitution guarantees the right to inspect public records,¹ and the LPRL implements this right. Under the LPRL, "any person of the age of ma-

jority may inspect, copy, or reproduce any public record,"² and "any person may obtain a copy or reproduction of any public record."³ The LPRL makes it a criminal offense for a public record custodian to violate the law or for a third party to participate in such a violation.⁴ Because it reflects an important public policy, "the Public Records Act should be construed liberally, and any doubt must be resolved in favor of the right of access."⁵

Who Must Retain and Produce Records?

The LPRL charges "custodians" with retaining and producing public records.⁶ The LPRL says "the word 'custodian' means the public official or head of any *public body*" that has custody or control of a public record, or the official's designated representative.⁷ The term "public body" includes "any . . . instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an

entity to perform a governmental or proprietary function."⁸

What Is a Public Record?

The LPRL's definition for the term "public records" covers most public information, regardless of the media on which it has been stored.⁹ According to the 1st Circuit, the "Public Records Law covers virtually every kind of material or information which is recorded for some use in the performance of any public function."¹⁰

Despite the broad definition for "public records," multiple exceptions and exemptions to LPRL coverage exist, both within the LPRL itself¹¹ and in other statutes. The Legislature has collected and listed within one section of the LPRL the exceptions and exemptions contained in other statutory material.¹²

Characterization as a "public" record depends more on the record's use and purpose than the medium or method of its transmission or storage. The Attorney

General has said that emails of a personal nature, unrelated to public business, are not public records even though sent on a public email account.¹³ On the other hand, when public officials conduct official business using private email servers, the LPRL may apply.¹⁴ The Supreme Court has said that, where personal emails sent and received by a public employee at work became the subject of audits conducted on his employer's email system, their "use" in the audits made the personal emails public records.¹⁵

The fact that a public body uses a private firm to carry out some of its public responsibilities does not necessarily protect the resulting records. Where public bodies have hired private entities to perform their functions,¹⁶ or where private entities have received public funds,¹⁷ the resulting records have been subject to production.

Retention Requirements for Public Bodies

The LPRL generally prohibits a custodian from disposing of public records for three years from creation.¹⁸ The State Archivist may establish retention schedules for specified records that deviate from this three-year default period.¹⁹ The LPRL itself creates special retention periods for some records.²⁰ Custodians must retain other records, such as conveyance and mortgage records, permanently.²¹

Production Requirements for Public Bodies

Under the LPRL, a custodian must "present any public record to any person of the age of majority who so requests."²² The custodian "shall make no inquiry of any person who applies for a public record, except an inquiry as to the age and identification of the person."²³

The custodian may require the requesting person to sign a register,²⁴ but the custodian may not "review, examine or scrutinize any copy, photograph, or memoranda in the possession of any such person."²⁵ The custodian also may not discourage public records requests by making conditions difficult or uncomfort-

able for the requester.²⁶ Examinations occur during regular business hours, unless the custodian agrees to another time.²⁷

A requesting person ordinarily has the right to inspect records and to make his or her own copies or to have the custodian provide copies.²⁸ Requesters have the right to obtain their copies in electronic format.²⁹

Local bodies may collect "reasonable" fees for making copies, which fees may vary between local bodies.³⁰ The state commissioner of administration maintains a uniform fee schedule for state agencies.³¹

Custodians ordinarily may not charge requesters for examining records or making their own copies.³² Absent a court order, custodians may not charge for reviewing records to decide whether records are subject to disclosure.³³

Custodians need not create new records that do not already exist. For example, a custodian need not compile lists of information extracted from existing records.³⁴

Ordinarily, custodians must segregate requested records for inspection from other records,³⁵ and they may withhold from the production any nonpublic material.³⁶ However, if segregating the record would be unreasonably burdensome or expensive, or if the custodian already maintains the record in a fashion that makes it readily identifiable, the official may say so in writing and direct the requester to the record's location.³⁷

Requesters may not make such burdensome demands for access and copies that they interfere with execution of a custodian's duties. However, the custodian bears the burden to justify any limitation on a requester's right to view records or obtain copies.³⁸ Moreover, the cumulative effect of existing or possible future requests by other persons should not be a factor in determining whether a particular request is burdensome.³⁹

If a public official receives a request for a record over which he does not have "custody or control," the official must "promptly certify this in writing."⁴⁰ The certificate must "state in detail . . . the reason for the absence of the record . . . its location, what person then has custody . . . and the manner and method in which,

and the exact time at which, it was taken from his custody or control."⁴¹

The fact that an official lacks physical possession of a record does not mean that the official does not have "custody or control" that requires production. A custodian may not avoid its responsibility to control public records by transferring physical possession to a private entity.⁴²

Mechanics of Making a Request

The LPRL prescribes no particular format for requests. The enforcement provisions let a requestor sue to enforce "his in-person, written, or electronic request."⁴³ However, one court has said that to bring an enforcement action the requester must have presented a written or electronic request that adequately identifies both the requester and the records at issue.⁴⁴ Multiple cases recognize the right to make requests for copies by mail.⁴⁵

