

**“ACTIVE INVESTIGATION PENDING:” LAW ENFORCEMENT’S FAVORITE
RESPONSE TO CIVIL LITIGANTS**

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We have all experienced the frustration of trying to recover evidence from law enforcement after it has been collected. Whether it’s video of a bar-room brawl, or footage of a would-be shoplifter slipping on his/her way out the door, once it’s in law enforcement’s hands, it’s hard to get it back. Often, business owners and shopkeepers believe they don’t need to save a separate copy because the police have one. But then, when the injured party files suit and the police department won’t return a copy, they’re the one facing potential sanctions for spoliation from the court.¹ Why does this happen so often, and what can you do to avoid this situation?

The easiest way to avoid this situation is of course to save as much as you can. “[I]n order for the injured party to pursue a remedy for spoliation, the spoliating party must have been under a duty to preserve the evidence at issue.”² “[T]he duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party.”³ In today’s world of premises liability litigation, almost any incident resulting in bodily injury where law enforcement become involved is likely to result in a lawsuit. Therefore, if the police want a copy, save one for yourself.

However, not everything goes according to plan. So, when you’ve turned over evidence to law enforcement that you no longer have in your own records, what do you do? All 50 States in the U.S. have codified public records laws which lay out procedures for members of the public to access and inspect such records.⁴ In Georgia, O.C.G.A. §50-18-71 establishes the procedures to request access to inspect public records.⁵ “Agencies shall produce for inspection all records

responsive to a request within a reasonable amount of time not to exceed three business days of receipt of a request;...”⁶ O.C.G.A. § 50-18-72 codifies each of the categorical exceptions to public inspection of records. Subsection (a)(4) excludes “[r]ecords of law enforcement, prosecution... in any pending investigation or prosecution of criminal or unlawful activity, other than the initial police arrest reports and incident reports...” from public inspection.⁷

Frankly, the most effective way to gain access to evidence exempted from the Open Records Act is to establish a working relationship with the relevant law enforcement agencies. In Georgia, the pending investigation exception is entirely discretionary on its face and does not instruct law enforcement agencies to withhold all investigative records, but instead merely permits them to do so.⁸ If you know the right people, and know how to ask nicely, a law enforcement agency may agree to give you a copy of the evidence you need. This may be a viable option for a mom & pop shop that has one location and a designated local law enforcement agency. However, according to the Bureau of Justice Statistics, in 2008, Georgia alone had 628 law enforcement agencies across the state.⁹ Assuming other States have comparable statistics, it is virtually impossible for larger retail establishments to maintain a working relationship with every agency in the various jurisdictions where they operate.

The next best way to solve the problem is to change the law itself. “The intent of the General Assembly in enacting the ‘open records’ law was to afford to the public at large access to public records with the exception of certain information which the act exempts from disclosure.”¹⁰ So why would State legislators specifically choose to exempt records in pending investigations and prosecutions? Some jurisdictions articulate concerns for the risk of interference with law enforcement proceedings,¹¹ depriving someone of a right to a fair trial,¹² invading someone’s personal privacy,¹³ disclosing the identity of confidential sources,¹⁴ or endangering the life or

physical safety of people involved in a criminal case.¹⁵ Further, the State has an interest in protecting the privacy of crime victims and their families.¹⁶ The Georgia Supreme Court has held that “Exempting each investigation... until the file is closed does not constitute an unreasonable public policy choice. As noted above, that policy protects the right to privacy of individuals named in investigative records and the integrity of investigations.”¹⁷

But do these concerns really apply to every document within an investigative file in every case? If records are being requested by their original custodians, who provided access to law enforcement in the first place, what public policy concern is raised by their dissemination? There are ways to account for the public policy considerations in favor of non-disclosure, without relying upon a blanket exemption from public. For example, states like Illinois and South Carolina have codified the statutory exemption of law enforcement investigation records in such a way that these concerns must be articulable in the specific document requested for the exemption to apply.¹⁸ If the evidence being sought is intended for civil litigation, and may be dispositive of the action, then as long as there is no risk to the criminal action, it makes more sense to permit the parties access by statute rather than require the party seeking access to instigate further litigation against the state agency. Requiring such in these circumstances is a waste of taxpayer time and money. Legislators should work to include language in the statute that contemplates circumstances where a store owner has done nothing to hide evidence, but merely cannot access it because the State is withholding it.

It is a vitally important practical measure for business owners to actively preserve any evidence that may be relevant to foreseeable litigation. Whether you find yourself changing internal policies, or working to change legislative policies, understanding the consequences of

where your records go and who has custody of them is crucial to protect your defenses against liability.

¹ “‘Spoliation’ refers to the ‘destruction or failure to preserve evidence that is relevant to contemplated or pending litigation.’” Stern v. Pettis, 357 Ga. App. 78, 82 (2020) *Citing* Phillips v. Harmon, 297 Ga. 386, 393 (2015) *See Also* AMLI Residential Properties, Inc. v. Georgia Power Co., 293 Ga. App. 358, 667 S.E.2d 150 (2008); Bridgestone/Firestone North American Tire, LLC v. Campbell, 258 Ga. App. 767, 768, 574 S.E.2d 923 (2002).

Spoliation creates the presumption that the evidence would have been harmful to the spoliating party. *See* American Multi-Cinema, Inc. v. Walker, 270 Ga. App. 314, 317, 605 S.E.2d 850 (2004) *See Also* O.C.G.A. § 24-14-22.

