

A SURVEY OF PUBLIC RECORD LAWS — ISSUES AFFECTING STATE AND LOCAL CONTRACTS, BIDDERS, AND CONTRACTORS

By Bryan Arnold¹

“Press releases tell us when federal agencies do something right, but the Freedom of Information Act lets us know when they do not.” Sen. Patrick Leahy

“[The Freedom of Information Act is] the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.” Antonin Scalia

I. INTRODUCTION

The following material presents a state-by-state survey of open record laws affecting the interests of state procurement officials, contractors, bidders, and the public. This survey does not serve as an exhaustive analysis of the subject, but provides a starting point for further review. This survey provides guidance regarding the (1) availability of bids, proposals, and related information; (2) availability of contracts and documents generated during performance; (3) protection for trade secrets and proprietary data; and (4) availability software either licensed to or developed by or for a state governmental entity. This analysis does not explore state protections for misappropriation of trade secrets, which may impact the availability of records.

II. ADDITIONAL RESOURCES

The attached analysis is drawn from several sources, which include statute; case law; attorney general opinions and guidance; and overviews provided by media groups and proponents of open government. There are several outstanding organizations that provide invaluable resources that explain the scope and application of state open record laws, some of which have served as source material for this survey. To the extent you have questions about state open record laws, you are encouraged to review the following internet-based resources:

- The Open Government Guide, developed by The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/ogg/index.php>. The report provides the most extensive state-by-state summary of open record laws available.
- The Freedom of Information Center, by the National Freedom of Information Coalition, which provides links to state open government laws and resources, <http://www.nfoic.org/foi-center>.
- Student Press Law Center, providing an automated fill-in-the-blank state open records request letter, <http://www.splc.org/foiletter.asp>.

¹ Bryan Arnold is a founding member of the law firm of Gordee, Nowicki & Augustini LLP, based in Irvine, California.

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

ALABAMA	
Statute	Alabama’s public records law essentially consist of one provision, Ala. Code § 36-12-40, which provides that “[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.”
Bid and Proposal Information	The term “public record” is defined as any document “made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business.” Ala. Code § 41-13-1. The definition is broad enough to encompass bids and proposals. In addition, the term “public writing” has been interpreted broadly to cover any “record as is <i>reasonably necessary</i> to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens.” <i>Stone v. Consolidated Pub. Co.</i> , 404 So. 2d 678, 681 (Ala. 1981).
Contracts and Documents Generated During Performance	The law does not address this subject, but the definition of a public record is broad enough to include contracts and documents in the government’s possession generated during contract performance.
Proprietary Data and Trade Secret Protection:	Alabama’s open records law does not contain any express protection for proprietary data or trade secrets, although there are some statutes outside of a contracting context that provide protection for certain information a private entity is required to supply to a governmental agency.
Access to Software?	This subject does not appear to be addressed by Alabama statute or case law.
ALASKA	
Statute	AS §§ 40.25.100 to 350. AS 40.25.110 provides that “[u]nless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.” The law applies to any “political subdivision, department, institution, board, commission, division, authority, public corporation, council, committee, or other instrumentality of the state or a municipality.” AS § 40.25-220(3).
Bid and Proposal Information	Release of bids and proposals, which are available for inspection, are governed by procurement statutes, rather than by the public records law. Sealed bids are “not open for public inspection until after the notice of intent to award a contract is given.” AS § 36.30.140(b). In such cases, “[t]o the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential.” <i>Id.</i> With respect to proposals, “proposals are open for public inspection after the notice of intent to award a contract is issued.” AS § 36.30.230(a). Material designated as trade secrets or proprietary may be excluded from inspection if the procurement officer concurs. <i>Id.</i> If the procurement is cancelled before notice of intent to award is issued, the proposal may be returned to the offeror. AS § 36.30.230(b)
Contracts and Documents Generated During Performance	The definition of “public records” includes items “that are developed or received by a public agency[] or by a private contractor for a public agency.” AS § 40.25.220(3). This definition should be broad enough to encompass contracts and

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	documents generated during performance. It is unclear the extent to which such information may be protected as a trade secret or confidential business information. The Alaska Supreme Court has recognized a deliberative process exemption to disclosure, which could also limit the availability of some information. <i>Fuller v. City of Homer</i> , 75 P.3d 1059, 1063 (Alaska 2003) (document is exempt if it “is an internal communication or one that the government directly solicited and that the communication is both predecisional and deliberative”).
Proprietary Data and Trade Secret Protection:	Records that constitute proprietary, privileged, or trade secret information under the Alaska Gasline Inducement Act (AS 43.90.150 or 43.90.220(e)) are not open to inspection. AS 40.25.120(12). With respect to contracts, “[t]he chief procurement officer and the commissioner of transportation and public facilities may establish procedures to protect the confidentiality of trade secret and confidential technical data.” 2 AAC 12.770.
Access to Software?	The definition of “public records” does not include “proprietary software programs.” AS 40.25.220(3).
ARIZONA	
Statute	A.R.S. §§ 39-101 to 161. “Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.” A.R.S. § 39-121.
Bid and Proposal Information	Bids and proposals are not open for public inspection until after the contract is awarded. If a bidder designates any material in the bid to be a trade secret or proprietary, and the state agrees, such information “in the bid documents shall remain confidential in accordance with rules adopted by the director.” A.R.S. § 41.2533(D); A.R.S. §41.2534(D).
Contracts and Documents Generated During Performance	All records are presumed to be open to the public but there are common law exceptions, including where a document “is either confidential or disclosure would be detrimental to the best interests of the state.” <i>Carlson v. Pima County</i> , 141 Ariz. 487, 490 (Ariz. 1984).
Proprietary Data and Trade Secret Protection:	Arizona’s public records law does not contain an express exemption for trade secrets and proprietary information. Arizona courts have, however, recognized common law exceptions to disclosure, including where a “document is either confidential or disclosure would be detrimental to the best interests of the state.” <i>Id.</i> Courts have recognized that trade secrets are “protected by the confidentiality exception to disclosure.” <i>Phoenix Newspapers, Inc. v. Keegan</i> , 201 Ariz. 344, 351 (Ariz. Ct. App. 2001). In addition, such information may be protected by other statutory provisions relating to the subject matter at issue. For example, proprietary information in bids and proposals, for example, must remain confidential. A.R.S. § 41.2533(D); A.R.S. §41.2534(D).
Access to Software?	This subject does not appear to be addressed by Arizona statute or case law.
ARKANSAS	
Statute	Arkansas Freedom of Information Act, Ark. Code Ann. §§ 25-19-101 to 25-19-109.

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Bid and Proposal Information	Access to bid and proposal information may be limited. Arkansas' FOIA contains an exemption for "[f]iles that, if disclosed, would give advantage to competitors or bidders." Ark. Code Ann § 25-19-105(b)(9)(A). An agency may assert this exemption on behalf of bidders to prevent the release of information that could give another bidder a competitive advantage, including access to proprietary information. <i>Arkansas Dep. of Finance v. Pharmacy Associates, Inc.</i> , 970 SW 2d 217, 220 (Ark. 1998) (state agency can claim the competitive-advantage exception on behalf of the person who supplied the information and withhold information from the winning bid that the bidder deemed proprietary).
Contracts and Documents Generated During Performance	Any contract executed by a state agency is a "public record." Ark. Code Ann. § 25-18-501 ("When any state agency enters into a contract with any entity, the contract shall be deemed a public record in accordance with the Freedom of Information Act of 1967, § 25-19-101 et seq."). Records generated and maintained by an agency during contract performance could be subject to FOIA. "Public records include any information "required by law to be kept or otherwise kept, and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds." Ark. Code Ann. § 25-19-103(5)(A). In addition, the law presumes that "all records maintained in public offices or by public employees within the scope of their employment" are public records. <i>Id.</i> However, Arkansas FOIA precludes the release of information "that, if disclosed, would give advantage to competitors or bidders." Ark. Code Ann § 25-19-105(b)(9)(A).
Proprietary Data and Trade Secret Protection:	FOIA does not provide express protection for trade secrets and proprietary data, however, the law exempts the production of information "that, if disclosed, would give advantage to competitors or bidders." <i>Id.</i> An agency need not "own" the data or have a proprietary interest itself to assert this restriction, but may assert it on behalf of its contractors and bidders. <i>Arkansas Dep. of Finance</i> , 970 SW 2d at 220.
Access to Software?	The definition of a "public record" does not include "software acquired by purchase, lease, or license." Ark. Code Ann. § 25-19-103(5)(B)
CALIFORNIA	
Statute	California Public Records Act, Cal. Govt. Code §§ 6250 to 6276.48. Act applies to all state and local agencies. Cal. Gov't Code § 6252.
Bid and Proposal Information	With respect to state acquisition of goods and services using the competitive bidding process (with award to the lowest responsible bidder), all bids are to be open for inspection after bid opening. Cal. Pub. Cont. Code §§ 10305, 10342. With respect to request for proposals, proposals are open for public inspection as a matter of practice after the agency has issued its Notice of Intent to Award a contract. State solicitations often contain terms providing that the bid or proposal becomes the property of the State. California courts have also recognized that bid and proposal information is available under the Public Records Act, but have held that the proposals need not be disclosed until after the agency has completed negotiations with the proposed

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	awardee. <i>Michaelis, Montanari & Johnson v. Superior Court</i> , 38 Cal. 4th 1065, 1077 (2006) (airport could properly wait until it concluded its negotiations to disclose competing proposals).
Contracts and Documents Generated During Performance	A “public record” is any “writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” Cal. Gov’t Code § 6252(e). However, the Public Records Act contains a deliberative process exemption for “[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business,” provided that the public interest in disclosure does not outweigh the public interest in retaining the information. Cal. Gov’t Code § 6254(a). This exemption does not apply to final determinations and the rationale supporting these determinations. In addition, the Public Records Act contains a “catch-all” exemption that allows an official to withhold information if “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Cal. Gov’t Code § 6255.
Proprietary Data and Trade Secret Protection:	The Public Records Act exempts information the disclosure of which is “exempted or prohibited pursuant to federal or state law.” Cal. Gov’t Code § 6254(k). This includes state evidentiary law, which allows the holder “to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” Cal. Evid. Code §1060.
Access to Software?	Computer software developed by a state or local agency is not a public record, even though the agency “may sell, lease, or license the software for commercial or noncommercial use.” Cal. Gov’t Code § 6254.9(a). “Computer software” is defined to include “computer mapping systems, computer programs, and computer graphics systems.” Cal. Gov’t Code § 6254.9(b). Electronic records are discoverable, but the Act does not require the release of electronic information in the form it is held if to do so “would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.” Cal. Gov’t Code § 6253.9(f).
COLORADO	
Statute	Colorado Open Records Act, C.R.S. §§ 24-72-201 to 24-72-309. The Act applies to all state agencies and any political subdivision of the state. C.R.S. § 24-72-202.
Bid and Proposal Information	Bid and proposal information may be discoverable, but is subject to protections for trade secrets and proprietary data. <i>See</i> C.R.S. § 24-72-204(3)(a)(IV). Courts apply the test set forth in <i>National Parks & Conservation Ass’n v. Morton</i> , 498 F.2d 765 (D.C. Cir. 1974) to assess whether the exemption applies. <i>International Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.</i> , 880 P.2d 160, 165 (Colo. Ct. App. 1994). If release of the information were ““(1) to impair the government’s future ability to gain necessary information[] or (2) [] cause substantial harm to the competitive position of the person providing the information’ the financial information is confidential for purposes of the statutory exemption.” <i>Id.</i> at 166 (quoting <i>Freedom Newspapers, Inc. v. Denver & Rio Grande Western R.R. Co.</i> , 731 P.2d 740, 743 (Colo. App. 1986)).
Contracts and Documents	Contracts executed by a state or local agency do not constitute confidential information and must be disclosed under the