Time Delays for Production and Remedies for Enforcement

The LPRL says that a custodian must "immediately" present any public records not then in "active use" upon request.⁴⁶ If the record is unavailable because it is in "active use," the custodian must promptly certify this in writing and fix a day and hour within three business days when the requester may access the record.⁴⁷

If the custodian questions whether the record is subject to production, he or she has three business days from the receipt of a written request to consider and then to respond in writing with his or her position.⁴⁸ The custodian must provide written reasons for the determination, including the legal basis for a finding that the record is exempt.⁴⁹

Although the LPRL says that the custodian must provide a determination within three business days, it, in effect, allows five. Under the enforcement provisions, a requester may sue to obtain documents if production has been "denied."⁵⁰ Denial consists either in a determination, or in the passage of five

business days without the custodian having provided either a written determination or an estimate of the time necessary to collect, segregate, redact, examine or review the request.⁵¹

In an LPRL enforcement suit, a requester may seek mandamus, injunctive relief, declaratory relief, attorney's fees, costs and damages.⁵² The requester must sue in the parish where the custodian's office is located,⁵³ and the court must try the suit by preference using summary procedure.⁵⁴ The court reviews the custodian's determination *de novo*, and the custodian bears the burden to justify withholding records.⁵⁵ A requester who prevails in such a suit "shall be awarded reasonable attorney's fees and other costs of litigation;" where the request prevails only in part, the court has discretion to award reasonable attorney's fees.⁵⁶

The LPRL lets requesters recover actual damages caused by an arbitrary and capricious denial of access or an unreasonable or arbitrary failure to respond timely.⁵⁷ An untimely response, if unreasonable or arbitrary, also may justify a discretionary award of civil penalties up to \$100 per day.⁵⁸

Conclusion

The LPRL provides a powerful vehicle for citizens to enforce their right to monitor those who govern them. Legal practitioners will find it worthwhile to obtain and maintain a ready familiarity with its terms.

FOOTNOTES

1. La. Const. art. XII, § 3.
2. La. R.S. 44:31(B)(1) (emphasis added).
3. La. R.S. 44:31(B)(2).
4. La. R.S. 44:37.
5. City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C., 07-1088, 07-1089, p. 14 (La. App. 1 Cir. 10/10/08), 4 So.3d 807, 817, writ dismissed, 08-2507 (La. 1/16/09), 998 So.2d 100, writ dismissed, 08-2525 (La. 1/16/09), 998 So.2d 99, judgment modified on rehearing, 07-1088, 07-1089 (La. App. 1 Cir. 2/13/09), 7 So.3d 21, writ denied, 09-0422 (La. 5/15/09), 8 So.3d 582, writ denied, 09-0530 (La. 5/15/09), 8 So.3d 583, writ denied, 09-0581 (La. 5/15/09), 8 So.3d 584, writ denied, 09-0587 (La. 5/15/09), 8 So.3d 585.
6. La. R.S. 44:31(A).
7. La. R.S. 44:1(A)(3).
8. La. R.S. 44:1(A)(1).

9. La. R.S. 44:1(A)(2)(a).
10. Capital City Press v. East Baton Rouge Parish Metropolitan Council, 95-1345 (La. App. 1 Cir. 6/28/96), 676 So.2d 793, 796, writ granted, 96-1979 (La. 11/15/96), 682 So.2d 745, rev. on other grounds, 96-1979 (La. 7/1/97), 696 So.2d 562.
11. E.g., La. R.S. 44:3; La. R.S. 44:3.1; La. R.S. 44:3.2; La. R.S. 44:3.3; La. R.S. 44:3.4; La. R.S. 44:4; La. R.S. 44:5; La. R.S. 44:19; La. R.S. 44:408; and La. R.S. 44:425.
12. La. R.S. 44:4.1.
13. La. Atty. Gen. Op. No. 10-0272.
14. La. Atty. Gen. Op. No. 01-155 ("If Board members or employees are actually conducting official business through electronic communications [on their personal computers], these private communications then become part of the public record and are subject to production under the Public Records Act.")
15. Shane v. Parish of Jefferson, 14-2225 (La. 12/8/15), 209 So.3d 726.
16. New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals, 16-1809 (La. 5/3/17), 200 So.3d 996; Burkett v. UDS Management Corp., 99-82 (La. App. 3 Cir. 6/2/99), 741 So.2d 838, writ denied, 99-1970 (La. 10/15/99), 748 So.2d 1150; La. Atty. Gen. Op. No. 86-772.
17. State ex rel. Guste v. Nicholls College Foundation, 564 So.2d 682 (La. 1990); Lewis v. Spurney, 456 So.2d 206 (La. App. 4 Cir. 1984), writ denied, 457 So.2d 1183 (La. 1984), writ denied, 458 So.2d 488 (La. 1984).
18. La. R.S. 44:36(A).
19. *Id.*
20. E.g., La. R.S. 44:36(B) (five years for Department of Revenue records); La. R.S. 44:36(C) (agencies receiving federal grants or participating in federal programs must comply with the federal record retention policy); La. R.S. 44:36(D) (Department of Public Safety and Corrections records on adult offenders are kept six years from expiration of the offender's sentence or the offender's death); La. R.S. 44:36(E) (prosecution records kept three years after exhaustion of appeals); and La. R.S. 44:36(F) (audio and video recordings of public meetings kept two years).
21. La. R.S. 44:36(A).
22. La. R.S. 44:32(A).
23. *Id.* La. R.S. 44:31.1 provides an exception to this rule. An individual who is "in custody after sentence following a felony conviction [and] who has exhausted his appellate remedies" is not a person entitled to request public records unless the request relates to efforts to obtain post-conviction relief. The custodian may ask whether the requestor is such an individual.
24. La. R.S. 44:32(A).
25. *Id.*
26. *Id.*
27. *Id.*
28. Title Research Corp. v. Rausch, 450 So.2d 933, 937 (La. 1984); La. R.S. 44:31(B)(2); La. R.S. 44:32(C).
29. St. Tammany Parish Coroner v. Doe, 10-0946 (La. App. 1 Cir. 10/29/10), 48 So.3d 1241; Johnson v. City of Pineville, 08-1234 (La. App. 3 Cir. 4/8/09), 9 So.3d 313; La. Atty. Gen. Op. No. 11-0155.
30. La. R.S. 44:32(C)(1)(a).

