H B 405

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465-3800

MEMORANDUM February 27, 1990

SUBJECT: Sectional summary of CSHB 405 (Finance)

TO: Representative Kay Brown

FROM: Theresa L. Bannister TB
Legislative Counsel

You have requested a sectional summary of the above described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 provides findings and intent for the bill.

Section 2 makes the public records of all public agencies open to inspection by the public under reasonable rules during regular office hours, except where specifically provided otherwise. Directs the custodial public officer to provide on request and on payment of a specified fee a certified copy of the public record.

Section 3. Sec. 09.25.110(b) establishes, except as otherwise provided, that the basic fee for copying public records may not exceed the standard unit cost of duplication established by the public agency.

Sec. 09.25.110(c) authorizes the public agency to charge personnel costs for record production under certain circumstances. Limits personnel costs to the actual salary and benefit costs for performing the search and copying tasks. Requires the fee to be paid before the records are disclosed and authorizes the agency to require payment in advance of the search.

Sec. 09.25.110(d) authorizes a public agency to reduce or waive a fee in certain circumstances. Requires that fee reductions and waivers be uniformly applied. Authorizes a public agency to waive a fee of $5 or less if the fee is less than the cost to arrange payment.

Sec. 09.25.110(e) authorizes the Bureau of Vital Statistics, the library archives, and the Division of Banking, Securities, and Corporations to continue charging the same fees for performing record searches.

Sec. 09.25.110(f) requires that electronic information provided in printed form be made available without codes or symbols, unless accompanied by an explanation of the codes or symbols.

Section 4. Sec. 09.25.115(a) authorizes a public agency, upon request and fee payment, to provide electronic services and products involving public records to members of the public. Encourages public agencies to make information available in usable electronic formats to the greatest extent feasible.

Sec. 09.25.115(b) indicates how fees are to be set for electronic services and products. Authorizes the reduction or waiver of a fee under certain circumstances. Requires that fee reductions and waivers be uniformly applied.

Sec. 09.25.115(c) establishes that the fee for duplicating a public record in the electronic form kept by a public agency may not exceed the actual incremental costs of the public agency.

Sec. 09.25.115(d) requires public agencies to include certain security and liability provisions in contracts for electronic services and products.

Sec. 09.25.115(e) requires each public agency to notify the state library of the electronic services and products offered by the agency under sec. 09.25.115. Requires the notification to include a summary of the available format options and the fees charged.

Sec. 09.25.115(f) requires public agencies that offer on-line access to an electronic file or data base to also provide without charge on-line access to the electronic file or data base through one or more public terminals.

Sec. 09.25.115(g) directs each public agency to establish the fees for the electronic services and products. Authorizes the TIC to cancel unreasonable fees of public agencies in the executive branch.

Sec. 09.25.115(h) prohibits a public agency from making electronic services and products available to some persons and not to others.

Sec. 09.25.115(i) directs a public agency other than a municipality to separately account for the fees received by the agency under sec. 09.25.115 and deposited in the general fund. Authorizes the legislature to use the annual estimated balance in the account to make appropriations to the agency to carry out the agency's activities.

Section 5 states that every person has a right to inspect a public record in the state, except in certain listed circumstances. Except as provided in AS 09.25.215, requires custodial public officers to permit the inspection and give a certified copy of the record on demand and payment of the required fee. States that the copy is evidence of the original. In the rest of the section, makes technical changes to conform the terminology to the use of "public records".

Section 6. Sec. 09.25.123(a) directs the TIC to supervise and adopt regulations for the implementation of AS 09.25.110 - 09.25.140 by public agencies in the executive branch.

Sec. 09.25.123(b) directs the Legislative Council to supervise and adopt procedures for the implementation of AS 09.25.110 - 09.25.140 by public agencies in the legislative branch.

Sec. 09.25.123(c) directs the administrative director of courts to supervise and adopt procedures for the implementation of AS 09.25.110 - 09.25.140 by public agencies in the judicial branch.

Sec. 09.25.123(d) requires that the regulations and procedures adopted under sec. 09.24.123 include procedures for appealing public agency action taken under AS 09.25.110 - 09.25.140.

Sec. 09.25.123(e) provides certain definitions for sec. 09.24.123.

Sec. 09.25.124 provides a right of appeal from final administrative orders made by a public agency under AS 09.25.110 - 09.25.140.

Section 7 authorizes a person to seek injunctive relief under AS 09.25.125 without exhausting the person's administrative remedies under AS 09.25.123 - 09.25.124.

Section 8 requires that if it is ambiguous whether an application of AS 09.25.100 - 09.25.220 to personal information violates the right to privacy provision in the state constitution, the ambiguity must be resolved in favor of the right to privacy.

Section 9 provides definitions for AS 09.25.100 - 09.25.220, including "electronic services and products", "public agency", and "public records". "Public agency" is defined to cover municipalities and the executive, legislative, and judicial branches of state government.

Section 10 requires each state agency to notify the state library of the creation of certain data, including automated data bases, and provide for their accessibility through the library, except in certain circumstances.

Section 11 makes certain information of the Department of Fish and Game confidential and establishes a specific period of confidentiality for some of the information.

Section 12 makes a technical change to conform to other changes in the bill.

Section 13 authorizes a municipality to copyright software and to enforce its copyright rights.

Section 14 makes a technical change to conform to other changes in the bill.

Section 15 adds four new sections.

Sec. 44.99.020(a) requires a state agency that requests personal information directly from the subject of the information to give when the request is made to the individual a notice that provides certain listed information.

Sec. 44.99.020(b) describes how the agency may provide the notice required by sec. 44.99.020(a).

Sec. 44.99.020(c) exempts certain listed requests for information from the notice requirement of sec. 44.99.020(a).

Sec. 44.99.030(a) allows an individual to challenge the accuracy and completeness of personal information on the individual that is maintained by a state agency and that is subject to public disclosure.

Sec. 44.99.030(b) states that an individual may challenge the accuracy or completeness of information under sec. 44.-99.030(a) by filing a written request to change the information. States what the request must contain.

Sec. 44.99.030(c) authorizes the state agency to request within a certain time verification of disputed personal information from the individual who made the request to change the information.

Sec. 44.99.030(d) requires the state agency, within a certain period of time, to review the request for change and either change the information or deny the request. Requires the agency to notify the individual of the change or denial and include certain information in the notification of denial.

Sec. 44.99.030(e) allows the individual whose request for change is denied to provide the agency with a statement providing the individual's reasons for disagreeing with the decision. Directs the agency to maintain the request for change and the statement in its records. Requires that the agency clearly note on all of the agency's records that contain the disputed information which portions are disputed. Clarifies how this is to be done if the record is in electronic form.

Sec. 44.99.030(f) exempts certain listed records and information from sec. 44.99.030.

Sec. 44.99.040 defines certain terms for the previous two sections. "Person" is defined to mean an individual. "State agency" is defined to cover the executive, judicial, and legislative branches of state government.

Sec. 44.99.050 authorizes a state agency to copyright software and to enforce its copyright rights. "State agency" is defined to cover the executive, legislative, and judicial branches of state government.

Section 16 states that requests for personal information made by a state agency on or after the effective date of the bill are covered by sec. 44.99.020.

TLB:pl
WKP2/097

STATE OF ALASKA
THE LEGISLATURE

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JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPE. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HB 405

House State Affairs 1/23/90

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF
HB 405

Public Access to EDP Information

Received January 8, 1990
by Reps. Brown, Boucher, Goll

Heard January 23, 1990
Heard February 1, 1990
Heard February 6, 1990

Adopted CSHB 405 (SA) February 6, 1990

Passed Out of Committee February 6, 1990
3 Do Pass
2 No Recommendation

TABLE OF CONTENTS

HB 405: Public Access to EDP Information

HOUSE COMMITTEE REPORT

(7)
Date Referred: January 8, 1990 FURTHER REFERRALS: FINANCE

Date of Committee Action: _____

The STATE AFFAIRS Committee considered: HB 405

HOUSE BILL NO. 405 PUBLIC ACCESS TO EDP INFORMATION

"An Act relating to public access to the information of the state."

RECOMMENDATIONS:
[X] be replaced with CS HB 405 (SA) [ ] the same title
[X] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[2] zero with analysis DPS/DNA

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
		✓	
		✓	

Chairman's Signature

Item 2

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HB 405
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title : Public Access to EPD Information

Sponsor : Rep. Brown
Requestor : State Affairs

Agency Affected : Administration
BRU : Information Services

Components : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0		0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See attached.

Prepared by : Paul Monette, Director
Division : Information Services

Phone : 465-2220
Date : 01/22/90

Approved by Commissioner : Frank S. Baxter (Jay M. Baker for)
Agency : Administration

Date : _____

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Skp

1/22/90

Department of Administration
Division of Information Services

HB 405 - - FISCAL NOTE

An Act Relating to Public Access to the Information of the State

HB 405 would produce no fiscal impact on the Division of Information Services, either during FY 90 or in succeeding fiscal years.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 405
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: 01/08/90
Title: An Act Relating to Public Access to the Information of the State
Sponsor: Rep. Brown, Boucher, Goll
Requestor: State Affairs

Agency Affected: Public Safety
BRU: DS Administration
Component: Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)
The Department has been able to accommodate requests for information to date. This bill provides for collection of fees for services. The Department cannot reasonably estimate what the additional number of requests associated with this bill will be. Accordingly, we have indicated a zero fiscal note with the assumption the Department may request through the budget process, to receive and expend funds generated by these services to provide these services.