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Generated During Performance	Act. <i>Freedom Newspapers, Inc.</i> , 731 P.2d at 743. With respect to other information, a “public record” includes “all writings made, maintained, or kept by the state, any agency, institution . . . or political subdivision of the state.” C.R.S. § 24-72-202(6)(a)(I). The Act does contain a “common law governmental or “deliberative process” privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government.” C.R.S. § 24-72-204(3)(a)(XIII). The Act also contains a “catch-all” provision exempting information if the custodian believes disclosure “would do substantial injury to the public interest” if released. C.R.S § 24-72-204(6)(a).
Proprietary Data and Trade Secret Protection:	The custodian of a record is required to deny access to “[t]rade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data.” C.R.S. § 24-72-204(3)(a)(IV).
Access to Software?	The term “writing” includes digitally stored data, but does not include computer software. C.R.S. § 24-72-202
CONNECTICUT	
Statute	Connecticut Freedom of Information Act (FOIA), Conn. Gen. Stat. §§ 1-200 to 1-242. “Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records. . .” Conn. Gen. Stat. § 1-210. FOIA applies to any state agency, political subdivision of the state, or “[a]ny person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law.” Conn. Gen. Stat. § 1-200(1).
Bid and Proposal Information	All bids and proposals are open for public inspection once a contract is awarded. Conn. Gen. State § 4a59 (“Each bid or proposal, with the name of the bidder, or proposer, shall be entered on a record, and each record, with the successful bid or proposal indicated thereon, shall, after the award of the order or contract, be open to public inspection.”). In addition, FOIA provides that “[t]he names of firms obtaining bid documents from any state agency” shall be disclosed. Conn. Gen. Stat. § 1-210(e)(3)
Contracts and Documents Generated During Performance	A “public record” is any “recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract” to perform a government function. Conn. Gen. Stat. § 1.200(5). This definition appears to be broad enough to include contracts and documents in the government’s possession relating to contract performance. However, such documents may be subject to protections for trade secrets. Conn. Gen. Stat. § 1-210(b)(5). Also, FOIA contains a deliberative process exemption for “[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.” Conn. Gen. Stat. § 1-210(b)(1).
Proprietary Data and Trade Secret Protection:	FOIA contains protections for trade secrets. A “trade secret” is defined as (A) “information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy; and (B) Commercial or financial information given

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	in confidence, not required by statute.” Conn. Gen. Stat § 1-210(b)(5).
Access to Software?	This subject does not appear to be addressed by Connecticut statute or case law.
DELAWARE	
Statute	Delaware Freedom of Information Act (FOIA), Del. Code Ann. 29 § 10001 to 10006. “All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” Del. Code Ann. 29 § 10003(a).
Bid and Proposal Information	A “public record” is “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.” Del. Code Ann. 29 § 10002(g). Bids and proposals received by the government appear to fall within this definition. Delaware’s FOIA does contain protections for trade secrets and confidential data.
Contracts and Documents Generated During Performance	Although not specifically addressed, contracts and documents in the government’s possession generated during performance would appear to fall within the definition of a “public record.” However, there are exceptions for trade secrets and confidential information. Del. Code Ann 29 § 10002(g)(2). Also, Delaware’s FOIA does not apply to “records specifically exempted from public disclosure by statute or common law.” Del. Code Ann. 29 § 10002(g)(6).
Proprietary Data and Trade Secret Protection:	“Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature” are deemed not to be public. Del. Code Ann. 29 § 10002(g)(2).
Access to Software?	This subject does not appear to be addressed by Delaware statute or case law.
DISTRICT OF COLUMBIA	
Statute	Freedom of Information Act (FOIA), D.C. Code Ann. §§ 2-531 to 2-540
Bid and Proposal Information	The subject does not appear to be expressly addressed by FOIA. Bids and proposals could relate to the expenditure of funds under Section 2-536(a)(6) and, thus, may have to be disclosed. Such information may be subject to protections for trade secrets and proprietary data. D.C. Code Ann. § 2-543(a)(1).
Contracts and Documents Generated During Performance	Contracts are available for inspection. D.C. Code Ann. § 2-536(a)(6) (“Information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies . . .” must be made available). In addition, an official must make available for inspection “any record produced or collected pursuant to a contract with a private contractor to perform a public function.” D.C. Code Ann. § 2-252(a-3). FOIA also provides that the official with “programmatically responsibility for the contractor shall be responsible for making such records available to the same extent

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	as if the record were maintained by the public body.” <i>Id.</i> FOIA, however, does provide for protection of trade secret and proprietary data. D.C. Code Ann. § 2-543(a)(1).
Proprietary Data and Trade Secret Protection:	D.C.’s FOIA contains an exemption for “[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.” D.C. Code Ann. § 2-543(a)(1).
Access to Software?	This subject does not appear to be addressed by District of Columbia statute or case law.
FLORIDA	
Statute	Florida Public Records Law, Fla. Stat. §§ 119.01 to 119.19. “It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person.” Fla. Stat. § 119.01(1).
Bid and Proposal Information	Sealed bids and proposals must be made available for inspection after contract award or within 10 days after bids or proposals are opened. Fla. Stat § 119.07(3)(m).
Contracts and Documents Generated During Performance	Florida’s Public Records Law appears to extend to all contracts and documents related to contract performance. A “public record” open for inspection “means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Fla. Stat. § 119.011(12). However, information properly protected as a trade secret may be exempt from disclosure. <i>See Sepro Corp. v. Fla. Dep’t of Env’tl. Prot.</i> , 839 So. 2d 781, 785 (Fla. App. 2003) (withholding communications containing trade secrets supplied during contract performance).
Proprietary Data and Trade Secret Protection:	Information that qualifies as a trade secret may be exempt from disclosure. <i>See id.</i> However, trade secrets are protected only if the holder of the trade secret takes measures (such as labeling) that “prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.” <i>Id.</i> at 783 (quoting Fla. Stat. § 812.081(1)(c)).
Access to Software?	<p>“Data processing software” is included in the definition of a “public record.” Fla. Stat. § 119.011(1). However, software that is a trade secret and licensed under an agreement that prevents its release is exempt from disclosure. Fla. Stat. § 119.07(3)(o). An agency may not execute a contract if it might impair the public’s ability to inspect public records. Fla. Stat. § 119.01(2)(c) (“agency may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records”).</p> <p>Agency-produced data processing software is also exempt if it is “sensitive.” Fla. Stat. § 119.07(3)(o). “Sensitive” software means that portion of the data processing software that (1) collects, stores, or retrieves information exempt from disclosure, (2) used for handling financial information of the agency, or (3) relates to authorization and security measures</p>

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	for automated software. Fla. Stat. § 119.07(3)(o)(2).
GEORGIA	
Statute	Georgia Open Records Act, O.C.G.A. § 50-18-70. Law applies to all state agencies and political subdivisions. <i>Id.</i>
Bid and Proposal Information	With respect to the acquisition of real property, bids and proposal are not to be disclosed until the contract is awarded or the project terminated. O.C.G.A. § 50-18-72 (“Engineers’ cost estimates and pending, rejected, or deferred bids or proposals until such time as the final award of the contract is made or the project is terminated or abandoned.”). The statute does not address other situations, but “public records” are defined as “documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency.” O.C.G.A. § 50-18-70(1). This would appear to encompass bids and proposals, although such information may be subject to trade secret protections.
Contracts and Documents Generated During Performance	Contracts and documents in the government’s possession regarding performance would appear to fall within the definition of a “public record.” However, such information may be subject to trade secret protections. O.C.G.A § 50-18-72(b)(1).
Proprietary Data and Trade Secret Protection:	“Any trade secrets obtained from a person or business entity which are of a privileged or confidential nature and required by law to be submitted to a government agency or to data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher learning, or other governmental agencies, in the conduct of or as a result of, study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where such data, records, or information has not been publicly released, published, copyrighted, or patented.” O.C.G.A. § 50-18-72(b)(1).
Access to Software?	The Act does not apply to “any computer program or computer software used or maintained in the course of operation of a public office or agency.” O.C.G.A. § 50-18-72(f)(2).
HAWAII	
Statute	Uniform Information Practices Act, Haw. Rev. Stat. § 92F-1 to 92F-42. “All government records are open to public inspection unless access is restricted or closed by law.” Haw. Rev. Stat. § 92F-11(a).
Bid and Proposal Information	State and local agencies are required to make available “[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13.” Haw. Rev. Stat. § 92F-12(3). The Office of Information Practices (OIP) has determined that disclosure may be limited where it would frustrate a legitimate governmental function under §92F-13. OIP Op. Ltr. No. 94-26, p. 7. This includes disclosure of bids and proposals before contract award. <i>Kaapu v. Aloha Tower Dev. Corp.</i> , 74 Haw. 365, 389 (1993) (prohibiting disclosure of proposals before negotiation of final lease because release of “trade secrets and confidential commercial and financial data . . . could foreseeably give an unfair competitive advantage to other developers in the event negotiations were to break down”). In addition, OIP has found that an agency does not have to release before the deadline for proposal submission the identity of those who picked up a