² Phillips, *supra* at 394 (2015) *Citing* Whitfield v. Tequila Mexican Restaurant No. 1, 323 Ga. App. 801, 807(6), 748 S.E.2d 281 (2013).

³ Phillips, *supra* at 396 (2015) *Citing* Graff v. Baja Marine Corp., 310 Fed.Appx. 298, 301 (11th Cir. 2009); West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999).

⁴ *State Public Record Laws*, foiadvocates.com/records.html (last visited March 8, 2021) *Citing* Ala. Code 36-12-40 et seq.; Alaska Stat. 09.25.100 to .220; Ariz. Rev. Stat. Ann. 39-121 to 1

-24; Ark. Code Ann. 25-10-101.; Cal.Gov.Code 6250 to 6270; C.R.S. 24-72-201 et seq; Conn.Gen.Stat.§1-200 et seq; 29 Del. C. § 10001 et seq.; DC Official Code §§2-531; Fla.Stat. Ann. 119.01 to .165; Ga.CodeAnn. 50-18-70 to 76; Haw. Rev. Stat. §92F-1 et seq.; Id Code 9-338 to 350; 5ILCS 140/1; Ind. Code Ann. 5-14-3-1 to 10; Iowa Code Ann. 22.1 to .14; Kan.Stat. Ann. 45-215 to 225; Ky.Rev.Stat..Ann. 61.870 to .884; La.Rev.Stat. Ann. 44:31; Me.Rev.Stat. Ann. 1-13 § 408; Md. Code. Ann., State & Govt., 10-611 to 628; Mass.Gen.Laws Ann. Ch.4, 7; Ch. 66, 10; MCL 15.231; Minn. Stat. Ann. 13:03; Miss. Code Ann. 25-61-1 et seq; Mo. Ann. Stat. 109.180 to .190; Mont.CodeAnn. 2-6-101 to 111; NEB.REV.STAT. 84-712; Nev.Rev.Stat. Ann. 239.005 to .40; NH Rev. Stat. 91-A:1; N.J.S.A. 47:1A-1 et seq; NY Pub. Off. Law Sec 84; N.C. Gen. Stat. 132-1 to 10; N.D. Cent. Code 44-04-18 to -18.8; Ohio Rev. Code. Ann. 149.43; Okla. Stat. Ann. Tit. 51.24A.1 to .18; Or. Rev. Stat. Ann. 192.410 to .505; Pa.Cons.Stat. Ann. Tit. 65, 66..1 to .4; R.I. Gen. Laws 38-2-1 to -14; S.C. CodeAnn. 30-4-10; S.D. Codified Laws Ann. 1-27-1 to -19; Tenn. Code Ann. 10-7-503 et seq.; Tx Code Ann. Secs 552.001 to 552.353; Utah Code Ann. 63G-2-101 to -207; 1 V.S.A. Sec. 315-320; Va. Code Sec. 2.2-3704; Wash. Rev. Code Ann. 42.56.001 to .904; W.Va. Code Sec. 29B-1-1; Wis. Stat. Ann. 19.31 to .39; Wyo.Stat. Ann.9-2-407.

⁵ “A request made pursuant to this article may be made to the custodian of a public record orally or in writing.” O.C.G.A. § 50-18-71(b)(1)(B).

⁶ O.C.G.A. § 50-18-71(b)(1)(A).

⁷ O.C.G.A. § 50-18-72(a)(4).

⁸ O.C.G.A. § 50-18-72(a)(4).

⁹ Brian A. Reaves, U.S. Department of Justice. “Census of State and Local Law Enforcement Agencies, 2008” Appendix table 6 p. 15 (July 2011, JCJ 233982) accessed online <https://www.bjs.gov/content/pub/pdf/cslllea08.pdf> (3/11/2021).

¹⁰ Griffin-Spalding County Hospital Authority v. Radio Station WKEU, 240 Ga. 444, 446, 241 S.E.2d 196, 199 (1978) [Superseded on other grounds by statute as stated in Blalock v. Cartwright, 300 Ga. 884, 799 S.E.2d 225 (2017)].

¹¹ 5 ILCS 140/7(d)(i) and SC ST § 30-4-40(a)(3)(A).

¹² 5 ILCS 140/7(d)(iii) and SC ST § 30-4-40(a)(3)(B).

¹³ SC ST § 30-4-40(a)(3)(C).

¹⁴ 5 ILCS 140/7(d)(iv) and SC ST § 30-4-40(a)(3)(D).

¹⁵ 5 ILCS 140/7(d)(vi) and SC ST § 30-4-40(a)(3)(F).

¹⁶ “Crime victims’ family members, though, do have a strong interest in ensuring respect for their family member’s dignity if they are killed or significantly harmed on camera, and recording policies should reflect respect for these circumstances by requiring consent before public disclosure.” Kyle J. Maury, Comment, *Police Body-Worn Camera Policy: Balancing the Tension Between Privacy and Public Access in State Laws*, 92 NTDLR 479, 496 (November 2016) *Citing* Kim Bellware, *Chicago Releases ‘Chilling’ Video of Cop Shooting Teen 16 Times*, Huffington Post (Nov. 24, 2015, 6:29 PM), http://www.huffingtonpost.com/entry/laquan-mcdonald-video_5654e329e4b079b281897fc2.

¹⁷ Unified Government of Athens-Clarke County v. Athens Newspaper, LLC, 284 Ga. 192, 196 n.32 (2008).

¹⁸ *See* 5 ILCS 140/7(d)(i) -(vii); SC ST § 30-4-40(a)(3)(A)-(G).