JNC 1/19/90

Prepared by: KES Ken Bischoff
Phone: 465-4336
Division: Administrative Services
Date: 01/19/90

Approved by Commissioner: Arthur English
Date: 1-19-90
Agency: Department of Public Safety

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HB 405
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date: 21-Feb-90
Agency Affected: Natural Resources
Title: An Act relating to Public Access & changes to information
BRU: Management & Administration
Sponsor: Brown, Boucher, Goil
Components: Information Resource Management
Requestor: Brown

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	10.0	10.0	10.0	10.0	10.0	10.0
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	10.0	10.0	10.0	10.0	10.0	10.0
CAPITAL						
REVENUE	10.0	10.0	10.0	10.0	10.0	10.0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/Program Rcpts	10.0	10.0	10.0	10.0	10.0	10.0
TOTAL	10.0	10.0	10.0	10.0	10.0	10.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Dianne M. Lyles
Phone : 762-2384
Division: Management and Administration
Date : 21-Feb-90

Approved by Commissioner: Lennie Gorsuch
Date: 21-Feb-90
Agency: Department of Natural Resources

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

The Information Resources Management component, Department of Natural Resources, is requesting the authority to receive program receipts generated from the implementation of HB405. Under this bill, the Department has the responsibility to make information records available to the public, and for this the Department can collect fees. Additionally under this bill, the Department has the opportunity to create new information products and services. For this the Department can also collect fees.

The Information Resources Management (IRM) component, which manages and maintains many of the Department's land records, must be positioned to respond to public requests for information. Authority to receive these program receipts will allow the Department's IRM component to defray the incremental costs of serving the public's requests for land records information.

The requested amount, $10.0, is the component manager's best estimate of revenue generation, without the benefit of any historic data for purposes of forecasting. Because fees will be charged based on covering incremental costs, and on recouping a reasonable portion of the costs associated with building and maintaining this information, agency costs are expected to match revenues generated.

Item 3

Rep. Kay Brown
1/22/90

By Brown, Boucher, Goll

HB 405
An Act Relating to Public Access to the Information of the State

Why legislation is needed:

* Computers and electronic data bases have proliferated throughout government, raising issues regarding access to electronic information that are not addressed in present law.

* Increased electronic access to the state's information systems, particularly for the more isolated communities of the state, would enhance the delivery of state services and the availability of information throughout the state.

* Public access to the state's information systems will be enhanced by establishing user fees for electronic services and products that are calculated to recover a reasonable portion of the costs associated with building and maintaining a public information system.

What the bill does:

■ **defines public records** (page 5, lines 17-23; page 3, lines 6-13; page 1, line 27 through page 2, line 9)

Public records include all information (books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics) that is developed or received by a public agency and preserved for its informational value or as evidence of the organization or operation of the agency. A software program is not a "public record."

Public records are available for public inspection and copying, except as otherwise provided by law.

Electronic information disclosed in printed form must be made available without codes or symbols, unless accompanied by an explanation of the codes or symbols.

■ **defines electronic services and products** (page 4, lines 2-22)

Electronic services and products include

* electronic manipulation of the data contained in public records in order to tailor the data to the person's request or to develop a product that meets the person's request;

* duplicating or providing periodic updates of an electronic file or database;

* providing on-line access to an electronic file or database;

* providing information that cannot be retrieved or generated based upon existing computer programs; and

* providing functional access to a public information system. Functional access includes the capability for alphanumeric query and printing; graphic query and plotting; nongraphic data input and analysis; and graphic data input and analysis.

■ **Establishes fee structure** (Page 2, lines 3-6 and 15-19)

Fees charged for obtaining a "public record" shall not exceed the costs of search and copying.

Agencies may establish fees for "electronic services and products" in order to recover 1) the actual, incremental costs of providing the service or product, and 2) a reasonable portion of the costs associated with building and maintaining the public information system.

■ **Addresses agency management** (Page 2, lines 6-7, 11-14, 19-29; page 3, lines 1-4)

The fee for obtaining a public record may be reduced or waived by an agency.

An agency is not obligated to provide electronic products or services.

The fee for obtaining an electronic service or product may be reduced or waived by an agency for a public purpose, including statutory program support, nonprofit use, journalistic use, and academic research.

When providing electronic services and products, agencies shall adopt access terms and conditions to protect system security and integrity, and to limit liability.

An agency may use program receipts accounting for fees.

Who is covered?

Executive branch agencies, the University, the Legislature, the Judiciary, municipalities

Proposed amendments:

1. Page 1, line 23, after "establishing" insert "user fees for"; delete "user fees" after the word "products". Clarification.

2. Page 2, line 14, insert after "public.": "An agency or department is encouraged to make information available in useable electronic formats to the greatest extent feasible."

3. Page 2, line 26, after "department" insert "or of a central computer system maintained by another agency". Clarification.

Geographic Information Systems: Issues Arising from the Proliferation of Information

Phillip Parent

Phillip Parent is a consultant with BSI Consultants, Inc. in Oakland, California. Formerly associated with the National Center for Geographical Information and Analysis, he has a background in survey, publications, hazardous waste management, and management of geographic information systems.

Abstract: *Geographic information is proliferating at an unprecedented rate due to the use of computer technology in mapping and spatial analysis applications. Three basic issues must be addressed in order to ensure the effective management of this flood of information: accuracy, access, and applicability. Accuracy, which is inversely proportional to uncertainty, can be compromised in a spatial database in three ways: data capture, analysis, and compatibility. Each of these operations can introduce error and skew results. Access and privacy is another issue arising from this proliferation of information. Data accessibility should balance the public's right to know with the individual's right to privacy. Public agencies are obligated to release raw data but not processed information on request. Integrated databases compiled by public agencies can be viewed as resources that can be marketed to the commercial sector. Applicability of information leads to effective decision-making, the satisfaction of end-users and, for public agencies, equitable access in the sense that the public can have the same information on which decision-makers base their decisions. Databases generated and maintained at the application (end-user) level are generally more productive initially than large-scale corporate systems. However, such databases are sometimes only effective in applications where the data are compatible with the original intended use. Thus there is a trade-off between application (single purpose) databases and corporate (multi-purpose) databases. Consensus among users on data compatibility and goals in the initial stages of implementation will increase long-term effectiveness. Databases must be designed with the flexibility to shift as applications mature.*

With the advent of modern computer technology, it is possible to generate an overwhelming amount of output with very little effort. In fact, automation can reduce not only the effort but also reduce the amount of thought required in the production of reports, maps, and in data analysis. Data, initially unedited observations of physical phenomena that have been effectively captured, stored, processed, analyzed, and presented in a timely and comprehensible way, are an asset. These data can be classified as information, which has been defined as the antidote to uncertainty (Epstein 1987). Data that don't meet these standards are useless as they tend to obscure relevant information. Specific issues arise as more private and public agencies amass large databases. Most of the research in the field of geographic information and analysis has been focused on the technical aspects of developing and operating geographic information systems (GIS). Little has been written on the management of the information generated in respect to GIS. However, as more systems come online and mature, the issues arising from the proliferation of information will gradually make their way to the forefront of social science research.

This paper will identify and discuss three major areas that need to be fully explored: (1) accuracy; (2) access and privacy; and (3) applicability, which impacts the long-term effectiveness of a system. These are by no means the only issues

tance that compatibility should not only be considered for questions of scale and resolution, but also for the original purpose of the data gathering. This problem of incompatible applications for the same data could be another stumbling block for shared databases.

Accuracy, then, can be distilled into three basic areas: data capture, analysis, and compatibility. Although resolution and documentation play an important role, these issues in and of themselves are not the deciding factors. High resolution and documentation do not guarantee accuracy and reduce uncertainty. What will ensure accuracy is care on all levels that the data are handled in an appropriate and responsible way by competent professionals well-schooled in the intricacies of GIS.

Access and Privacy

The dilemma of the public's right to know versus the individual's right to privacy is an issue that will receive increasing scrutiny as individual databases become part of an integrated whole. The relationship between data and information is the basis for any investigation of access and privacy. In accordance with the federal Freedom of Information Act of 1966, data that are publicly held should, with the exception of proprietary records such as geophysical exploration records that must be filed for mineral claims and the like, be available to the general public. Generally speaking, agencies are required to disclose information in the format in which it is held. However, once the data are processed and analyzed, the public's right to access is diminished. For instance, agencies are not required to create new reports or formats in response to requests. Indeed, agencies do not even have to provide data in a readable form. As a rule, agencies may only recover their costs for reproducing the data, not the costs of producing them. Other factors that enter into the question of access are staff time to handle information requests and the re-use of data and the motives behind the request (Roitman 1986).

A different issue is the problem of private companies—credit bureaus, for example—that hold extensive databases on individuals. Should this information be regulated? Should it be public domain? With the ease of building and maintaining electronic databases, these issues eventually will have to be addressed. (Indeed, during the recent Bork hearing for the Supreme Court, eyebrows in Washington, D.C. were raised when a video store released the record of the movies Judge Bork rented. Although no embarrassing titles were found, the potential for abuse caused lawmakers to think about the possible ramifications of an information society gone wild.) Although there has been some excellent research on the privacy issue (Roitman 1987), there is certainly room for further study as it is an issue that will only become more important as GISs become more popular.

A public agency such as a planning department can build a sizable database consisting of tax assessment data, cable TV hookups, zoning designations, noise levels, water use and so on. Other agencies with their own data layers, such as police departments with crime-type and frequency maps, health agencies with violation maps, or school districts with bus route maps, could integrate their data and process the information. Indeed, private companies that specialize in the gathering, repackaging, and selling of information can reap huge profits. By spatially addressing this information, entire new approaches to marketing can be created. The applications for such a comprehensive database for private enterprises are substantial. Real estate firms, pollsters, direct marketing companies, and political groups among others could utilize these databases for targeting select market segments. However, few public agencies are in the business of data dissemination. They are service oriented and have acquired this data to support their mandated public duties, not as a marketable asset. An agency with such an integrated database might not have the extra staff to make this data available and is under no obligation to re-format, tabulate, or process the data for the public.

Two major groups are affected by the issue of data access: Public agencies that control the databases but are not in a position to process or market them due to economic and

political constraints, and private entities that would like to utilize the data. There are two approaches they could take. First, the private companies could request the individual raw data layers from each agency and format, process, and tabulate the resultant information themselves. This would effectively limit access to individuals and companies that have the economic or technical resources to undertake such a project. The other approach would be for the public agency involved to set up a semi-private entity to archive, format, process, tabulate, and market the databases. The entity could be non-profit or for-profit and services could range from simply gathering and re-formatting data to developing analytical software to improve the information content.