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	solicitation, attended a bidders' conference, or submitted a notice of intent to bid. OIP Op. Ltr. No. 94-26 at 2. More recently, OIP extended this principal to documents filed with pre-award protests containing information about prospective offerors (including their identity) and proposals they might submit. OIP Op. Ltr. 09-02, pp. 4-5 (requiring redaction of protestors' identity and bits of proposal information contained in the protest prior to disclosure). After proposal submission, this information may be disclosable, but may still be subject to protections for trade secrets and proprietary data under §92F-13(3).
Contracts and Documents Generated During Performance	Contracts and documents generated during performance would qualify as public records, but are subject to §92F-13(3), which allows an agency to withhold documents if disclosure would frustrate a legitimate government function.
Proprietary Data and Trade Secret Protection:	The Act does not contain express protections for proprietary data and trade secrets. However, the Act contains an exemption for "Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3). OIP guidance suggests this exemption may include: (1) "Government Purchasing Information that, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency;" (2) "Proprietary Information such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it; and (3) "Confidential Business Information which includes trade secrets or confidential commercial and financial information where there is a likelihood of substantial competitive harm, for example, where disclosure would allow competitors to electively under price, estimate profit margins, or determine market and supply weaknesses." http://www.state.hi.us/oip/uipa.html
Access to Software?	Release of proprietary information, including software, is one of the things designed by OIP as protected from disclosure under §92F-13.
IDAHO	
Statute	Idaho Code § 9-337 to 9-350. The law applies to all state and local agencies. A "public record" includes "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics." Idaho Code § 9-337(13).
Bid and Proposal Information	Bid and proposal information does not appear to be exempt from disclosure, but trade secrets (including those that are contained in responses to RFPs and other forms of solicitations) are exempt. Idaho code § 9-340D(1).
Contracts and Documents Generated During Performance	Contracts and documents generated during performance appear to fall within the definition of a "public record." However, trade secrets may still be protected under § 9-340D(1).
Proprietary Data and Trade	Trade secrets are exempt from disclosure. Idaho Code § 9-340(D)(1). A "trade secret" is "information, including a

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Secret Protection:	formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in progress research that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” <i>Id.</i>
Access to Software?	“Computer programs developed or purchased by or for any public agency or independent public body corporate and politic for its own use” are exempt from disclosure. Idaho Code §9-340D(15).
ILLINOIS	
Statute	Freedom of Information Act 5 ILCS 140/1 to 140/11.5 (effective January 1, 2010). The new act applies to all state and local governmental bodies. 5 ILCS 140/2(a).
Bid and Proposal Information	Bids and proposals are exempt from disclosure until after the contract is awarded or a final selection is made. 5 ILCS 140/7(1)(h). In addition, this exemption includes “information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body.” <i>Id.</i>
Contracts and Documents Generated During Performance	Contracts and documents generated during performance may be discoverable. The Act provides that “[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public.” 5 ILCS 140/2.5. However, the Act provides for protection of trade secrets and commercial information. 5 ILCS 140/7(1)(g). It also contains a deliberative process exception for “[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated.” 5 ILCS 140/7(1)(f). The Act does extend to a “public record” that is “in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function.” 5 ILCS 140/7(2).
Proprietary Data and Trade Secret Protection:	The Act contains an exemption for trade secrets, commercial information, and financial information obtained from a person or business if the information is “furnished under a claim that they are proprietary, privileged or confidential” and “disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business.” 5 ILCS 140/7(1)(g).
Access to Software?	The Act contains an exemption for “[a]dministrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.” 5 ILCS 140/7(1)(o).
INDIANA	
Statute	Access to Public Records Act, Ind. Code § 5-14-3 to 5-14-3-10. Unless exempt, any “person may inspect and copy the

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	public records of any public agency during the regular business hours.” Ind. Code § 5-14-3(a). The Act extends to all forms of state and local governmental bodies. Ind. Code § 5-14-3-2(m).
Bid and Proposal Information	Bids and proposals would appear to be available, but are subject to trade secret and confidential financial information protections. Ind. Code § 5-14-3-4(a).
Contracts and Documents Generated During Performance	A “public record” is any “writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency,” which appears to be broad enough to encompass contracts and documents generated during performance in the government’s possession. Ind. Code § 5-14-3-2(n). The Act does contain protections for trade secrets and “confidential financial information” that is not required to be filed with the agency. Ind. Code § 5-14-3-4(a). The Act also contains a deliberative process exemption that gives an agency the discretion to withhold “[r]ecords that are intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.” Ind. Code § 5-14-3-4(b)(6). This exemption extends to “material developed by a private contractor under a contract with a public agency.” <i>Id.</i>
Proprietary Data and Trade Secret Protection:	Records that contain “trade secrets” are exempt from disclosure. Ind. Code § 5-14-3-4(a)(4). A “trade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Ind. Code § 24-2-3-2. “Confidential financial information” that agency obtains “upon request” is also exempt from disclosure, but this exemption does not apply to “information that is filed with or received by a public agency pursuant to state statute.” Ind. Code § 5-14-3-4(a)(5).
Access to Software?	“Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility” may be withheld at the discretion of the agency. Ind. Code § IC 5-14-3-4(b)(11).
IOWA	
Statute	Examination of Public Records, Iowa Code § 22.1 to 22.14. The Act applies to state and local governmental entities. Iowa Code § 22.1(1). The term “public records” includes “records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, political subdivision,[or] nonprofit corporation.” Iowa Code § 22.1(3).
Bid and Proposal Information	Subject not addressed by Iowa law. However, the policy of the Iowa Department of Administrative Services is to treat bids and proposals as property of the state, the contents of which “will be in the public domain and be open to inspection

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	by interested parties subject to exceptions provided in Iowa Code Chapter 22 or other applicable law.” http://das.gse.iowa.gov/procurement/bid_process.html . However, disclosure appears to be subject to the trade secret protections provided in Iowa Code § 22.7(3).
Contracts and Documents Generated During Performance	Contracts and documents generated during performance would appear to fall within the definition of a “public record.” See Iowa Code § 22.1(3). Such information would be subject to trade secret protections. Iowa Code § 22.7(3). There is also an express exemption for “[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose,” which could provide agencies with the ability to withhold some information provided to the agency. Iowa Code § 22.7(6).
Proprietary Data and Trade Secret Protection:	“Trade secrets which are recognized and protected as such by law” are to be “kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information.” Iowa Code § 22.7. A “trade secret” is “information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is both of the following: a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use [and] b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Iowa Code § 550.2(4). In one case, the Iowa Supreme Court found that a computer data system purchased with public funds was subject to trade secret protection and properly withheld under Section 22.7. <i>Brown v. Iowa Legislative Council</i> , 490 N.W.2d 551, 552 (Iowa 1992).
Access to Software?	A governmental body is not required to give access to “[d]ata processing software developed by the government body, as provided in section 22.3A.” Iowa Code § 22.2(3)(b). Section 22.3A provides that a “government body may provide, restrict, or prohibit access to data processing software developed by the government body, regardless of whether the data processing software is separated or combined with a public record.”
KANSAS	
Statute	The Open Records Act, K.S.A. § 45-215 to 45-230. “[P]ublic records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy.” K.S.A. § 45-216(a). The Act applies to all state bodies and other governmental entities “receiving or expending and supported in whole or in part by” public funds. K.S.A. § 45-217(f)(1).
Bid and Proposal Information	An agency is not required to disclose “[s]ealed bids and related documents, until a bid is accepted or all bids rejected.” K.S.A. § 45-221(28). An agency is not required to disclose “[t]he contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition of property, prior to the award of formal contracts therefor.” K.S.A. § 45-221(13). It is also may withhold “[p]lans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.” K.S.A. § 45-221(18). “Financial information submitted by contractors in qualification statements to any public agency” may be withheld as well. K.S.A. § 45-221(33).

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Contracts and Documents Generated During Performance	The Act also contains a deliberative process exception, which allows an agency to withhold “[n]otes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed.” K.S.A. § 45-221(20).
Proprietary Data and Trade Secret Protection:	The Act does not provide any general protection for trade secrets. The Act does prevent disclosure of certain plans, drawings, and specifications which are the property of private persons. K.S.A. § 45-221(18). It also protects financial information submitted by contractors in qualification statements.” K.S.A. § 45-221(33). Trade secrets may potentially be protected under Kansas trade secret law, which provides that “[t]he owner of a trade secret has a privilege, which may be claimed by the owner or his or her agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” K.S.A. § 60-432.
Access to Software?	An agency is not required to disclose “[s]oftware programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, which describes: (A) The information which the agency maintains on computer facilities; and (B) the form in which the information can be made available using existing computer programs.” K.S.A. § 45-221(16).
KENUCKY	
Statute	Open Record Act, K.R.S. § 61.870 to 61.884. Requirements apply to all state and local governmental bodies. K.R.S. § 61.870(1). “All public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884.” K.R.S. § 61.872(1).
Bid and Proposal Information	Sealed bids are open for inspection after bid opening. K.R.S. § 45A.080(4). Kentucky statutes do not specify whether bids and proposals for other procurement methods are public records, but the Kentucky Attorney General has opined that “[w]ith specific reference to bidding documents . . . such records must be made available after the bids have been opened and a vendor selected.” Ky. Atty. Gen. Op. 92-32, p. 3.
Contracts and Documents Generated During Performance	Contracts and documents generated during performance may be discoverable. <i>See id</i> (“This Office has repeatedly recognized that the public is entitled to review the contracts, vouchers, and other business records of a public agency as a means of insuring agency accountability.”). However, any agency may still protect confidential and proprietary information contained in contracts and other material. <i>See</i> 00 ORD 112, p. 4 (allowing for production of a contract with information, such as formulas and processes, redacted).
Proprietary Data and Trade Secret Protection:	The Act contains protection for information generally recognized as confidential and proprietary. K.R.S. § 61.878(1)(C)(1). To qualify for protection, the record must be “1) confidentially disclosed to an agency or required by an agency to be disclosed to it; 2) generally recognized as confidential or proprietary; and 3) of such a character that disclosure would permit an unfair commercial advantage to competitors of the entity that disclosed them.” 00 ORD 112, p. 2.

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Access to Software?	The definition of a “public record” includes “software.” K.R.S. § 61.870(2). The term “software” is defined as “the program code which makes a computer system function” and includes “the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs.” K.R.S. § 61.870(3). However, it “does not include that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency.” <i>Id.</i>
LOUISIANA	
Statute	Public Records Act, La R.S. Ann. 44:1 to 44:41. Law applies to all state and local governmental entities, including “public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function.” La R. S. 44:1(A)(1).
Bid and Proposal Information	The definition of public record is broad enough to encompass bid and proposals, which would constitute information possessed and used by a public body. The Act applies to all records “having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state.” La. R.S. §44:1(A)(2). The full scope of protection for proprietary information and trade secrets is unclear.
Contracts and Documents Generated During Performance	The Act appears to apply to contracts and all records retained or possessed by the governmental entity in the transaction of its business. <i>Id.</i>
Proprietary Data and Trade Secret Protection:	The full scope of protection for trade secrets and proprietary data is unclear. The Act does provides protection for proprietary or trade secret information submitted to the state “to obtain or retain approval of such code, pattern, formula, design, device, method, or process for sale or use in this state” or “to facilitate the further research, development, or commercialization of such code, pattern, formula, design, device, method, or process.” La. R.S. §44:3.2. The courts appear to have not addressed the questions of whether there is larger protection for proprietary and trade secret information. <i>See</i> L.A. Atty. Gen. Op. 95-254(A) (noting it is an open question whether constitutional privacy protections apply to third party financial data).
Access to Software?	This subject does not appear to be addressed by Louisiana statute or case law.
MAINE	
Statute	Freedom of Access Act, 1 M.R.S.A. §§ 401 to 434. The Act applies to state agencies and political subdivisions of the state. 1 M.R.S.A. § 402(3).
Bid and Proposal Information	Each bid must be open for inspection after the contract is let. 5 M.R.S.A. §1825-B(6).