31. La. R.S. 44:32(C)(2). See, La. Admin. Code Title 4, § 301 (2013).
32. Foster v. Kemp, 94-1228 (La. App. 1 Cir. 6/23/95), 657 So.2d 681.
33. La. R.S. 44:32(C)(3).
34. Nungesser v. Brown, 95-3005 (La. 2/16/96), 667 So.2d 1036.
35. La. R.S. 44:33(A)(1).
36. La. R.S. 44:32(B).
37. La. R.S. 44:33(A)(2).
38. Elliott v. District Attorney of Baton Rouge, 94-1804 (La. App. 1 Cir. 9/14/95), 664 So.2d 122, 126; Vandenberg v. Parish of Jefferson, 11-52 (La. App. 5 Cir. 5/24/11), 70 So.3d 51, writ denied, 11-1333 (La. 9/30/11), 71 So.3d 289; Beckett v. Serpas, 12-1349 (La. App. 4 Cir. 3/20/13), 112 So.3d 348.
39. Elliott, 94-1804, 664 So.2d at 126.
40. La. R.S. 44:34.
41. *Id.*
42. Alliance for Affordable Energy v. Frick, 96-1763 (La. App. 4 Cir. 5/28/97), 695 So.2d 1126. See also, Times-Picayune Pub. Co. v. Johnson, 94-0790 (La. App. 4 Cir. 10/3/94), 645 So.2d 1174, writ not considered, 95-0212 (La. 3/17/95), 651 So.2d 259, writ denied, 95-0083 (La. 3/17/95), 651 So.2d 260.
43. La. R.S. 44:35(A).
44. Lewis v. Morrell, 16-1055 (La. App. 4 Cir. 4/5/17), 215 So.3d 737.
45. Elliott v. District Attorney of Baton Rouge, 94-1804 (La. App. 1 Cir. 9/14/95), 664 So.2d 122; State ex rel. Denning v. State, 00-2047 (La. 3/30/01), 788 So.2d 437; Bozeman v. Mack, 97-2152 (La. App. 1 Cir. 12/21/98), 744 So.2d 34, writ denied, 99-0149 (La. 3/19/99), 740 So.2d 113.
46. La. R.S. 44:33(B)(1).
47. *Id.*
48. La. R.S. 44:32(D).
49. *Id.*
50. La. R.S. 44:35(A).
51. *Id.* Cf. Foster v. Kemp, 94-1228 (La. App. 1 Cir. 6/23/95), 657 So.2d 681 (*dicta* that the statutory delays do not apply to mail-in requests).
52. La. R.S. 44:35(A).
53. *Id.*
54. La. R.S. 44:35(C).
55. La. R.S. 44:35(B).
56. La. R.S. 44:35(D).
57. La. R.S. 44:35(E)(1).
58. *Id.*

Davis B. (Pepper) Allgood is a senior partner in the Business and Commercial Litigation Practice Group in the Baton Rouge office of Jones Walker LLP. He has litigated and resolved complex business disputes for more than 30 years, including corporate, construction, eminent domain and business tort claims. He is the chair of the Construction Subcommittee of the Expert Witness Committee of the American Bar Association's Section of Litigation. (dallgood@joneswalker.com; Ste. 500, 8555 United Plaza Blvd., Baton Rouge, LA 70809)