An advantage of the second approach is that the integrity of the databases could be preserved, an important consideration if the available data are generated from many different sources. Privacy could be guaranteed by having restricted databases reside in the generating agency. A single chartered entity controlling the access and distribution of data would ensure compatible formats, consistent documentation, similar scales and cartographic conventions, and the avoidance of unnecessary duplication. It would also ensure equal access to a diverse set of users. This is the way that Japan is developing its centralized GIS under the aegis of the Ministry of Construction (Okabe 1988).

Of course, this is a long-term solution that requires political sponsorship, start-up funding, and the support of the private sector. However, cooperation between the private and public sectors on the local level is increasing. If public databases and the information that results from data processing are readily available to all segments of society at a reasonable cost, the issue of access will not be a controversial subject. If the data are carefully gathered and private information shielded, the "big brother" concerns of some social critics can be avoided. However, there are no guarantees that this will be the case.

Applicability of a GIS System

The applicability of a system and the information contained within it directly impact the effectiveness of that system as a management tool. A fundamental question of all managers trying to implement a system is how can an agency measure the effectiveness of an integrated geographic information-processing system. Effectiveness, defined as the value of enhanced decision-making from increased analysis capabilities, and improved information availability attributable to the information system (Prisley and Mead 1987), can be interpreted at two levels. At the first level, it can be an improvement of end-user and over-all organizational productivity due to system application (Nunamaker and Konsynski 1986). By taking a larger view, effectiveness can be viewed as the balance between equality (the doctrine of equal rights) and equity (the concept of fairness) (Chrisman 1987). The narrower definition is based on internal productivity at the agency level while the broader definition deals with the impact of the system on the public at large. This impact, although hard to quantify, is intangible benefit that should be taken into account in a cost/benefit analysis (Prisley and Mead 1987).

Measuring an increase in internal productivity, necessary for the first definition of effectiveness, is an ongoing process starting at the earliest stages of conceptual planning. Initial productivity measures range from profits and operating expenditures to customers served to maps produced and so on (Schmidt 1979). Production goals must be decided upon before undertaking an implementation project. By comparing the impact of a GIS to the stated goal of the GIS effectiveness can be ascertained.

This traditional approach to effectiveness is being altered by changing technology. Distributed processing is becoming an attractive alternative to centralized data management. Networking capabilities are being upgraded and stand-alone work-stations are becoming less expensive. In addition, users are becoming more computer literate. Every planning department now has people who feel more comfortable behind a CRT screen than a drafting

THE GOVERNMENT PULSE

AGENCIES

Ending the Government's Paper Chase

But computerized records pose a host of new questions

By Judith Havemann
Washington Post Staff Writer

In a nondescript building in Washington, D.C., Federal Maritime Commission clerks manually insert changes in 800,000 pages of shipping rates in 5,000 green binders each year, using horse-and-buggy technology to regulate the commerce of the space age.

By 1991, these records will be computerized and made instantly available to anybody who wants to know how much it costs to ship anything by ocean around the world.

The transformation of the commission's records is an example of a process that will become increasingly common as the government moves toward "paperless" agencies by the year 2000.

But as records change from sheets of paper into electronic blips, widespread confusion prevails as to whether records like those of the Maritime Commission should be made easily accessible to the public, in what form and at what cost, and whether the government should release the information itself or turn it over to the private sector.

"The laws and policies that spell out citizen access rights to government information in the age of electronic government are woefully out of date," the American Civil Liberties Union (ACLU) has said.

Congress will take up legislation to update the government's "information dissemination policy" when it reconvenes this year.

The bill is called the Paperwork Reduction Act, and, in addition to continuing a long-standing effort to cut down on the forms the government requires citizens to fill out, it seeks to commit federal agencies to a policy of openness and disclosure when it comes to government information.

For the first time, a bipartisan House bill marries the word "electronic" to its information-policy language, telling the government to release, "to the greatest extent practicable," information maintained on computers in "usable electronic formats."

Although information policy sounds as controversial as motherhood and apple pie, it has been a contentious issue in recent years while the Office of Management and Budget established policies favoring the private sector over the government.

The Reagan administration's Office of Information and Regulatory Affairs at OMB required that federal agencies place "maximum feasible reliance on the private sector for dissemination of [information] products and services."

The policy has been dramatically modified in favor of public access under President Bush, but Congress has not been satisfied.

"We want to bring organization to dissemination anarchy," says Democratic Rep. Robert E. Wise Jr. of West Virginia, whose subcommittee on government information, justice and agriculture worked out the information dissemination language in legislation introduced in the House by the chairman and ranking minority member of the House Government Operations Committee.

Under the bill, a government agency would no longer have to step aside if a private firm was interested in selling its information. Instead, federal agencies would have to consider whether an equivalent product or service was available and "reasonably achieves the dissemination objectives of the agency product or service" the agency was about to offer.

The issue grows in importance as more and more information is stored in government computers. The Securities and Exchange Commission is developing an Electronic Data Gathering System (EDGAR) that will handle 6 million pages of security filings per year, the Patent Office is creating an Automated Trademark System, and the Transportation Department is developing an electronic system for international tariff filings.

So far, most of the new data systems are in agencies that regulate businesses, says Jerry Berman, director of the Information Technology Project for the ACLU.

But, he says, "the benefits of electronic information systems are not being equitably or widely shared by the public at large."

Although the Environmental Protection Agency recently began offering an electronic service that tells the public what toxic chemicals are being released throughout the country, "there are no large-scale dissemination projects underway at agencies such as Justice, Health and Human Services or HUD," Berman says.

Berman says more than 440 government data bases exist without a government index system detailing where they are or how to use them.

In the case of the Federal Maritime Commission, electronic versions of some or all of its records have been compiled for about five years at private expense and sold to customers.

When the commission proposed converting its records to electronic format, the private firms that had been key-punching records into computers and selling the information to steamship companies and others questioned whether the agency should "reinvent the wheel."

After a long battle, Congress allowed the agency to provide electronic information directly to the public, but in a relatively raw form—leaving the door open for private firms to "crunch" the numbers into more usable formats for customers.

Today, "everybody supports the Federal Maritime Commission modernization," says Ronald Plesser, an attorney for the private providers of information.

Republican Rep. Frank Horton of New York, ranking minority member on the Government Operations Committee, predicts that the paperwork bill will sail through the House on the noncontroversial calendar of measures.

It has the support of most industry and public-interest groups, except one big one—the American Library Association.

The association opposes the Wise provisions because of its suspicion of the Office of Management and Budget.

Under the bill, the OMB director would be required to "guide" agency information policy, following the guidelines laid out in the law.

"As librarians we know that information is power and if this goes through it will give OMB a lot of power over information," says Anne A. Heanue, an official of the Library Association's legislation committee.

"We have seen OMB in operation," says Patricia Schuman, chairman of legislation for the association. Its role would have a "chilling effect" on agencies releasing information, she says.

But the Information Industry Association, a group of 850 information companies, sees little problem with the legislation.

"We don't believe it gives OMB any more power than it has now. . . . This is the first statute setting out the right of access. Where we once argued against government competition we now believe the best way to get information to citizens is sometimes government and sometimes private."

Gary Bass, head of the citizen organization OMB Watch, says the measure "goes a long way toward advocating greater accountability for both OMB and the entire government." ■

STATE FREEDOM OF INFORMATION ACTS

Chart IV-A
4/87

	States with FOIAs which specifically cover access to public records in computer, electronic or magnetic tape form or records regardless of physical form or characteristics	Charging policy for copies of public records
ALABAMA		
ALASKA		
ARIZONA	x	Cost of providing copies plus value of reproduction on commercial market
ARKANSAS	x	No express charging policy
CALIFORNIA	x*	Cost of duplication or statutory fee
COLORADO	x	Reasonable fee for actual costs or statutory fee
CONNECTICUT	x	Cost to public agency
DELAWARE		
FLORIDA	x	Statutory fee or actual cost of duplication (cost of material and supplies, not labor or overhead)
GEORGIA	x	Compensation for reproduction at rate agreed to by custodian and requestor
HAWAII		
IDAHO		
ILLINOIS	x	Actual cost of reproducing and certifying and for use of reproduction equipment
INDIANA	x	Computer tape or disk produced by legislative services agency: fee must not exceed sum of 1) direct cost of supplying information in that form, 2) standard cost of selling same information in publication form, 3) percentage of direct cost of maintaining information system (3 may not exceed 1 and 2).
IOWA	x	Reasonable fee not to exceed cost of providing service
KANSAS	x	Statutory fee or for records maintained in computer facilities, cost of computer services including staff time
KENTUCKY	x	Reasonable fee which does not exceed actual cost (not staff required)
LOUISIANA	x	Reasonable fees
MAINE	x	When inspection can't be accomplished without translation of electronic data, may charge for cost of translation
MARYLAND		Reasonable fee or statutory fee
MASSACHUSETTS	**	
MICHIGAN	x	Mailing costs, actual cost of duplication or or publication (labor, cost of search, examination, review, deletion and separation of exempt material)
MINNESOTA	x	Actual cost of making, certifying and compiling copies plus an additional reasonable fee (related to development costs of information), if data base has a commercial value
MISSISSIPPI	x	Actual cost of searching, reviewing, duplicating and mailing
MISSOURI	x	Reasonable fee

* Records maintained by Legislative Counsel are not subject to FOIA.
** FOIA may not apply to legislature.
***Not required to supply computer tapes if data is promptly published and offered for sale

	States with FOIAs which specifically cover access to public records in computer, electronic or magnetic tape form or records regardless of physical form or characteristics	Charging policy for copies of public records
MONTANA		
NEBRASKA	x	No express charging policy
NEVADA		
NEW HAMPSHIRE		
NEW JERSEY		
NEW MEXICO		
NEW YORK	x	Statutory fee or actual cost of reproducing record
NORTH CAROLINA	x	Statutory fee
NORTH DAKOTA		
OHIO		
OKLAHOMA		Cost of reproducing copy, and if request is for commercial purpose or would cause excessive disruption of public body's functions, reasonable fee for direct cost of document search
OREGON	x	Actual cost in making records available
PENNSYLVANIA	**	
RHODE ISLAND	x	Reasonable expense in retrieval and/or copying
SOUTH CAROLINA	x	Actual cost of searching for or making copies of records and may charge reasonable hourly rate for making records available
SOUTH DAKOTA		
TENNESSEE	x	No express charging policy
TEXAS		
UTAH	x	Reasonable fees
VERMONT		
VIRGINIA	x	Actual cost (copying and search time)
WASHINGTON		
WEST VIRGINIA	x	Actual cost of making reproductions
WISCONSIN	x***	Statutory fee or actual, necessary and direct cost of reproduction and transcription
WYOMING	x	Reasonable fee

* Records maintained by Legislative Counsel are not subject to FOIA.
** FOIA may not apply to legislature.
***Not required to supply computer tapes if data is promptly published and offered for sale or distribution.