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Contracts and Documents Generated During Performance	Contracts and documents generated during performance would appear to fall within the definition of a “public record.” The Act extends to any records “that is in the possession or custody of an agency or public official.” 1 M.R.S.A. § 402(3).
Proprietary Data and Trade Secret Protection:	The Act does not contain any express exceptions for proprietary data and trade secrets, but does exempt information from disclosure to the extent the record “would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State.” 1 M.R.S.A. 402(3)(b). Maine Rule of Evidence 507 provides: “A person has a privilege, which may be claimed by the person or the person’s agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.”
Access to Software?	This subject does not appear to be addressed by Maine statute or case law.
MARYLAND	
Statute	Public Information Act, Md. Code Ann., State Gov’t §§ 10-601 to 10-628. The Act applies to all state agencies and all political subdivisions of Maryland. Md. Code Ann, State Gov’t §§ 10-601, 10-612.
Bid and Proposal Information	Bids and proposals may be disclosable, but are subject to the statutory protections for proprietary data and trade secret protection, similar to the federal FOIA process.
Contracts and Documents Generated During Performance	The information may be disclosable, but is subject to the statutory protections for proprietary data and trade secrets, similar to the federal FOIA process. In addition, an agency may refuse to disclose “any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.” Md. Code Ann., State Gov’t § 10-618(b). To qualify under this deliberative process exemption, the material must have been created to assist in decision making. Maryland Attorney General, Public Information Act Manual, p. 31 (quoting <i>Office of the Governor v. Washington Post Company</i> , 360 Md. 520, 551 (2000)).
Proprietary Data and Trade Secret Protection:	An official must deny a request for “the part of a public record that contains any of the following information provided by or obtained from any person or governmental unit: (1) a trade secret; (2) confidential commercial information; (3) confidential financial information; or (4) confidential geological or geophysical information.” Md. Code Ann., State Gov’t § 10-617(d). The provision is similar to the federal FOIA restriction and cases interpreting FOIA are persuasive in interpreting the Maryland equivalent. <i>See id.</i>
Access to Software?	The subject is not addressed in Maryland statute or case law, but would also be subject to protections for trade secrets. In addition, information concerning the security of an information system is exempt from disclosure. Md. Code Ann., State Gov’t § 10-617(g).
MASSACHUSETTS	
Statute	Public Records Law, Mass. Gen. Laws ch. 66 §§ 1 to 18. Any official with custody of a “public record” must make it (or

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	any segregable portion) open for inspection. Mass. Gen. Laws ch. 66 § 10. The definition of “public record” includes material made or received by “officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof.” Mass. Gen. Laws ch. 4 § 7.
Bid and Proposal Information	Bids and proposals are not “public records” “until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases.” <i>Id.</i> In addition, inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract,” are not “public records.” <i>Id.</i> The exemption for trade secrets and proprietary data, however, may not apply to information provided with bids and proposals because it is not information provided for the development of governmental policy. <i>See</i> Div. of Pub. Rec., “A Guide to the Massachusetts Public Records Law,” p. 16, http://www.sec.state.ma.us/pre/prepdf/guide.pdf .
Contracts and Documents Generated During Performance	Contracts and material generated during performance would appear to fall within the definition of a “public record.” There is some limited protection for interagency and interagency memorandum relating to policy positions being developed by the agency. Mass. Gen. Laws Ch. 4 § 7(d). Massachusetts also requires contractors to keep certain financial records and provide financial statements to the state. Mass. Gen. Laws ch. 30 § 39R. Records kept and filed under this section are not public records. Mass. Gen. Laws. ch. 30 § 39R(f).
Proprietary Data and Trade Secret Protection:	The Act provides some protection for confidential business information, but the protection is limited. The definition of a “public record” does not include “trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality.” Mass. Gen. Laws ch. 4 § 7. The statute provides that the exemption “shall not apply to information submitted as required by law or as a condition of receiving a governmental contract.” <i>Id.</i> However, financial statements and other material that a contractor is required to maintain and file under Chapter 30, Section 39R are exempt. Mass. Gen. Laws. ch. 30 § 39R(f).
Access to Software?	This subject does not appear to be addressed by Massachusetts statute or case law.
MICHIGAN	
Statute	Freedom of Information Act, Mich. Comp. Law §§ 15.231 to 15.246. The Act applies to both state and local public bodies. Mich. Comp. Law § 15.232.
Bid and Proposal Information	Bids and proposals are not public records until “public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.” Mich. Comp. Law § 15.243(i). Courts have explained that this section does not allow an agency to withhold proposals in other contexts. <i>Nicita v. Detroit</i> , 194 Mich. App. 657, 666 (1992) (agency could not withhold unsolicited bid submitted without competition until contract award). In addition, any proprietary information may be subject to disclosure, as there is no express protection for such information in a bidding context. <i>Nicita v. City of Detroit</i> , 216 Mich. App. 746, 752 (1996) (“ <i>Nicita II</i> ”).

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Contracts and Documents Generated During Performance	Contracts and records generated during performance would appear to be subject to disclosure. The Act does not provide for protection of trade secrets and proprietary data in this context, but additional protections may potentially be found elsewhere. <i>See</i> Mich. Comp. Law § 15.243(1)(h) (exempting material subject to a “privilege recognized by statute or court rule”); <i>but see Nicata II</i> , 216 Mich. App. at 752 (allowing disclosure of unsolicited bid in its entirety).
Proprietary Data and Trade Secret Protection:	The Act provides only limited protection for trade secrets and commercial information. Such information is exempt if it is “voluntarily provided to an agency for use in developing governmental policy” on a promise of confidentiality. Mich. Comp. Law § 15.243(f). This would not appear to apply to documents generated during the bidding process or during contract performance. The Act also exempts information of a personal nature, the disclosure of which would result in an unreasonable invasion of privacy. Mich. Comp. Law § 15.243(1)(a). The Courts have found that this protection does not extend to confidential business records. <i>Nicita II</i> , 216 Mich. App. at 752.
Access to Software?	The definition of “public record” does not include software. Mich. Comp. Law § 15.232(e). “Software” is “a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result.” Mich. Comp. Law § 15.232(f). Software does not include information stored on a computer or disclosure of “field names” that do not violate a software license. <i>Id.</i>
MINNESOTA	
Statute	Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01 to 13.99. The Act “establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01(3). The Act applies to all state agencies and political subdivisions in the state. Minn. Stat. §§ 13.02, 13.03.
Bid and Proposal Information	Sealed bids, “including the number of bids received, prior to the opening of the bids” are not public information. Minn. Stat. § 13.37(d)(2). Such information would be available after bid opening.
Contracts and Documents Generated During Performance	The definition of a government data is broad enough to encompass contracts and documents generated during performance in the government’s possession. There may be some limited form of trade secret protection.
Proprietary Data and Trade Secret Protection:	Trade secrets are not public, but the statute defines “trade secret” in an unusual manner. “‘Trade secret information’ means government data , including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.” Minn. Stat. § 13.37(b) (emphasis added).
Access to Software?	With respect to government created software, the “entity may enforce a copyright or acquire a patent for a computer

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	software program or components of a program created by that government entity without statutory authority. In the event that a government entity acquires a patent to a computer software program or component of a program, the data shall be treated as trade secret information . . .” Min. Stat. § 13.03(5).
MISSISSIPPI	
Statute	Mississippi Public Records Act, Miss. Code Ann. §§ 25-61-1 to 25-61-17. The Act applies to all entities of the state and any subdivision thereof. Miss. Code Ann. § 25-61-3(a). Unless exempt, “all public records are . . . public property.” Miss. Code Ann § 25-61-5(1).
Bid and Proposal Information	Once bids and proposals are submitted to a state or local agency they become “public property subject to being inspected and copied by any person.” <i>Caldwell & Gregory, Inc. v. University of S. Miss.</i> , 716 So. 2d 1120, 1121 (Miss. Ct. App. 1998). Confidential information contained in the bid may be protected, but the contractor may be required to act and obtain a court order to prevent disclosure. Miss. Code Ann. § 25-61-9; <i>see</i> Miss. Atty. Gen. Op. 96-0497, 1996 WL 437487 (bidder A could obtain access to bidder B’s proposal, even though all bids were rejected, provided bidder B is given the opportunity to obtain a court order to protect any commercial or financial information).
Contracts and Documents Generated During Performance	Contracts and documents generated during performance would appear to be available, although they may be subject to protection for trade secrets and confidential commercial or financial information.
Proprietary Data and Trade Secret Protection:	<p>Any proprietary or commercial information that an entity is required to submit to a public body is exempt from disclosure. Miss. Code Ann. § 79-23-1 (“Commercial and financial information of a proprietary nature required to be submitted to a public body, as defined by paragraph (a) of Section 25-61-3, by a firm, business, partnership, association, corporation, individual or other like entity, shall be exempt from the provisions of the Mississippi Public Records Act of 1983. . .”).</p> <p>Information submitted as part of the contracting process may not be “required” information. In the contracting context, it would appear that the Act places an affirmative obligation on the holder of any confidential information to protect it. Documents that “contain trade secrets or confidential commercial or financial information” may not be disclosed until notice is given to the third party submitting the information and the third party is given reasonable time to obtain “a court order protecting such records as confidential.” Miss. Code Ann. § 25-61-9(1). The courts have explained that the protection is not limited to data that constitutes a “trade secret” but extends to the broader category of “commercial or financial information.” <i>Caldwell & Gregory, Inc.</i>, 716 So. 2d at 1122.</p>
Access to Software?	Software is exempt if it is a trade secret and obtained under a license agreement that prohibits disclosure. Miss. Code Ann. § 25-61-9(6). Data processing software produced by an agency is disclosable unless it is “sensitive.” <i>Id.</i> “Sensitive” means those portions (including documentation and specifications) used to (1) collect, process, store, and retrieve exempt information; (2) control access and security measures for automated systems; and (3) “[c]ollect, process, store, and retrieve information, disclosure of which would require a significant intrusion into the business of the public body.” <i>Id.</i>

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

MISSOURI	
Statute	Sunshine Law, Miss. Rev. Stat. §§ 610.010 to – 610.225 and Public Records Act, Miss. Rev. Stat. § 109.180. “Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen.” <i>Id.</i>
Bid and Proposal Information	An official may close bids, proposals, and “related documents . . . until the bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected.” Miss. Rev. Stat. § 610.021(12). An official may also close specifications for competitive bidding until the specification is approved or released for bid. Miss. Rev. Stat. § 610.021(11). There may be some protection for records that relate to proprietary “scientific and technological innovations.” Miss. Rev. Stat. § 610.021(15).
Contracts and Documents Generated During Performance	The definition of a “public record” appears to be broad enough to encompass contracts and documents in the government’s possession generated during performance. A “public record” is defined as “any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body.” Miss. Rev. Stat., § 610.010(6). However, the Sunshine Law contains a deliberative process exemption for “internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting.” <i>Id.</i>
Proprietary Data and Trade Secret Protection:	The Sunshine Law and Public Records act do not expressly address protection for trade secrets and proprietary data. However, the Sunshine Law does provide that “public records relating to scientific and technological innovations in which the owner has a proprietary interest” may be closed. Miss. Rev. Stat. § 610.021(15). In addition, the law does provide for records to be closed “which are protected from disclosure by law.” Miss. Rev. Stat. § 610.021(14).
Access to Software?	An official may close “[s]oftware codes for electronic data processing and documentation.” Miss. Rev. Stat. § 610.021(10).
MONTANA	
Statute	Mont. Code Ann. §§ 2-6-101 to 2-6-112. “Every citizen has a right to inspect and take a copy of any public writings of this state,” except for “[r]ecords and materials that are constitutionally protected from disclosure.” Mont. Code Ann. § 2-6-102. The right to inspect documents is protected by the Montana Constitution. Mont. Const., Art. II § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Bid and Proposal Information	“Procurement information is a public writing and must be available to the public.” Mont. Code Ann. § 18-4-126. With respect to competitive sealed proposals, “proposal documents may be inspected by the public” after they have been opened and reviewed by the procurement officer for release. Mont. Code Ann. § 18-4-304. The Montana Supreme Court has held that proposals become public documents once submitted. <i>Great Falls Tribune Co. v. Day</i> , 959 P.2d 508, 513 (Mont. 1998) (“proposals submitted by private vendors to the Department’s screening and evaluation committee are documents of a public body or agency”). Bids and proposals may be subject to some protection for trade secrets and proprietary data.
Contracts and Documents Generated During Performance	Contracts and documents generated during performance would appear to fall within Montana’s broad provisions, but may be subject to trade secret protection.
Proprietary Data and Trade Secret Protection:	Prior to 2003, it appears that trade secrets and proprietary data were precluded from disclosure under the privacy protections under Montana Constitution. The Montana Supreme Court ruled, however, that the privacy protections do not extend to non-humans. <i>Great Falls Tribune v. Mont. PSC</i> , 82 P.3d 876, 883 (Mont. 2003). Such entities, however, may “enjoy confidentiality of its property interests under Montana statutory law, such as the Uniform Trade Secrets Act, Title 30, Chapter 14, Part 4, or protection against the “taking” of private property for public use without just compensation under the federal and state constitutions.” <i>Id.</i> The decision suggests that trade secrets may be protected, but contractors would have a harder time protecting proprietary data and confidential financial information that does not rise to the level of a “trade secret.”
Access to Software?	This subject does not appear to be addressed by Montana statute or case law.
NEBRASKA	
Statute	Neb. Rev. Stat. §§ 84-712 to 84-712.09. Requirements apply to “all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.” Neb. Rev. Stat. § 84-712.01(1).
Bid and Proposal Information	Bids and proposals would appear to fall within the definition of a “public record.” <i>See id.; cf. Op. Att’y Gen. No. 94092</i> (November 22, 1994) (proposals submitted to Education Innovation Fund grants were public records). However, such records may be subject to protection for trade secrets and proprietary information.
Contracts and Documents Generated During Performance	Contracts and documents generated during performance documents would also appear to fall within the definition of a “public record,” but may be subject to protection for trade secrets and proprietary information.
Proprietary Data and Trade Secret Protection:	The law provides protection for “[t]rade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose.” Neb. Rev. Stat. § 84-712.05(3). The Attorney General opined that the exemption does not require a showing of “substantial” injury, but does require more than a bare assertion that the

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	information is confidential. Neb. Att’y. Gen. Op. No. 92068 (May 7, 1992). The Attorney General opined that there must be a “finding that a specified competitor (or competitors) may gain a demonstrated advantage by disclosure is required to invoke the exception.” <i>Id.</i>
Access to Software?	This subject does not appear to be addressed by Nebraska statute or case law.
NEVADA	
Statute	Public Records Act, Nev. Rev. Stat. §§ 239.001 to 239.330. The Act applies to (1) an “elected or appointed officer” or (2) an “institution, board, commission, bureau, council, department, division, authority or other unit of government,” (3) a university foundation, or (4) an educational foundation. Nev. Rev. Stat. § 239.005.
Bid and Proposal Information	The Act provides that “all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times” for inspection. However, the Act does not define what constitutes a public record. The Nevada Supreme Court has determined that there should be a balancing test, weighing the public’s need for the document against the confidentiality or privacy interests of the person seeking to prevent disclosure. <i>Donrey of Nevada v. Bradshaw</i> , 798 P.2d 144 (Nev. 1990).
Contracts and Documents Generated During Performance	The availability is unclear and would appear to depend on the balancing of private/public interests under <i>Donrey</i> .
Proprietary Data and Trade Secret Protection:	The Act does not contain express exemption for proprietary data and trade secrets, but these interests would likely be addressed under the balancing test announced in <i>Donrey</i> .
Access to Software?	“Computer programs are intellectual property owned or licensed by the State and are not public records.” Nev. Att’y Gen. Op. 89-1.
NEW HAMPSHIRE	
Statute	Right-to-Know Law, N.H. Rev. Ch. 91-A:1 to 91-A:15. “Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies . . .” N.H. Rev. Stat. Ch. 91-A:4(I).
Bid and Proposal Information	Although “public records” is not a defined term, the law appears to be broad enough to encompass bids and proposals. However, such documents may be subject to protections for confidential commercial or financial information.
Contracts and Documents Generated During Performance	Although “public records” is not a defined term, the law appears to be broad enough to cover contracts and documents generated during performance, subject to protections for confidential commercial or financial information. The Act also contains a deliberative process exemption for “[p]reliminary drafts, notes, and memoranda and other documents not in

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.” N.H. Rev. Stat. Ch. 91-A:5(IX).
Proprietary Data and Trade Secret Protection:	The Act exempts “confidential, commercial, or financial information” from disclosure “and other files whose disclosure would constitute invasion of privacy.” N.H. Rev. Stat. Ch. 91-A:5(IV). The courts have interpreted this language “as requiring analysis of both whether the information sought is ‘confidential, commercial, or financial information,’ and whether disclosure would constitute an invasion of privacy.” <i>Union Leader Corp. v. New Hampshire Hous. Fin. Auth.</i> , 142 N.H. 540, 552 (N.H. 1997). “The terms ‘commercial or financial’ encompass information such as ‘business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition’.” <i>Id.</i> at 554 (quoting <i>Landfair v. United States Dept. of Army</i> , 645 F. Supp. 325, 327 (D.D.C. 1986)).
Access to Software?	This subject does not appear to be addressed by New Hampshire statute or case law.
NEW JERSEY	
Statute	Open Public Records Act, N.J.S. §§ 47:1A-1 to 47:1A-11. The Act applies to all documents “made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof.” N.J.S. § 47:1A-1.1. “[A]ll government records shall be subject to public access unless exempt from such access.” N.J.S. § 47:1A-1.
Bid and Proposal Information	Bids and proposals may be available, but are subject to limitations regarding access to trade secrets and commercial or financial information. N.J.S. § 47:1A-1.1. In addition, information that would give advantage to competitors or bidders is not subject to disclosure. <i>Id.</i>
Contracts and Documents Generated During Performance	Immediate access is ordinarily to be provided to contracts. N.J.S. § 47:1A-5(e). Documents generated during performance could be available, but are subject to protections for trade secrets and proprietary commercial information. In addition, material should not be disclosed if it “would give an advantage to competitors or bidders.” N.J.S. § 47:1A-1.1.
Proprietary Data and Trade Secret Protection:	“Trade secrets and proprietary commercial or financial information obtained from any source” are not public records. N.J.S. § 47:1A-1.1.
Access to Software?	A “trade secret,” which is exempt from disclosure, includes “data processing software obtained by a public body under a licensing agreement which prohibits its disclosure.” <i>Id.</i> In addition, any administrative or technical information that “would jeopardize computer security is exempt.” <i>Id.</i>
NEW MEXICO	
Statute	Inspection of Public Records Act, N.M. Stat. Ann. §§ 14-2-1 to 14-2-12. The Act applies to the “executive, legislative and judicial branches of state and local governments.” N.M. Stat. Ann. § 14-2-6(D).