COMMISSION OF THE
EUROPEAN COMMUNITIES

Guidelines for improving the synergy between the public and private sectors in the information market

Directorate-General
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FOREWORD

Information is considered more and more as a motor for the industrial development of the Community within a highly competitive world market. The setting up of an information services market as decided by Council on 26 July 1988[1] is a major aim in the Community's overall strategy.

It is recognized that a strong and healthy information market in the European Community can only be achieved through the work of a wide range of participants. As is recognized in the plan of priority actions for the setting up of an information services market, the public sector has an important role to play as a major producer of basic data and information, as a provider of information goods and services and as a major consumer. According to the way it functions, it can either encourage or hinder initiatives leading to the development of a strong European information industry.

To promote optimal synergy between public sector support and private sector initiatives, the Commission undertook a series of consultations and discussions with representatives of the public and private sectors of the European information market in all Member States. As a result, the Commission has now produced 'Guidelines for improving the synergy between the public and private sectors in the information market', which have been endorsed by the representatives of the

[1] OJ L 285 p 39 88/524/CEC

Member States meeting within the Senior Officials Advisory Committee (SOAC).

Guidelines are considered essential in order to help the public sector in decision-making related to making information available for external use and supporting the development of the information market; and to establish certain ground rules for avoiding possible unfair competition.

The guidelines, which are advisory only, are aimed at providing a basic set of generally agreed principles and recommendations which can be used in the development of national guidelines in individual Member States. They are in no sense directives, but it is hoped that they will, by virtue of their production at the Community level, support national initiatives designed to promote the growth of the European information industry.

C. JANSEN VAN ROSENDAAL

INTRODUCTION

Governments and public sector bodies collect large amounts of data and information, as part of their routine functions, which could be made available to the private sector for the construction and marketing of electronic database services. The private sector is well placed to combine information from a variety of government sources, and its prime function is to produce and distribute information products oriented to the needs of the market. In order to develop and strengthen the information industry, a positive initiative is required from governments, to encourage the use and exploitation of public sector data and information. However, there are few convergent policies or guidelines within Member States relating to the role of the public sector in this area. In addition, if there are different policies operating in the different Member States, then it will be very difficult to develop the market. It is therefore desirable that national policies, as far as they exist, be coordinated at the Community level in order to allow the majority of the EC countries not yet having such a policy to follow these orientations on a national level.

In the following text, the guidelines are numbered, and explanatory material is printed in italic.

GUIDELINES FOR IMPROVING THE SYNERGY BETWEEN THE PUBLIC AND PRIVATE SECTORS IN THE INFORMATION MARKET

THE PUBLIC SECTOR AS A PRODUCER OF BASIC DATA AND INFORMATION

Following the general principles used in the European System of Integrated Economic Accounts (ESA) (Sector 60, general government), the public sector includes central and local public administrations, which administer and finance a group of activities, principally of a non-market nature, intended for the benefit of the community, and institutions whose principal resources are derived from public funds. Organizations wholly or partly owned by the public sector and operating under the normal rules of the market are considered for the purpose of these guidelines as being in the private sector.

In the following guidelines, 'exploitation' may include some or all of the activities involved in the distribution, manufacture and distribution of value-added information services. Electronic information services include all products and services originating from binary storage in a computer.

1. Public administrations regularly and systematically collect basic data and information in the performance of their governmental functions. These collections have value beyond their use by governments, and their wider availability would be beneficial both to the public sector and to private industry. Public organizations should, as far as is practicable and when access is not restricted for the protection of legitimate public or private interests, allow these basic information materials to be used by the private sector and exploited by the information industry through electronic information services.

   Information to which access would be likely to be restricted includes material relating to national security, external relations, the safety of the State and public security, matters sub judice,

personal privacy and personal data, commercial and industrial confidentiality, and in general any material required by law to be held in confidence. When availability of data or information for use or exploitation is denied to the private sector, an explanation of the reason for non-availability should be given.

2. Member States should compile and publicize guidelines defining the conditions of release, use and exploitation of public sector data and information.

   National or regional guidelines of greater specificity, developed by consultation with the appropriate bodies, are required to take account of the different conditions prevailing in the individual Member States.

3. Basic data and information collected by the public sector should be regularly reviewed, with regard to the possibility of their further use, and exploitation.

   If consideration is being given to the harmonization of public sector data and handling procedures in the interests of greater efficiency, regard should also be paid to the possibilities for easier use and exploitation of the information by the private sector. If circumstances permit, it may be advantageous to involve the private sector in the review process.

4. The availability of basic data and information should be publicized to the private sector, and the procedures by which it can be obtained and used or exploited should be made clear. Negotiation procedures and pricing principles should as far as practicable, having regard to the characteristics of the data or information, be harmonized across public administrations.

   The establishment of an advisory body, able to coordinate and share among administrative bodies experience of negotiations with the private sector of the information industry, and the development of model contracts, are measures likely to promote uniformity of procedures.

Pricing policies may vary depending on the nature of the information. A price should be established which reflects the costs of preparing and passing it to the private sector, but which does not necessarily include the full cost of collecting and handling it in the course of routine administration. The price may be reduced if provision of the resulting information service is deemed to be necessary in the public interest. Public sector accounting procedures should not impede receipt of payment for information or services sold.

5. When public sector information or data is released for exploitation by the private sector, restrictions should not normally be placed on the types of customer or the territories to which the resulting service may be made available.

   The general principle is that no unnecessary barriers to the flow of information across borders should be imposed.

6. Contracts or other arrangements with private sector database providers or host services should not grant exclusive rights if they lead to distortion of competition. If, for reasons such as the penetration of a new market or provision of a service in the public interest, an exclusive right is deemed necessary, it should be subject to regular review.

THE PUBLIC SECTOR AS A PROVIDER OF ELECTRONIC INFORMATION SERVICES

7. The public sector should adopt policies and procedures which encourage investment by the private sector in the development of information services based on public data.

   The database industry is characterized by low levels of investment and risk aversion among the traditional publishing or manufacturing groups which have entered the market. Use of public sector data and information presents an opportunity to encourage

the private sector in the provision of electronic information services.

8. When a public administration provides electronic information services directly, it should avoid any practice which leads to the distortion of competition. Before establishing a new electronic service or continuing an existing one, public administrations should consider whether an existing private sector service can be used or adapted to meet their requirements.

   Reasons for which the public sector might develop and support electronic information services could include, amongst others, the following examples:

   (i) where the service is deemed to be essential to the public interest, but the private sector is unwilling or unable to offer it on reasonable terms;

   (ii) where it is an inseparable part of public sector tasks;

   (iii) where a visibly neutral service, independent of the private information industry, is required.

9. Electronic information services directly supplied by the public sector should be regularly reviewed, with a view to deciding whether their provision by the public or private sector is most appropriate, or whether the involvement of the private sector in their production or distribution, or their replacement by appropriate commercial services is desirable.

   The public sector could, for example, develop databases and then consider offering them to the private sector, or could offer the distribution rights of public sector databases to the private sector. In order that the taxpayer may share in the rewards of success when databases which have reached commercial viability are transferred, a royalty payment in addition to the negotiated price may be considered appropriate.

10. Electronic information service entrepreneurs in European Community countries should be treated on a equal footing irrespective of their country of origin within the European Community.

The offer of, for example, rights of exploitation of public sector data or information should be made on an equal footing to all EC hosts, no special advantage being given to national hosts.

PUBLIC SECTOR SUPPORT OF INFORMATION SERVICES

While as yet no common procedures for public support have been established, in this relatively new sector certain ground rules ought to be observed.

11. Support from the public sector may only be given in accordance with the European Community rules on competition, as expressed in Articles 92 and 93 of the Treaty, on aids granted by States.

12. Subject to the provisions of Guideline 11 above, direct or indirect financial support from the public sector may be provided to encourage pre-competitive research and development, and to encourage the emergence of new market sectors.

    Public support can be given provided that reasonable and non-discriminatory procedures are set up to transfer the R&D results to interested organizations within the Community who wish to exploit them commercially. Public support should cover only part of the investment costs during development and start-up phases, and not ongoing operating costs of services, and such support, limited in time, should not generate unfair competition for existing services.

13. Public assistance may also be provided to develop and maintain information services which cannot become viable on a commercial basis but which are necessary in the public interest. Public assistance may also involve reducing linguistic barriers to the use of existing databases of European origin, by making them accessible in other languages.

14. As part of the process of stimulating the development of the information market, consideration should be given to the establishment of joint ventures between the public and private sectors.

Support can also be given by the public sector to the establishment of new electronic information services in the marketplace, by acting as a 'launch customer' and guaranteeing the purchase of an agreed amount of appropriate service provision.

15. Conditions governing application of public support to users of European electronic information services should not discriminate against these services on the basis of their European Community country of origin.

16. Public sector accounting and budgetary procedures and exchange controls should not prevent access by interested public departments to electronic information services throughout the Community.

LEGAL AND STATUTORY RESPONSIBILITIES

17. The public sector should strive to eliminate unjustified legal or other obstacles to the use of public information by the private sector and its exploitation by the information industry, while ensuring that commercial and other confidentiality considerations and civil and criminal liability are respected (see Guideline 1).

    Public administrations should, for example, be clear in the applications of rules for classification of information.

18. The public sector should, to the highest extent possible, make use of the discretion given under Article 2 (4) of the Berne Convention to exempt from copyright texts of a legislative, administrative or legal nature and official translations of such texts. In the case of texts falling under the copyright convention, the public sector ought not to award exclusive right of reproduction to a single organization as this might hinder value enhancement by other users.