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Bid and Proposal Information	With respect to competitive sealed bidding, each bid must be open to public inspection after bid opening. N.M. Stat. Ann. § 13-1-107.
Contracts and Documents Generated During Performance	The Act applies to virtually all government records, which would include contracts. The Act applies to “all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business.” N.M. Stat. Ann. § 14-2-6(E). Material generated during performance may also be available, although it may be subject to protection as a trade secret.
Proprietary Data and Trade Secret Protection:	The Act makes trade secrets associated with hospitals exempt, but does not expressly address other situations. The Act does, however, exempt access to records “as otherwise provided by law.” N.M. Stat. Ann. § 14-2-1(A)(12). Under Rule 508 of the Supreme Court Rules of Evidence, “[a] person may refuse to disclose and may prevent others from disclosing a trade secret owned by him.”
Access to Software?	This subject does not appear to be addressed by New Mexico statute or case law.
New York	
Statute	Freedom of Information Law, N.Y. Pub. Off. Law §§ 84 to 90. Law applies to all units of state and local government. N.Y. Pub. Off. Law § 86(3). The Act applies to “any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever.” N.Y. Pub. Off. Law § 86(4).
Bid and Proposal Information	An agency may withhold documents if disclosure “would impair present or imminent contract awards or collective bargaining negotiations.” N.Y. Pub. Off. Law §87(2)(c).
Contracts and Documents Generated During Performance	Contracts and documents in the government’s possession generated during performance would appear to fall within the definition of a public record, but may be subject to trade secret protections.
Proprietary Data and Trade Secret Protection:	An agency may withhold documents that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” N.Y. Pub. Off. Law § 87(2)(d).
Access to Software?	This subject does not appear to be addressed by New York statute or case law.
NORTH CAROLINA	
Statute	Public Records Law, N.C. Gen. Stat. §§ 132-1 to 132-10. Obligations apply to all state agencies and local political subdivisions. N.C. Gen. Stat. § 132-1(a).
Bid and Proposal Information	With respect to competitive bidding, “[e]ach and every bid conforming to the terms of the invitation, together with the

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	name of the bidder, shall be tabulated and that tabulation shall become public record in accordance with the rules adopted by the Secretary . . . Provided, that trade secrets, test data and similar proprietary information may remain confidential.” N.C. Gen. Stat. § 143-52(a). Bids on construction contracts are also to be made public. N.C. Gen. Stat. § 143-128.1(c) (“All bids shall be opened publicly, and once they are opened, shall be public records under Chapter 132 of the General Statutes.”).
Contracts and Documents Generated During Performance	With respect to competitive bidding, “[a]ll contract information shall be made a matter of public record after the award of contract . . . Provided, that trade secrets, test data and similar proprietary information may remain confidential.” N.C. Gen. Stat. § 143-52(a).
Proprietary Data and Trade Secret Protection:	The Law does not require or authorize an agency to release information that constitutes a trade secret as defined in N.C. Gen. Stat. § 66-152(3). N.C. Gen. Stat. § 132-1.2(1)(a). A “trade secret” is defined as “business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that: a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” N.C. Gen. Stat. § 66-152(3).
Access to Software?	The North Carolina Attorney General has opined that software is not a public record. www.AboutDOJ/LegalServices/LegalOpinions/Opinions/Status of State Owned Computer Software
NORTH DAKOTA	
Statute	Open Records Statute, N.D.C.C. §§ 44-04-18 to 44-04-18.21. “Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.” N.D.C.C. § 44-04-18(1). The requirements apply to all state agencies and political subdivisions in the state. N.D.C.C § 44-04-18(5).
Bid and Proposal Information	Unless it constitutes a trade secret or contains proprietary information, “bids or proposals received by a public entity in response to a request for proposals by the public entity are exempt until all of the proposals have been received and opened by the public entity or until all oral presentations regarding the proposals, if any, have been heard by the public entity.” N.D.C.C. §44-04-18.4(6). In addition, “[r]ecords included with any bid or proposal naming and generally describing the entity submitting the proposal are open.” <i>Id.</i>
Contracts and Documents Generated During Performance	Subject not addressed in statute, but contracts and documents generated during performance would appear to be covered by the Act, but subject to protection for confidential information.
Proprietary Data and Trade Secret Protection:	Confidential information is exempt from disclosure. N.D.C.C. § 44-04-18(8) (“[t]his section is violated when a person’s right to review or receive a copy of a record that is not exempt or confidential is denied”). “Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	disclosed.” N.D.C.C. §44-04-18.4(1). “Commercial information” is information regarding the buying and selling of goods and “financial information” means information pertaining to the monetary resources of a person. N.D.C.C. §44-04-18.4(2). In both instances, to receive protection, the information must (1) not have been previously publicly disclosed and (2) there must be a risk of substantial competitive injury or impairment of the public entity’s ability to obtain similar information in the future if the information is released. <i>Id.</i>
Access to Software?	Software is generally not a public record. “Any computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, institution, department, or board and for which the public entity or state agency, institution, department, or board acquires a license, copyright, or patent is exempt . . .” N.D.C.C. §44-04-18.5. In addition, a third party’s computer program is considered confidential, proprietary information. N.D.C.C. § 44-04-18.4(2)(c)(7) (proprietary information includes a “computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use”).
OHIO	
Statute	Ohio. Rev. Code § 149.43. Requirements apply to “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units.” Ohio Rev. Code § 149.43(A)(1); <i>see also</i> Ohio Rev. Code § 149.011(A).
Bid and Proposal Information	Competitive bids are publicly opened, but the subject of disclosure is not addressed by the Open Records Law. Ohio Rev. Code § 735.06. Documents, however, may be subject to the exemption for trade secrets.
Contracts and Documents Generated During Performance	The subject of the availability of contracts and related documents is not addressed by statute, but would appear to fall within the definition of a “public record.” The information, however, may be subject to trade secret protection.
Proprietary Data and Trade Secret Protection:	“Trade secrets are exempt from disclosure under the ‘state or federal law’ exemption of R.C. 149.43.” <i>State ex rel. Besser v. Ohio State Univ.</i> , 89 Ohio St. 3d 396, 399 (Ohio 2000). Under Ohio’s version of the Uniform Trade Secrets Act, a “trade secret” is “information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use [and] (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Ohio Rev. Code §1333.61.

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Access to Software?	Not addressed by statute, but one court has held that an agency does not have an obligation to provide software to a requestor so that he can access information stored on magnetic tapes. <i>State ex rel. Recodat Co. v. Buchanan</i> , 46 Ohio St. 3d 163, 165 (1989).
OKLAHOMA	
Statute	Oklahoma Open Records Act, Okla. Stat. tit. 51 §§ 24A.1 to 24A.19. The Act applies to state and local agencies, including any subdivision supported by public funds. Okla. Stat. tit 51 § 24A.3(2).
Bid and Proposal Information	Bids and proposals may be withheld “[i]f disclosure would give an unfair advantage to competitors or bidders” prior to bid opening or publication of competitive bids. Okla. Stat. tit 51 § 24A.10(B).
Contracts and Documents Generated During Performance	Subject not addressed by Oklahoma case law or statute.
Proprietary Data and Trade Secret Protection:	Subject not generally addressed by the Act, although it contains provisions exempting trade secrets from disclosure in certain cases. <i>See</i> Okla. Stat. tit 51 § 24A.10 (protecting information of a “person or entity seeking economic advice from the Oklahoma Department of Commerce”); Okla. Stat. tit 51 § 24A.19 (information relating to research Okla. Stat. tit 51 § 24A.22 (public utility trade secrets).
Access to Software?	The definition of “public record” does not include software. Okla. Stat. tit 51 § 24A.3(1).
OREGON	
Statute	Inspection of Public Records, Or. Rev. Stat. §§ 192.410 to 192.505. The Act applies to all records of state officers, state agencies, and local governmental entities and covers “any writing that contains information relating to the conduct of the public’s business . . . prepared, owned, used or retained by a public body regardless of physical form or characteristics.” Or. Rev. Stat. § 192.410.
Bid and Proposal Information	Bids are confidential until the time set for bid opening and then they are public. Or. Rev. Stat. §§ 279B.055(5)(a) and 279C.365(2)(a) and (3); <i>see</i> Or. Att’y Gen’s Pub. Rec. and Mtgs Man. (“Manual”), p. 84 (2008). “Proposals are confidential until after the notice of intent to award a contract is issued.” <i>Id.</i> p. A-7 (citing Or. Rev. Stat. § 279B.060(5)(a)). The information is public “except to the extent that the bidder has appropriately designated parts of the bid as trade secrets, which may then be exempt from disclosure under ORS 192.501(2), or as information submitted to a public body in confidence, which may be exempt under ORS 192.502(4).” <i>Id.</i> at 84. The Attorney General suggests that public bodies that anticipate receiving trade secret information should specify in the solicitation “that any trade secret information must be specifically identified,” although this is not required for trade secret protection. <i>Id.</i> p. 35
Contracts and Documents Generated During Performance	Contracts would fall within the definition of a public record, but contracts and documents generated during performance would be subject to protection for trade secrets and, potentially, confidential information. In addition, the Act has a form

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	of the deliberative process exemption, preventing disclosure of “[c]ommunications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action.” Or. Rev. Stat. § 192.501(1).
Proprietary Data and Trade Secret Protection:	Trade secrets are exempt from disclosure “unless the public interest requires disclosure in the particular instance.” Or. Rev. Stat. § 192.501. A “trade secret” is defined as including, but “not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.” Or. Rev. Stat. § 192.501(2). This definition does not appear to be as broad as that provided by state’s trade secrets law and the relationship is unclear. Manual, p. 34-35. The Oregon Attorney General has opined that such things as “fee schedules and price lists provided in response to a request for proposal;” lightning strike data made available to the Oregon Department of Forestry under a license with a private corporation; and an insurer’s projections of trend, target loss ratios, and accidental death rates given to the Department of Insurance qualify as “trade secrets” under the Inspection of Public Records Law. <i>Id.</i> at p. 34. The Attorney General notes that the exemption is conditional (meaning the agency has the option of releasing the material), but also suggest that if releasing the information would constitute misappropriation of a trade secret, disclosure would be prohibited under the catch all exemption for records the disclosure of which is prohibited by Oregon law (Or. Rev. Stat. § 192.502(9). <i>Id.</i> at 35.
Access to Software?	The government may withhold “[c]omputer programs developed or purchased by or for any public body for its own use.” Or. Rev. Stat. § 192.502(15). A “computer program” means “a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program.” <i>Id.</i> The definition does not include the data stored using the program. <i>Id.</i>
PENNSYLVANIA	
Statute	Right to Know Act, § 101 to 3104 (effective January 1, 2009).
Bid and Proposal Information	Bids and proposals are exempt “prior to the award of the contract or prior to the opening and rejection of all bids.” §708(b)(26). The Act also exempts “financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; and “the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).” § 708(b)(26).
Contracts and Documents Generated During Performance	Contracts over \$5,000 are to be filed with the Treasury Department and available for public inspection and may be posted on a website. §§ 1701-1702. The definition of “record” is broad enough to encompass documents generated during performance in the government’s possession: “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	with a transaction, business or activity of the agency.” § 102. Such information may be subject to trade secret protection.
Proprietary Data and Trade Secret Protection:	“A record that constitutes or reveals a trade secret or confidential proprietary information” is exempt from disclosure. § 708(b)(11). A “trade secret” includes “[i]nformation, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” § 101. “Confidential proprietary information” is defined as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” <i>Id.</i>
Access to Software?	A “trade secret” includes “data processing software obtained by an agency under a licensing agreement prohibiting disclosure.” § 102. Records associated with computer software are also exempt if disclosure would jeopardize computer security. § 708(b)(4).
RHODE ISLAND	
Statute	Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15. The Act applies to any “legislative, judicial, regulatory, or administrative body of the state, or any political subdivision thereof.” R.I. Gen. Law § 38-2-2(1).
Bid and Proposal Information	Definition of “public record” includes all documents “made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” The definition appears broad enough to encompass bids and proposals. However, information regarding feasibility estimates and evaluations might be withheld until the acquisition is complete. <i>See</i> R.I. Gen. Laws § 38-2-2(4)(N) (exempting “real estate appraisals, engineering, or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or abandoned”). In addition, the Act provides protection for trade secrets and commercial or financial information. R.I. Gen. Laws § 38-2-2(4)(B).
Contracts and Documents Generated During Performance	Definition of “public record” would appear to include contracts and documents in the government’s possession relating to performance. However, the Act provides protection for trade secrets and commercial or financial information. R.I. Gen. Laws § 38-2-2(4)(B). In addition, the Act contains a deliberative process exemption for “[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.” R.I. Gen. Laws § 38-2-2(4)(K).
Proprietary Data and Trade Secret Protection:	“Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature” is excluded from the definition of a “public record.” R.I. Gen. Laws § 38-2-2(4)(B).
Access to Software?	This subject does not appear to be addressed by Rhode Island statute or case law.

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

SOUTH CAROLINA	
Statute	Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-40-10 to 30-40-110. The Act applies to any “any public or governmental body or political subdivision of the State.” S.C. Code Ann. § 30-40-20(a). “Public records” are any “books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.” S.C. Code Ann. § 30-40-20(c).
Bid and Proposal Information	<p>The South Carolina Procurement Code provides that “[p]rocurement information must be a public record to the extent required by” FOIA, but provides “that commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed.” S.C. Code Ann. § 11-35-410(A). “Privileged and confidential information” is information that is not customarily released to the general public and “which might cause harm to the competitive position of the party supplying the information.” S.C. Code Ann. § 11-35-410(B). However, bids and proposals need not be disclosed if no award is made. S.C. Code Ann. § 11-35-410(C). In addition, predecisional interagency and interagency documents “containing technical evaluations and recommendations are exempted so long as the contract award does not expressly adopt or incorporate” the contents of these documents. S.C. Code Ann. § 11-35-410(D).</p> <p>Under FOIA, a governmental entity may, but is not required to, exempt “[d]ocuments of and documents incidental to proposed contractual arrangements and documents of and documents incidental to proposed sales or purchases of property,” which would include bids, proposals, and related documents. S.C. Code Ann. § 30-40-40(a)(5). However, these documents are not exempt “once a contract is entered into or the property is sold or purchased except as otherwise provided in this section.” <i>Id.</i> The Act also provides that “confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed.” <i>Id.</i></p>
Contracts and Documents Generated During Performance	Contracts and documents generated during performance in the government’s possession would appear to fall within the definition of a “public record,” but protections for trade secrets and proprietary information may limit disclosure.
Proprietary Data and Trade Secret Protection:	The Procurement Code prohibits release of confidential proprietary information obtained in response to a bid and proposal. S.C. Code § 11-35-410(A). Under FOIA, a governmental entity may also withhold documents reflecting trade secrets. S.C. Code § 30-40-40(a)(1). “Trade secrets” are “unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information.” <i>Id.</i>
Access to Software?	This subject does not appear to be addressed by South Carolina statute or case law.
SOUTH DAKOTA	
Statute	S.D. Code Ann. § 1-27-1 to 1-27-19. The law was significantly amended in 2009, effective July 1, 2009. “Each government entity or elected or appointed government official shall, during normal business hours, make available to the

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official.” S.D. Code Ann. § 1-27-1. The requirements apply to all “records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state.” S.D. Code Ann. § 1-27-1.1.
Bid and Proposal Information	Bids and proposals would appear to be covered by the new law, but are subject to protections for trade secrets and proprietary and confidential information. The law also exempts “[f]inancial information supplied by or on behalf of a person, firm, or corporation for the purpose of qualifying to submit a bid or proposal.” S.D. Code Ann. § 1-27-1.6(2).
Contracts and Documents Generated During Performance	Contracts appear to constitute public documents and must be “retained in the contract’s original format or a searchable and reproducible format” for the length of the contract plus two years. S.D. Code Ann. § 1-27-4.1. Documents in the government’s possession would also appear to be covered but are subject to protections for trade secrets and proprietary and confidential information. The law provides a deliberative process exemption for “[d]rafts, notes, recommendations, and memoranda in which opinions are expressed or policies formulated or recommended are exempt from disclosure.” S.D. Code Ann. § 1-27-1.7. The law also provides that “[d]ocuments or communications used for decisional process arising from person’s official duties [are] not subject to compulsory disclosure.” S.D. Code Ann. § 1-27-1.9.
Proprietary Data and Trade Secret Protection:	The law exempts trade secrets and proprietary and commercial information from disclosure: “Trade secrets, the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state, and other proprietary or commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose . . .” S.D. Code Ann. § 1-27-1.5(3). In addition, another section exempts “[p]roprietary data, trade secrets, or other information that relates to: (a) A vendor’s unique methods of conducting business; (b) Data unique to the product or services of the vendor; or (c) Determining prices or rates to be charged for services, submitted by any vendor to any public body.” S.D. Code Ann. § 1-27-1.6. The law also exempts “[a]ny other record made closed or confidential by state or federal statute or rule.” S.D. Code Ann. § 1-27-1.5(27).
Access to Software?	The law exempts from disclosure: “Valuable formulae, designs, drawings, computer source code or object code, and research data invented, discovered, authored, developed, or obtained by any agency if disclosure would produce private gain or public loss.” S.D. Code Ann. § 1-27-1.6(1).
TENNESSEE	
Statute	Public Records Act, Tenn. Code Ann. §10-7-101 et seq. The Act applies to all “state, county and municipal records.” Tenn. Code Ann. § 10-7-503(a)(2)(A).
Bid and Proposal Information	With respect to sealed bids for goods and services and leases of real property, bids “and individual purchase records, including evaluations and memoranda relating to same, shall be available for public inspection only after the completion of evaluation of same by the state.” Tenn. Code Ann. § 10-7-504(a)(7). For “[p]roposals received pursuant to personal

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	service, professional service, and consultant service contract regulations,” the proposals “and related records, including evaluations and memoranda, shall be available for public inspection only after the completion of evaluation of same by the state.” <i>Id.</i>
Contracts and Documents Generated During Performance	Definition of a “public record” includes all documents “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” Tenn. Code Ann. § 10-7-503(a)(1). This would appear to be broad enough to apply to a contract and documents in the government’s possession regarding performance. The extent of protection for trade secrets, proprietary data, and confidential business information is unclear.
Proprietary Data and Trade Secret Protection:	The protection for such information appears to be uncertain. The Act does not appear to contain a general statute protecting trade secrets and confidential business information, although there are several specific examples of protection in context other than the purchase of goods and services.
Access to Software?	This subject does not appear to be addressed by Tennessee statute or case law.
TEXAS	
Statute	Public Information Act, Tex. Gov’t Code §§ 552.001 to 552.353. “Public information is available to the public at a minimum during the normal business hours of the governmental body.” Tex. Gov’t Code § 552.021. The term “public information” means “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by a governmental body. Tex. Gov’t Code § 552.002. The Act applies to all state agencies and local agencies, but not the judiciary. Tex. Gov’t Code § 552.003(1).
Bid and Proposal Information	Information relating to competition or bidding is exempt if its release “would give advantage to a competitor or bidder.” Tex. Gov’t Code § 552.104. As explained by the Attorney General, this provision is intended to protect the government and not bidders. Tex. Att’y Gen, Public Information 2010 Handbook, p. 85. It is frequently used to protect information provided to the government, but the protection does not last forever. <i>Id.</i> Bids must be publicly disclosed after bidding is complete and a contract has been executed. <i>Id.</i> The government is still required to withhold “portions of bids that contain trade secrets or other commercial or financial information that is made confidential by law” under Section 552.110. <i>Id.</i> at p. 86.
Contracts and Documents Generated During Performance	Contracts and related documents would appear to be disclosable. “[I]nformation in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is discoverable “unless they are expressly confidential under other law.” Tex. Gov’t Code § 552.022. The information would still be subject to protections for trade secrets and commercial or financial information of Section 552.110. The Act also contains a deliberative process exemption, providing that “interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from” disclosure. Tex. Gov’t Code § 552.111.
Proprietary Data and Trade	The Act contains protections for both trade secrets and commercial or financial information. “A trade secret obtained from

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Secret Protection:	a person and privileged or confidential by statute or judicial decision is excepted from” disclosure. Tex. Gov’t Code §552.110(a). Commercial or financial information is also exempt if “it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Tex. Gov’t Code § 552.110(b).
Access to Software?	Subject not addressed by Texas statute. Licensed software would appear to be subject to protections for trade secrets and commercial and financial information, but the availability of government developed software may be in question.
UTAH	
Statute	Utah Government Records Access and Management Act. Utah Code Ann. § 63G-2-101 to 63G-2-901. “Every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours.” Utah Code Ann. § 63G-2-201(1). “A record is public unless otherwise expressly provided by statute.” Utah Code Ann. § 63G-2-201(2). The Act applies to all state agencies, political subdivisions in the state, and schools. Utah Code Ann. § 63G-2-103.
Bid and Proposal Information	Bids and proposals may be withheld prior contract or award if disclosure “would impair governmental procurement proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with a governmental entity.” Utah Code Ann. § 63G-2-305(b)(6).
Contracts and Documents Generated During Performance	The “documentation of the compensation that a governmental entity pays to a contractor or private provider” is a public record, except to the extent it contains protected confidential information. Utah Code Ann. § 63G-2-301(2)(j). In addition, “contracts entered into by a governmental entity” are normally public. Utah Code Ann. § 63G-2-301(3)(d). The definition of “public record” would also appear broad enough to cover documents generated during performance in the government’s possession, although this information may be subject to protections for trade secrets and confidential and financial information.
Proprietary Data and Trade Secret Protection:	Trade secrets are protected “if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63G-2-309.” Utah Code Ann. § 63G-2-305(1). Under the Uniform Trade Secret law, a “trade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Utah Code Ann. § 13-24-2. “[C]ommercial information or nonindividual financial information” is protected “if disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future” and “the person submitting the information has a greater interest in prohibiting access than the public in obtaining access.” Utah Code Ann. § 63G-2-305(2).