    Article 2 (4), as revised at the Stockholm Copyright Convention, 1967, states that 'It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts'. The aim is to adopt the most favourable interpretation of the Convention in order to encourage the private sector to create advanced information services.

19. When public sector information or data is made available for private sector use or exploitation, any pre-existing citizens' rights of access to the original information as determined by legislation must be preserved.

    The individual should continue to be able to have access to such information on the same terms as obtained before its release to the private sector.

European Communities — Commission

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Kay Brown

Alaska State Legislature
House of Representatives

November 27, 1989

Rep. Red Boucher, Chairman
House State Affairs Committee
Alaska State Legislature
3111 C Street
Anchorage, AK 99503

Dear Rep. Boucher,

Since I was out of town when the House State Affairs Committee met recently to discuss state information services, I wanted to share some of my thoughts in writing.

As you know, when the Legislature is not in session I work as an analyst for PlanGraphics, Inc., a Kentucky-based firm that specializes in the design and implementation of geographic information systems (GIS). In that context I have had the opportunity to do research and become familiar with public access and computer technology issues. While the discussion below mostly addresses issues affecting GIS development, these concepts also are applicable to other information systems.

Public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials. The courts have established a clear connection between the "right to know" and governmental accountability. When tax dollars are spent, or government takes action, citizens can review the information on which the decision was based. The right to know the basis for government's actions and decisions provides a deterrent to abuse of government authority, but this general concept does not address a myriad of emerging information access issues.

In the context of GIS development, I have become convinced that the public interest will be best served by implementing the concept of "information utilitarianism" -- the goal of which is to provide the greatest access to information for the greatest number.

The technical and institutional issues imposed on a GIS custodial agency are complex. Regulations (6 AAC 95) specify access procedures applicable to custodians of government records, but Alaska law does not address the expanded roles of the agencies, made possible by GIS and other technological improvements, as information disseminators and integrators.

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The evolution of GIS into an "information utility" that provides information products and services for standard rates raises significant policy issues concerning the economics of information and expanded government authority to provide information services. This critical debate likely will result in division of control over the "value of information," as well as the analytical and integration capacities of the technology, among various contenders. Government will remain the collector of information, controlling the updates to the most extensive and useful data bases, and thus is the initial "owner" of the value of a significant portion of source information.

The information processing capabilities of GIS make it reasonable to anticipate an unprecedented number and variety of access requests coming from sister agencies, commercial vendors, and the general public as the system applications expand and outsiders become aware of the resource. Most multilayered GISs will have the capacity and ability to produce a much more complex set of information and information products than was contemplated when the public records policies were set. Open records laws deal quite adequately with the three or four requests a year made to a typical government agency, but have a different impact when applied to several hundred requests a month, including requests such as on-line access and complete data base updates.

The utility of GIS for managing government's information is such that outside requests can predictably reach a level that could severely limit any control over staff time and the agency's budget. Another concern is the ever increasing cost to the state to meet the rising costs of increasing access.

Literal application of the current regulations causes more potential restriction of information access than it promotes in the GIS environment. Rules that adequately protect the public's right to know in the world of paper records can prove counterproductive in the world of information management through computer technology. The map can now be managed as a database and not as a picture. If a map was used to make a leasing decision, a copy of the map should be available under the open records law. But is there any public policy basis for providing access relatively free for the commercial use of a map if it did not exist before the request? Information in a GIS data base can be analyzed and manipulated in an almost infinite number of ways to produce *new* information that did not previously exist.

Based on two basic and quite diverse policy approaches visible today in different jurisdictions, policy makers are

trying to meet the requirements of the applicable state open records law. An agency faced with dealing with open record requests at its own expense (in terms of management of staff time, capital investment in the system, and especially operation and maintenance costs) has little incentive to operate as a utilitarian information processor.

In the absence of cost recovery options, GIS managers may perceive it to be in their interests to refuse as many requests as possible by distinguishing the requested material from "records" or inventing some other basis to deny access. These might include, "...the information is not final, the information requires proprietary software, the information is not available in the form requested, the request is not specific enough to identify the record," and so on.

Most GIS managers probably would like to grant broader access to information, but they must be able to afford the exercise. The more successful the agency is in limiting access, the less expense that must be covered by increased appropriations from the legislature.

The most easily defended policy at this time is to 1) grant all requests for traditional text material in printout form, 2) deliver a copy of the database in the form of a tape when asked, 3) absorb the real costs of the exercise, and 4) turn down all requests that don't fit that mold.

If the access request is analyzed exclusively under the open records law, and an exception category fits well enough to refuse access, the exception will not allow for subsequent sale or distribution of the particular information or different information to satisfy a similar future request. If the access request is met merely because no open record exception applies, then no subsequent control is retained for similar requests in the future, no matter how burdensome or expensive they might prove to be.

For two kinds of financial reasons, GIS custodians are choosing to pursue an active policy of providing and selling information. The first reason is to obtain reasonable purse-string control over access necessary to limit frivolous requests and to avoid the unpredictable expense of meeting the potential demand. The second reason is to establish a method for offsetting the costs of establishing, operating, and maintaining the system.

Under present Alaska regulations it is not possible for an agency to charge fees for GIS products and services beyond the cost of searching and copying.

In order to move toward the concept of information utilitarianism, and promote broad public access to

information kept by state agencies, I believe we should amend the statute to make a distinction between "records" and "products and services." This solution would uphold the underlying principles of the Freedom of Information Act to keep government accountable for its actions and expenditures while simultaneously promoting utilitarian access to state information.

This strategy envisions proprietary government action to make information *products and services* available for a price calculated to produce a balance between revenues and expenditures. Information that is used to form public policy would continue to be treated as a *record* and made available to any member of the public for a nominal cost.

A reasonable distinction between information that constitutes a *record*, and information that constitutes a *product, publication, custom report, custom map, or a service*, will enable an agency to enhance access for the general public and recover a portion of the system's cost from commercial and other large users. This will help maintain the long-term viability of the state's GIS systems.

The system of public access I envision would establish user fees for various levels of access to an agency GIS. Users could be offered "access packages," each sufficient to produce a range of products or services within the full range of system capabilities. The GIS agency could offer access to the system at one of several functional levels, within which any process or product can be located. Basically, functionality equates to software capability, so it is access to software that distinguishes the levels in this proposed access scheme. For example, functionality levels could include:

- Plotting, printing, and reproduction of standard products only;
- All above, plus alphanumeric query and printing capability;
- All above, plus graphic query and plotting capability;
- All above, plus nongraphic data input and analysis capability; and
- All above, plus graphic data input and analysis capability.

Again, any information used to make a decision or form public policy would be defined as a *record* and would continue to be available to any member of the public for the nominal cost of searching and copying.

Thank you for the opportunity to comment. I am working on legislation on this topic and other related issues, including privacy concerns, that I plan to introduce next

session. I look forward to discussing this with the State Affairs Committee.

Sincerely,

Rep. Kay Brown

Policies for the Electronic Information Age

Now that computers have taken over, states need to update the rules for managing their information resources.

Edwin Levine

Information – the lifeblood of government – is getting more complicated to manage.

Like everyone else, states have become totally dependent on computers and software, networks and telephones, for storing, sorting and providing access to their information. Managing this electronic data and the technological structure that supports it will become the challenge of the 90s.

Statutes dealing with government information and the public's right to know have become outdated. Lawmakers are finding themselves embroiled in complex debates over information dissemination and the costs of access to computerized government information, copyright, computer security, optical storage and computer privacy.

The need for redefinition is based on the increased value of the information being produced, created and stored by government today. It was valuable as "marks on paper," but the costs of finding, sorting, combining and analyzing paper files were prohibitively high. Computerizing the information has reduced costs, improved the ease of use and provided capabilities for information management that were impractical with paper records.

Today it is possible to use technology to manage information, rather than having to manage the technology itself. For state legislatures this is a critical distinction. If we separate the information from the technology that stores and processes it, the underlying policy issues are much clearer. These issues are the meat and potatoes of state legislatures: How will scarce resources be allocated? What are the equity concerns? What is the public interest?

Information is an asset. But does the information belong to the individual who provided it to the motor vehicle registration bureau? Or to the bureau, which wants to sell it to a company that markets mailing lists? Or is it now "public information," which must be provided to any person who asks for it, including the child support enforcement unit that wants to find recalcitrant parents?

Legislative responses to these questions are eclectic. Some states restrict the release of "personally identifiable information," while others limit only distribution of "confidential" information. At the federal level, Congress passed the Computer Matching and Privacy Protection

Edwin Levine is staff director of the Florida Legislature's Joint Committee on Information Technology Resources.

Act last October. It establishes stringent controls on matching computerized information about individuals.

Studying the problems raised by the growth of computerized government, the Florida Legislature's Joint Committee on Information Technology Resources identified four major groups of issues that lawmakers are going to have to deal with —control of information, its dissemination, its security and its preservation.

One of the problems of controlling information is the question of privacy, allowing people to know what personal information is being collected about them, why it was collected, where it came from, how it will be used, who has access to it. The common concern is the individual's lack of control over information about himself once it is computerized.

The second set of issues raises fundamental questions about government's responsibility for providing access to public information. It brings up such questions as whether government can copyright its information, whether software written by government employees should be sold, who should be allowed and who prevented from disseminating government information, whether government will provide only what the private sector won't, whether information will be available to everyone or only to those with a computer, whether it's fair to provide a computer printout to some and a diskette or tape to others.

The debate over who will profit from the use of information is fierce. Many public agencies would like to offset the tax burden with profits from their investment, but should taxpayers have to pay again for what they have already funded? Minnesota allows its counties to copyright and sell their software. Is it in the public interest to have government compete with private business? Should private software companies be taxed if the receipts are to be used to fund the marketing of software developed by public employees?

Is it fair for government to charge for the examination of its actions? Is it appropriate to require that examination of the public record be based on fees or the ability to pay, or should citizens have free access to this material?

The third and fourth sets of issues that legislatures must address are those of security and preservation. Security is vital to ensure that data is neither altered nor destroyed and that confidential information is not released. Other security issues have to do with disaster recovery, access controls, security plans and protection of functions such as electronic voting systems where the integrity of the process must receive extraordinary attention.