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	For both trade secrets and commercial or financial information, the entity seeking protection must comply with 63G-2-309, which requires a written claim of confidentiality and a written justification in support. Utah Code Ann. § 63G-2-309.
Access to Software?	Definition of “record” does not include “proprietary software,” “a computer program that is developed or purchased by or for any governmental entity for its own use,” or “material to which access is limited by the laws of copyright or patent.” Utah Code Ann. § 63G-2-103(22).
VERMONT	
Statute	1 V.S.A. §§ 315 to 320. The requirements apply to all state agencies and any political subdivision of the state. 1 V.S.A. § 317(a).
Bid and Proposal Information	Bids and proposals may be available, but not until after contract award. “[R]ecords relating specifically to negotiation of contracts including but not limited to collective bargaining agreements with public employees” are not public records. 1 V.S.A. § 371(c)(5). The release of bids and proposals is also subject to protection for “trade secrets.” <i>Springfield Terminal Ry. Co. v. Agency of Transp.</i> , 174 Vt. 341, 347 (Vt. 2002).
Contracts and Documents Generated During Performance	The requirements extend to “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency.” 1 V.S.A. § 317(b). Contracts and documents generated during performance in the government’s possession appear to fall within this definition, but may be subject to trade secret protection. In addition, documents of a deliberative nature may be excluded from the definition of a “public record.” The law recognizes a common law executive privilege for the governor’s office. 1 V.S.A. § 317(c)(4). It also extends the protection to local governmental entities. 1 V.S.A. § 317(c)(17) (interdepartmental and intradepartmental communications exempt “to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action”).
Proprietary Data and Trade Secret Protection:	Trade secrets are not within the definition of a “public record.” The requirements exempt “trade secrets, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it.” 1 V.S.A. § 317(c)(9). The exemption is not limited to intellectual property rights, but can include “internal, corporate financial information . . . if that financial information qualifies as a ‘compilation of information’.” <i>Springfield Terminal Ry. Co.</i> , 174 Vt. at 347.
Access to Software?	The subject of third-party software is not specifically addressed, but may be subject to trade secret protection. State-developed software of departments engaged in marketing activities and which give the agency a competitive advantage is not a “public record,” unless the department decides to license the software. 1 V.S.A. § 317(c)(30).
VIRGINIA	
Statute	Freedom of Information Act (FOIA), Va. Code Ann. §§ 2.2-3700 to 2.2-3714. FOIA applies to all state agencies and all

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	political subdivisions of the Commonwealth. Va. Code Ann. § 2.2.3701.
Bid and Proposal Information	Bids and proposals and related documents may not be available, at the discretion of the agency, until contract award. FOIA exempts “[r]ecords relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract.” Va. Code Ann. § 2.2-3705(12). Under the procurement code, a competitive sealed bidder and competitive negotiation offeror are entitled to inspect bids and proposals after they are opened and prior to award, except if the agency rejects all bids and proposals and rebids. Va. Code Ann § 2.2-4342(C) & (D). Cost estimates prepared by a public body are not open for inspection. Va. Code Ann §2.2-4342(B). The procurement code also protects trade secret and proprietary information submitted by a bidder or offeror, provided the bidder or offeror take the steps necessary to protect the information. Va. Code Ann §2.204342(F).
Contracts and Documents Generated During Performance	“[A]ll proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection,” except where limited. Va. Code Ann § 2.2-4342(A). In addition, the definition of “public record” includes all writings and recordings “prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.” Va. Code Ann. § 2.2-3701. This would appear to be broad enough to encompass documents in the government’s possession generated during performance.
Proprietary Data and Trade Secret Protection:	In a bidding context, trade secrets and proprietary information are exempt from FOIA, provided the bidder or offeror “(i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.” Va. Code Ann §2.2-4342(F).
Access to Software?	Software may be withheld, but could be released at the discretion of the government. “Vendor proprietary information software that may be in the official records of a public body” may be withheld. Va. Code Anno. § 2.2-3705.1(6). “Vendor proprietary software” means “computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions.” <i>Id.</i> “Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision” may also be withheld. Va. Code Ann. § 2.2-3705.1(7).
WASHINGTON	
Statute	Public Records Act, RCW §§ 42.56.001 to 42.56.904. The Act applies to all state and local agencies. RCW § 42.56.010(1).
Bid and Proposal Information	A “public record” is defined broadly to include “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW § 42.56.010(2). This would appear to encompass bids and proposals, although such information may be subject to trade secret protections as described below.

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

Contracts and Documents Generated During Performance	Contracts and documents generated during contract performance in the possession of the governmental entity would also appear to fall within the definition of a public record. However, such information may potentially be protected as a trade secret. <i>See Progressive Animal Welfare Soc’y v. Univ. of Wash.</i> , 125 Wn.2d 243, 262 (Wash. 1994) (applying protections under the Uniform Trade Secrets Act (UTSA) to the Act). The Act also contains a deliberative process exemption for “[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended [except] when publicly cited by an agency in connection with any agency action.” RCW § 42.56.280.
Proprietary Data and Trade Secret Protection:	The Act provides for protection of financial, commercial, and financial information in some instances, such as highway construction contracts, health care and health services, but does not contain a general exemption for such data. <i>See</i> RCW § 42.56.270. The Act contains an exemption for material exempt under some “other statute which exempts or prohibits disclosure of specific information or records.” RCW § 52.56.070(1). The UTSA is a form of statute that could apply to exempt material. <i>Progressive Animal Welfare Soc’y</i> , 125 Wn.2d at 262. Under the UTSA, a “trade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” RCW § 19.108.010(4).
Access to Software?	Other than protections to preserve the security of computer and telecommunications networks, the subject of access to software does not appear to have been addressed by statute, although such information may be subject to trade secret protection. RCW § 42.56.420(4).
WEST VIRGINIA	
Statute	Freedom of Information Act (FOIA), W. Va. Code §§ 29B-1-1 to 29B-1-7. The Act applies to “every state officer, agency, department;” “every county and city governing body, school district, special district, municipal corporation, and any board, department, commission council or agency thereof;” and any body created or funded by these entities. W. Va. Code § 29B-1-2(3).
Bid and Proposal Information	Bids and proposals are available, but may be closed until contract award. After contract award, a “copy of each bid in the possession of the director shall be maintained as a public record, shall be open to public inspection in the office of the director and may not be destroyed without the written consent of the Legislative Auditor.” W. Va. § 5-3-11(h).
Contracts and Documents Generated During Performance	A “public record” is defined as any “writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.” W. Va. § 29B-1-2(4). This would appear to be broad enough to cover contracts and materials in the government’s possession generated during performance. The material, however, might be subject to trade secret protection. W. Va. 29-B-1-4(a)(1). In addition, FOIA exempts “[i]nternal memoranda or letters received or prepared by any public body.” W. Va. § 29B-1-4(a)(8). This exemption allows an agency to withhold “written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	deliberative, decision-making process,” but does not extend to communications between the agency and those outside the government. <i>Daily Gazette Co. v. West Virginia Dev. Office</i> , 198 W. Va. 563, 575 (W. Va. 1996).
Proprietary Data and Trade Secret Protection:	Trade secrets are exempt from disclosure. W. Va. § 29B-1-4(a)(1). Trade secrets “may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.” <i>Id.</i>
Access to Software?	FOIA exempts disclosure of “[c]omputing, telecommunications and network security records, passwords, security codes or programs used to respond to or plan against acts of terrorism which may be the subject of a terrorist act.” W. Va. § 29B-1-4(a)(13). Otherwise, the subject of access to third-party or state-developed software does not appear to be addressed by West Virginia statute or case law.
WISCONSIN	
Statute	Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The law applies to any “state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation.” Wis. Stat. § 19.32(1).
Bid and Proposal Information	A “record” is any material on which information is recorded “or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.” Wis. Stat. § 19.32(2). Bids and proposals would appear to fall within the definition of a “record.” The law does impose restrictions on the release of trade secrets, but not necessarily for confidential commercial and financial information. Wis. Stat. § 19.36(5); <i>State v. Beaver Dam Area Dev. Corp.</i> , 2008 WI 90, 83 n.21 (Wis. 2008) (noting the legislature did not extend protections to commercial or financial information). As explained by the Wisconsin Supreme Court, there is also a common-law exception to disclosure: “In addition to the express statutory provisions limiting disclosure under public records law, Wisconsin courts have recognized other limitations to disclosure, including the requirement that the harm to the public from disclosure should be balanced against the benefit of disclosure to the public.” <i>Id.</i> This common-law exception could potentially be used to limit access to bids and proposals (including confidential financial and business information), particularly before the award of any contract.
Contracts and Documents Generated During Performance	Definition of “record” appears to be broad enough to cover contracts and documents in the government’s possession generated during performance. Such records may be subject to trade secret protection and the balancing test discussed in <i>Beaver Dam Area Dev. Corp.</i> In addition, the term “[r]ecord” does not include drafts, notes, preliminary computations and like materials prepared for the originators personal use or prepared by the originator in the name of a person for whom the originator is working.” Wis. Stat. §19.32(2)
Proprietary Data and Trade Secret Protection:	“An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in” the Uniform Trade Secrets Act (UTSA). Wis. Stat. § 19.36(5). The UTSA defines “trade secret” as

SURVEY OF PUBLIC RECORD LAWS AFFECTING PUBLIC CONTRACTS

	<p>“information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply: 1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use [and] 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.” Wis. Stat. § 134.90(1)(c). The Wisconsin Supreme Court has explained that the legislature only exempted “trade secrets” and not “commercial and financial information.” <i>Beaver Dam Area Dev. Corp.</i>, 2008 WI at 83 n.21.</p>
Access to Software?	<p>A “computer program” is not subject to inspection. Wis. Stat. § 19.36(4). “Computer program” is defined as “the processes for the treatment and verbalization of data.” Wis. Stat. 16.971(4)(c).</p>
WYOMING	
Statute	<p>Public Records Act, Wy. Stat. §§ 16-4-201 to 16-4-205.</p>
Bid and Proposal Information	<p>“Public records” includes all documents “made by the state of Wyoming and any counties, municipalities and political subdivisions thereof and by any agencies of the state, counties, municipalities and political subdivisions thereof, or received by them in connection with the transaction of public business.” Wy. Stat. § 16-4-201(a)(v). This would appear to be broad enough to cover bids and proposals, although they may be subject to protections for trade secrets and confidential commercial information. Wy. Stat. § 16-5-203(d)(v).</p>
Contracts and Documents Generated During Performance	<p>The subject is not addressed but such material would likely qualify as a “public record.” Such information may constitute protected trade secrets and confidential commercial information. <i>Id.</i> In addition, the law applies a deliberative process exemption for “[i]nteragency or intraagency memoranda or letters which would not be available by law to a private party in litigation with the agency.” Wy. Stat. § 16-4-203(a)(v).</p>
Proprietary Data and Trade Secret Protection:	<p>A custodian shall deny right to inspection of “[t]rade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person.” Wy. Stat. § 16-5-203(d)(v).</p>
Access to Software?	<p>This subject does not appear to be addressed by Wyoming statute or case law.</p>