Preservation problems have to do with saving and managing public records that are stored on non-paper media such as magnetic tape or optical disk. Questions that have to be answered include what is the status of non-paper records as evidence, whether a document is a copy or 'the' original, how to manage access and destruction of computer records and the software used to search them, and how to determine what records to preserve given the glut of useless information that can now be cheaply stored electronically. Then there is new technology such as electronic mail that never creates a paper document at all.

These issues have already created difficulties for legislatures. In Texas an optical storage law has been challenged because it allowed for the destruction of "the original" paper records and authorized the use of technology for which there are no national standards.

New York has completed a plan to manage and preserve electronic records. The Uniform Commercial Code is being reviewed to determine how electronic records will affect current law.

State legislatures have dealt with broad societal changes in the past, but the information age is speeding toward us a lot faster than anything we've ever dealt with before. The adoption of information technology may be virtually complete by the turn of the century. Will lawmakers have enough time to determine the public interest in these issues?

The treatment of government's own information will be most troublesome. Who will control this information, who will disseminate it, how will it be secured and how will it be preserved? The information age will force every legislature to re-examine old and settled issues from a new perspective.

OTA REPORT BRIEF

October 1988

Informing the Nation: Federal Information Dissemination in an Electronic Age

The government today stands at a major crossroads with respect to the future of Federal information dissemination. Technical advances are creating opportunities for productivity improvement in Federal information dissemination that OTA estimates, conservatively, at hundreds of millions of dollars per year. Technological advances have opened up many new and potentially cost-effective ways to disseminate Federal information, especially those types of information (such as bibliographic, reference, statistical, and scientific and technical) that are particularly well-suited to electronic formats. For example, an entire year's worth of the *Congressional Record* or *Federal Register*, or several Bureau of the Census statistical series on employment and demographic trends, can be placed on one compact disk that can be easily read with a low-cost reader and basic microcomputer. Press releases, weather and crop bulletins, and economic or trade indices can be disseminated immediately via electronic bulletin boards or online information systems.

OTA expects important underlying technical advances in microcomputers, printers, scanners, electronic publishing systems, optical disks, and a host of online networks to continue unabated for at least the next 3 to 5 years and 10 years or more in many cases.

On the demand side, OTA's 3- to 5-year outlook indicates that overall demand for Federal information in paper formats will decline modestly and the demand for microfiche will drop rather markedly (except for document storage and archival purposes), while the demand for electronic formats will continue to increase dramatically. The results of surveys conducted by the General Accounting Office indicate, for example, that civilian agencies disseminated electronically over 7,500 information products in fiscal year 1987, which is more than triple that of 4 years earlier.

Information is the lifeblood of many Federal Government programs and activities and is essential to the implementation of agency missions and to informed public debate. The advent of electronic dissemination has generated serious conflicts over how to maintain and strengthen public access to government information and balance the roles of the Federal Government and the private sector. Congress has enacted numerous laws that emphasize the importance of broad public access to Federal information and assign various information dissemination functions to individual Federal agencies and governmentwide clearinghouses. But the existing statutory and institutional framework was established by Congress largely during the pre-electronic era, and technological advances are creating a number of problems and challenges.

- At a fundamental level, electronic technology is changing or even eliminating many distinctions between reports, publications, databases, records, and the like, in ways not anticipated by existing statutes and policies. A rapidly growing percentage of Federal information exists in an electronic form on a computerized system as part of a "seamless web" of information activities.
- Electronic technology is eroding the institutional roles of governmentwide information dissemination agencies. While many individual Federal agencies disseminate at least some of their information in electronic formats, the central governmentwide dissemination mechanisms (primarily the Superintendent of Documents sales program at the U.S. Government Printing Office, Depository Library Program administered by GPO, and National Technical Information Service) are presently limited largely to paper or paper and microfiche formats and thus disseminate a declining portion of Federal information.
- Technology has outpaced the major governmentwide statutes that apply to Federal information dissemination. The Printing Act of 1895, Depository Library Act of 1962, and Freedom of Information Act of 1966 predate the era of electronic dissemination. The Paperwork Reduction Act of 1980 was amended in 1986 to include information dissemination within its scope, but substantive statutory guidance on electronic information dissemination per se is minimal.
- The advent of electronic dissemination raises new equity concerns since, to the extent electronic formats have distinct advantages (e.g., in terms of timeliness, searchability), those without electronic access are disadvantaged. In general, library, research, media, consumer, and related groups

The Office of Technology Assessment (OTA) is an analytical arm of the U.S. Congress. OTA's basic function is to help legislators anticipate and plan for the positive and negative impacts of technological changes.
Address: OTA, U.S. Congress, Washington, DC 20510-8025. Phone: 202 224-9241. John H. Gibbons, *Director*

argue that the Federal Government has a responsibility to assure equity of access to Federal information in paper and electronic formats.

- **Technological advances complicate the Federal Government's relationships with the commercial information industry.** While those companies that market repackaged or value-added Federal information (e.g., with additional indexing or analysis) benefit from access to electronic formats, some of these firms are concerned about possible adverse effects of government competition and oppose government dissemination of "value-added" information. This conflicts with the long-established government role in producing and disseminating value-added information products in paper format and its logical extension to electronic formats.

OTA concludes that congressional action is urgently needed to resolve Federal information dissemination issues and to set the direction of Federal activities for years to come. Congress needs to provide direction to existing agencies and institutions with respect to electronic information dissemination. Key policy alternatives are listed in the box below.

Copies of the OTA report, "Informing the Nation: Federal Information Dissemination in an Electronic Age," are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325, (202) 783-3238. The GPO stock number is 052-003-01130-1; the price is $14.00. Copies of the report for congressional use are available by calling 4-8996. Summaries of reports are available at no charge from the Office of Technology Assessment.

Key Policy Alternatives

Options for the Government Printing Office
- —strengthen the GPO role in standards-setting, training, and innovation relevant to electronic publishing.
- —include selected electronic information formats and products in the Superintendent of Documents sales program (while preserving the prerogatives of agencies to disseminate electronic information themselves and of private vendors to further enhance and resell electronic information).
- —improve traditional GPO printing services through more competitive pricing and delivery, itemized estimating and billing practices, surveys of customer needs and problems, and revised and strengthened GPO advisory groups.
- —accelerate the introduction and use of electronic formats for the *Congressional Record*, *Federal Register*, and other key governmental process information products.

Options for the National Technical Information Service
- —decide where NTIS should be located within the Federal Government and how it should relate to other Federal agencies, including what materials agencies should submit to NTIS.
- —develop and implement an electronic document system, using a range of electronic publishing technologies.
- —increase the cooperation with the Superintendent of Documents in regard to indexing, marketing, and international exchange of Federal information.

Options for the Depository Library Program
- —offer electronic formats and products for distribution to depository libraries.
- —conduct pilot projects, demonstrations, and tests involving various electronic technologies, financial arrangements, and delivery mechanisms (including possible involvement of the private sector).
- —consider a reorganization or restructuring of the Depository Library Program in light of both electronic options and the evolving nature of libraries and the telecommunication infrastructure.

Options for Technical/Management Improvement
- —establish governmentwide technical standards on text markup, page document description, optical disks, and other areas important to electronic information dissemination.
- —establish governmentwide information index to major Federal information products, regardless of format.
- —establish agency innovation centers to exchange learning and experience about technological innovations and user needs relevant to electronic information dissemination.
- —revise the information resources management program to give information dissemination a stronger role.
- —establish an electronic press release service for dissemination of time-sensitive Federal information directly to the press, via private electronic news and wire services, and to the Depository Library Program taking care that the needs of smaller, less affluent or technically sophisticated, and/or out-of-town news organizations are met.

Options for Statutory Change
- —amend the Printing Act, Depository Library Act, and/or Paperwork Reduction Act to provide statutory direction for specific institutional and technical/management alternatives as well as to provide general philosophical guidance on electronic information dissemination.
- —legislate a renewed congressional commitment to public access to Federal information in an electronic age.
- —legislate a governmentwide electronic information dissemination policy, including more specific guidance on the role of the private sector, contracting out of Federal information dissemination, user charges, and provision of value-added information products.
- —amend the Freedom of Information Act to bring electronic formats clearly within the statutory purview, and define the scope, fees, and procedures for FOIA requests and searches in an electronic environment.
- —amend FOIA to function more broadly as an "access to information" statute rather "access to records" statute.

Options within the legislative branch
- —establish a strategic direction for electronic dissemination of legislative branch information.
- —determine how to ensure that electronic congressional information is available to the public, and how that information should be made available (by GPO, congressional offices, depository libraries, and private vendors).
- —establish a coordinating mechanism of House, Senate, and support offices involved with the dissemination of congressional information, to maximize the exchange of learning, minimize potential overlap, and take advantage of opportunities for technologically enhanced access.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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April 20, 1989

MEMORANDUM

TO: Representative Kay Brown

FROM: Maria Gladziszewski
Legislative Analyst

RE: **The Impacts of Technology on Public Access to Information, Computer Crimes and Employee Surveillance**
Research Request 89.268

You asked us to conduct research on several aspects of advancing information technology. Specifically, you were interested in three areas: 1) public access to information, 2) computer crime, and 3) employee monitoring. I will discuss each area in detail after the following brief summary of findings.

SUMMARY

- All fifty states operate under Freedom of Information (FOI) provisions, either from state constitutional or statutory authority. The federal Freedom of Information Act (FOIA), passed in 1966, established for the first time a statutory right of access to federal government information.

- Federal and state laws regarding public access to information were written with paper records in mind, and most observers have concluded that current laws do not adequately address information dissemination in the computer age.

- The director of the National Center for Computer Crime Data stated that computer crime legislation needs constant revision to outpace new technologies. Legislation must prohibit alteration, damage, and destruction of data, as well as disruption and denial of services.

- Dean Guaneli, assistant attorney general, knows of no cases of computer crime prosecuted in Alaska. Several sections in the criminal statute could be used to prosecute unauthorized access to computers. Mr. Guaneli stated that having all sections dealing with potential computer crimes in one place in the statutes would be useful.

- Because of the increased number of computers in the workplace and the resultant increased ability to monitor employees, electronic monitoring has recently become a topic of public policy debate.

- Intrusive monitoring can conflict with traditional expectations of what is fair on the job. Monitoring without warning can make employees feel like they are being spied upon and may violate personal privacy of both employees and customers.

- Electronic monitoring is a topic that especially affects women and minorities because they comprise the majority of the clerical work force likely to be monitored (routine computer programmers, word processing clerks, telephone operators, airline reservation agents, etc.)

PUBLIC ACCESS/FREEDOM OF INFORMATION

You requested information relating to rights of the public to access governmental information and mentioned concerns about invasion of privacy. You asked that the public access research attempt to 1) define "public access," 2) determine what other states are doing regarding public access to information and 3) determine the status of current Alaska laws in this area. A brief review of federal and state legislation on access to information and privacy issues is offered below as an attempt at defining "public access." Also included is a discussion of access to information in relation to computerized databases.

"Public Access" to Information

Information has long been recognized as playing an essential role in a democratic political system. Rapid advances in information technology have raised new economic and policy issues to be addressed by Congress, the courts, and state legislatures. The technology makes it possible for agencies to acquire information electronically (via magnetic tape, cassettes, disks, optical disks, or transmission over telephone links) and to release information electronically (via the same media and by satellite transmission). The new technologies can improve public access to information. They can also, however, be very costly and can threaten the position of established electronic information suppliers. Additional questions arise depending upon whether one considers access obligations under freedom of information laws or whether one considers more active information dissemination initiatives (through some form of electronic publishing). "Public" access to information released electronically really means access by a relatively small portion of the population with access to microcomputers. Until every citizen has a microcomputer, the concept of "public" availability really means "direct availability to certain technologically sophisticated constituencies, such as investors, inventors and

patent attorneys, tariff filers or medical researchers, or indirect availability to members of the general public using agency public reference rooms or public libraries."[1]

Federal Legislation Relating to Access to Information

Public access to information held by federal agencies is addressed in three federal acts.[2] The Administrative Procedure Act (APA) of 1946 requires agencies to publish information about agency procedures and rules in the Federal Register. The APA was "drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know..."[3]

The Freedom of Information Act (FOIA) of 1966 revised the public information disclosure section of the APA. The APA generally had been recognized as falling short of its disclosure goals and "came to be looked upon as more a withholding statute than a disclosure statute."[4] The FOIA established for the first time a statutory right of access to federal government information. Underlying principles of the FOIA, however, are inherent to the democratic ideal: "The basic purpose of FOIA is to ensure that an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[5] In an effort to clarify and extend the disclosure requirements of the FOIA, and also as a reaction to the abuses of the Watergate era, the FOIA was substantially amended in 1974. These amendments significantly narrowed the ability of

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[1]Henry H. Perritt, Jr., Electronic Acquisition and Release of Federal Agency Information, (The Administrative Conference of the United States, 1988), p. 18.

[2]The Administrative Procedure Act of 1946 (5 USC §1002), the Freedom of Information Act of 1966 (5 USC §552), and the Privacy Act of 1974 (5 USC §552a).

[3]Lotte E. Feinberg, "Managing the Freedom of Information Act and Federal Information Policy," Public Administration Review, November/December 1986, p. 616.

[4]Guidebook to the Freedom of Information and Privacy Acts, pp. 1-10.

[5]NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) cited in Guidebook to the Freedom of Information and Privacy Acts, compiled and edited by Justin D. Franklin and Robert F. Bouchard (1986).

agencies to withhold records.[6] The Act contains nine exemptions which protect the following types of records from access, disclosure, or dissemination: 1) national security, 2) agency personnel matters, 3) matters specifically exempted from access by another statute, 4) commercial secrets, 5) agency deliberations, 6) private personal matters, 7) law enforcement investigations, 8) financial institution investigations and 9) geological surveys. The Federal FOIA applies only to "records" maintained by "agencies" of the Executive Branch of the federal government (including the Executive Office of the President and independent regulatory agencies). The FOIA does not apply to records maintained by the courts, by Congress, or by state governments.

The Privacy Act of 1974 responded to concerns about government use and possible misuse of personal information. Although the government had gathered information about citizens for decades, public concern was heightened at the time for several reasons. Among these were the abuses of Watergate (illegal wiretapping and surveillance of private citizens by federal agencies) and the technological capability to collect vast amounts of information on individuals. While information had previously been stored in manual files, advances in technology made it easier than ever for the government to compile, retrieve, analyze and disseminate data.

The Privacy Act states that "any citizen of the United States or an alien lawfully admitted for permanent residence" can use the Act and is entitled to its protection. The scope is more narrow than that of the Federal Freedom of Information Act, which allows use by "any person." The Privacy Act applies to records in a "system of records" and can be documents, regardless of physical form, which contain an "identifying particular" that could be used to identify someone (social security number, draft registration number, fingerprint, etc.) The Privacy Act adopts the definition of "agency" in the FOIA and also does not apply to records compiled by Congress, by the courts, or by state governments.

The Freedom of Information Act does contain provisions addressing potential conflicts between privacy interests and pro-disclosure policies. The FOIA attempts to resolve the conflict between public access to agency records and individual privacy by permitting agencies to delete private or proprietary information from records made available to the public. The Act states that "[a]ny reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt..."

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[6] In 1976 Congress again narrowed what could be withheld from disclosure and in 1978 made some technical changes to the FOIA. Congressional hearings held in 1981 demonstrated that, after several years of administrative experience with the FOIA, the Act was "in need of both substantive and procedural reform." The most recent FOIA amendments passed through Congress in 1986.

States' Action Relating to Freedom of Information

All fifty states operate under Freedom of Information provisions, either from state constitutional or statutory authority. According to the Council of State Governments (CSG), some states operate under restrictive open records provisions that classify as public records only those documents required to be kept by law or those made pursuant to law.[7] Less restrictive laws usually provide that "all records in the possession of a public agency" are public unless otherwise specified in statute or regulation. Thirty-six states, including Alaska, have laws of this type.[8]

Attachment B, a chart prepared by the National Conference of State Legislators (NCSL), lists states with FOIAs which specifically cover access to public records regardless of the physical characteristics of the records. Thirty-one states have laws that specifically include computerized public records.

All states provide exemptions to open records laws and the same categories of exemptions can be found in all states. Exemptions to state open records laws are of six types: 1) information classified as confidential by state law; 2) law enforcement and investigatory information (e.g., criminal history records, child abuse records); 3) trade secrets and commercial information, 4) preliminary department memoranda (e.g., working papers and correspondence of the governor and legislators, intra-agency memorandums); 5) personal privacy information; and 6) information relating to litigation against a public body (e.g., legislative research documents, bill drafting services).[9] Table 2 lists information classified as confidential in Alaska statute.

In March 1989, The Reporters Committee for Freedom of the Press, a nonprofit organization based in Washington, D.C., completed fifty-one guides to open meetings and open records laws entitled Tapping Officials' Secrets. The guides include analyses of statutes, exemptions, and other legal limitations. The open records chapter in each guide includes a section addressing the law on specific categories of records (e.g., bank records, hospital records, public utility records, etc.) The guides explain the foundations for state open government in common law, in the first state laws after independence, and in territorial laws in western states. A compendium of guides to all states is available for $200, or they are available individually for $5 per state. A copy of the guide for Alaska has been requested and will be forwarded to your office upon receipt.

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[7]See Attachment A, a memorandum issued in December 1988 by the Council of State Governments, for more information on state public record laws.

[8]North Dakota Legislative Council, Open Records Laws, October 1986, p. 8, as cited in CSG Backgrounder No. 128801 (Attachment A).

[9]Braverman and Heppler, "A Practical Review of State Open Records Laws," 49 Geo. Wash. Law Rev., 1981, p. 739.

Access to Information in Alaska

The Alaska legislature has not passed legislation entitled Alaska's "Freedom of Information Act." Rather than one "open records" or "freedom of information" section in statute, provisions relating to access to information are found in many sections of Alaska statutes. The definition of "public record" was not added to statute until 1978.[10] The sections considered to be Alaska's FOIA, were passed by the legislature in 1962.[11] These provisions pertaining to public records are relatively general as compared with some states' provisions. Whereas some states have passed specific laws and list many exceptions to open records provisions in their FOI laws, the principal part of Alaska's FOI statute lists as confidential only "(1) records of vital statistics and adoption proceedings; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by federal law or regulation or by state law..." The sections of the Alaska Administrative Code regarding public information became effective in 1982.

We have prepared Tables 1, 2, 3, and 4 in an effort to determine the status of current Alaska laws relating to public access. Table 1 lists statutes specifying records as public, Table 2 lists statutes specifying records as confidential, Table 3 lists other statutes relating to public access to information, and Table 4 lists the titles of interpretations of Alaska law issued by the Office of the Attorney General.

According to Assistant Attorney General James L. Baldwin, determining which records are confidential and which are public has not been predictable: "we buy a lawsuit every time we deal with it." Mr. Baldwin also stated that because of the "skeletal" nature of Alaska's public records statutes, difficulty arises when attempting to sort out what information is exempt from public disclosure.

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[10] AS 11.81.900.

[11] See Attachment C, AS 9.25.100-125 and 6 AAC 95, Alaska statutes and regulations regarding public information.

TABLE 1
ALASKA STATUTES MANDATING A RECORD AS PUBLIC

09.25.110	"Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public..." (Section 3.22 ch 101 SLA 1962)
09.25.120	"Every person has a right to inspect a public writing or record in the state, including public writings and records in recorders' offices except (1) records of vital statistics and adoption proceedings...; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by federal law or regulation or by state law..." (Section 3.23 ch 101 SLA 1962)
11.81.900	"'Public record' means a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic, developed or received under law...and preserved...by any agency, municipality, or any body subject to the open meeting provision of AS 44.62.310, as evidence of the...activities of the state or municipality or because of the informational value in it; it also includes staff manuals and instructions to staff that affect the public...." (Section 10 ch 166 SLA 1978)

STATUTE	TYPE OF RECORD
34.45.310	Abandoned property, lists of
24.45.370	Abandoned property, record of proceeds from the sale of
44.62.500	Administrative adjudication, copies of proposed decisions
18.26.040	Alaska Medical Facility Authority, minutes of board meetings
37.13.110	Alaska Permanent Fund, conflict of interest of board members of
37.13.200	Alaska Permanent Fund, information in the possession of, with exceptions
42.06.260	Alaska Public Utilities Commission, applications for certificates of public convenience and necessity
42.05.671	Alaska Public Utilities Commission, records in the possession of, with exceptions
42.06.445	Alaska Public Utilities Commission, records in the possession of, with exceptions
42.06.210	Alaska Public Utilities Commission, reports regarding oil and gas pipeline facilities
37.12.120	Alaska Resources Corporation, information in the possession of, with exceptions
08.13.050	Barbers and hairdressers, licensing records of
39.52.220	Boards and Commissions members, declaration of potential ethics violations
45.55.250	Broker-dealers/investment advisors, applications for registration and revocation orders
06.20.190	Business licensees, annual report
08.18.021	Construction contractors, applications for registration
08.18.081	Construction contractors, claims against
10.15.240	Cooperative corporations, name of each party to the contract
23.20.105	Employing units, records of, containing information prescribed by the Department of Labor
46.15.020	Environmental conservation, applications for permits and other documents in the Commissioner's office
39.52.210	Executive branch officials, declaration of potential ethics violations
39.52.130	Executive branch officials, some gifts received by, with a value of $50 or more
16.10.410	Fish hatcheries, public meetings regarding issuance of licenses for
16.10.290	Fish processor/primary buyer, records of suits against
46.03.311	Hazardous waste, permit applications/reports of persons who generate, with exceptions
23.05.020	Labor, records of all proceedings of the Department of
24.05.135	Legislative floor sessions
24.23.060	Legislative professional service contracts
24.20.120	Legislative council, reports released by
24.10.120	Legislators, report of compensation to
24.60.100	Legislators, disclosure of representation for compensation by
24.60.050	Legislators, records of receipt of state loans or participation in state programs by, with exceptions
24.60.110	Legislators, conflict of interest
24.60.080	Legislators, gifts received by, with a value of $100 or more
24.60.070	Legislators/public officials, some close economic associations of
44.47.571	Local boundary commission, minutes of all meetings and hearings
25.05.191	Marriage license docket
40.05.010-030	Mining claims, some information on the status of
45.30.018	Mobile homes, attorney general actions regarding claims against manufacturers of
08.71.055	Opticians, names of applicants and licensees
06.40.100	Premium finance licensees, annual report
36.30.530	Procurement, information regarding state contracts, "except as otherwise provided by state law"
39.35.040	Public Employees Retirement Board, record of proceedings of
39.45.025	Public Employees Retirement Board, record of proceedings of, deferred compensation
39.30.155	Public Employees Retirement Board, record of proceedings of, supplemental benefits
40.21.010-150	Public records, management and preservation of
40.17.010	Real property
43.05.010	Revenue, Commissioner of, record of each order, process and certificate issued
27.21.100	Surface coal mining, applications for permits for
45.50.130	Trademarks registered
14.40.160	University of Alaska Board of Regents, board meeting records

Prepared by the House Research Agency, April 1989 (89.268A).

TABLE 2
ALASKA STATUTES WHICH MANDATE A RECORD AS CONFIDENTIAL

STATUTE	TYPE OF RECORD
PROPRIETARY INFORMATION (TRADE SECRETS, MARKETING INFORMATION, ETC.)	
46.03.180	Air contaminant sources, production figures or techniques of an operator of
44.88.340	Alaska Industrial Development Authority, commercially sensitive information of exporters obtained by
37.13.200	Alaska Permanent Fund, information which discloses the particulars of the business or affairs of a private enterprise
42.06.445	Alaska Public Utilities Commission, certain information regarding pipeline carriers
42.05.671	Alaska Public Utilities Commission, some records can be deemed privileged records, a person may make written objection to disclosure
38.06.060	Alaska Royalty Oil and Gas Development Authority, records relating to business or marketing information of producers
43.80.065	Commercial fish processors, information from reports used to identify individuals
44.81.260	Commercial Fishing and Agriculture Bank, information regarding the business records of, with exceptions
16.05.815	Commercial fishing, records which identify individual fishermen, buyers or processors
10.06.820	Corporations, information obtained by DCED from interrogatories
46.03.020	Environmental compliance, secret processes or methods of manufacture discovered by DEC during investigations regarding
08.54.230	Guided hunts, records maintained by DCED regarding
46.03.311	Hazardous waste, information that would divulge products or processes entitled to protection as trade secrets
27.20.041	Mine operation, all reports/information required to be filed regarding
27.25.090	Mineral assays, information pertaining to the results of, (for 2 years)
27.29.030	Mining loans, information supplied by applicants for
18.60.099	Occupational safety inspections, information that may reveal trade secrets obtained by the Department of Labor during
38.05.036	Oil and gas contracts, some information made available to Revenue during audits of royalty and net profit payments
38.05.035	Oil and gas leasing, some information received by DNR regarding
31.05.035	Oil and gas, reports filed by holders of permits to drill, with exceptions
46.04.025	Oil pollution control, proprietary technical information regarding
36.30.360	Procurement contracts, some information furnished by a bidder for
36.30.040	Procurement contracts, techinical data and trade secrets submitted by bidders for
36.60.230	Procurement contracts, trade secrets and other proprietary information contained in proposal documents for
36.30.140	Procurement contracts, trade secrets and other proprietary information disclosed during bidding for
37.17.090	Science and Technology Foundation grant recipients, some information generated by (if agreed upon before grant is issued)
27.21.200	Surface coal mining exploration permit, information that is a trade secret or privileged competitive right of an applicant for
27.21.100	Surface coal mining, certain information relating to the competitive rights of a permit applicant
REGARDING COMMERCE	
37.12.120	Alaska Resources Corporation, information which discloses the particulars of the business or affairs of a private enterprise
06.05.175	Bank records pertaining to depositors and customers, with exceptions
08.24.250	Collection agencies, some reports filed by
21.27.350	Insurance agents, brokers, and adjusters, records in the possession of the Division of Transactions of
21.36.400	Insurance claim investigations, information received by the Division of Insurance regarding
21.22.120	Insurance holding companies, examinations of
21.39.120	Insurance rating organizations, examinations of, until approved by the director of insurance
36.10.190	Public contracts, information regarding specific employees of holders of
06.30.120	Savings and loan records, with exceptions
06.30.655	Savings and Loans, information obtained by DCED regarding
21.34.090	Surplus lines insurance, records of examinations of
21.34.080	Surplus lines insurance, report submitted to the Director regarding
43.19.010	Tax compacts, information obtained during audits of multistate
43.05.230	Tax returns, particulars set out or disclosed in, with exceptions
09.25.100	Taxation, information which discloses the particulars of the business or affairs of a taxpayer
44.33.020	Tourism-related businesses, information obtained by DCED that discloses the particulars of an individual business

TABLE 2 (Continued)
ALASKA STATUTES WHICH MANDATE A RECORD AS CONFIDENTIAL

STATUTE	TYPE OF RECORD
LAW ENFORCEMENT AND INVESTIGATORY INFORMATION	
47.17.040	Child protection, investigation reports and reports of harm
12.62.015	Criminal justice information
28.35.032	Driving while intoxicated, information supplied to the court system by providers of treatment programs for persons convicted of
28.35.030	Driving while intoxicated, information supplied to the court system by providers of treatment programs for persons convicted of
47.37.170	Intoxicated persons, record of protective custody for
33.16.170	Parole, preparole reports and other information obtained by the parole board
33.20.211	Prisoners, certain documents regarding
REGARDING PUBLIC EMPLOYEES	
22.30.011	Judicial conduct commission, private reprimand of a judge by
22.30.060	Judicial conduct commission, proceedings of
24.60.160	Legislative ethics committee, advisory opinions of
24.60.170	Legislative ethics committee, investigations of complaints submitted to
39.25.080	Personnel records of state employees
39.52.340	Public employees, information obtained during ethics investigations of, while on-going
39.52.320	Public employee, attorney general's report declaring no probable cause to believe an ethical violation was committed by
39.52.240	Public employee, request for advice of the attorney general regarding an ethics violation of
39.52.260	Public employee, supervisor's report of a potential violation by, unless formal proceedings are initiated
37.10.071	Public fund investment records, if records contain information that discloses the particulars of the business or affairs of a person
09.25.150	Public officials or reporters, sources of information obtained in duty as
REGARDING THE LEGISLATURE	
24.20.301	Legislative budget and audit committee, reports and records of, until released
24.60.050	Legislative budget and audit division, report to the committe prepared by, until released
24.20.100	Legislators, research and bill drafting services for
24.55.160	Ombudsman investigations, identities of complainants or witnesses

TABLE 2 (Continued)
ALASKA STATUTES WHICH MANDATE A RECORD AS CONFIDENTIAL

STATUTE	TYPE OF RECORD
REGARDING HEALTH AND SOCIAL SERVICES	
25.23.150	Adoption, all papers and records pertaining to, unless the court and all interested parties consent
47.37.210	Alcoholics/intoxicated persons, records of treatment facilities for
08.95.900	Clinical social workers, information about clients of
18.20.090	Hospital, information received by DHSS regarding an individual or a
09.25.120	Medical
18.23.030	Medical review organizations, all data/records, with exceptions
47.30.845	Mentally ill patients, information obtained in the course of evaluation, examination or treatment of
47.30.590	Mentally ill persons, information obtained by DHSS regarding
47.30.840	Mentally ill persons, photographs taken of
44.21.235	Older Alaskans Commission, records obtained by the office of the long-term care ombudsman
18.05.046	Persons with impairments, registry maintained by DHSS of
17.30.155	Pharmacy board, medical practitioners not required to furnish names of patients or research subjects to
08.86.200	Psychologists, information about clients of
47.05.020	Public assistance, information concerning persons applying for or receiving assistance
09.25.120	Public health
18.23.010	Reviews of health care services, physician-patient confidentiality cannot be used to withhold info during
47.10.340	Runaway minors, records of licensed programs for
47.35.060	Social service institutions, records regarding individuals placed for care in
23.15.190	Vocational rehabilitation, information concerning persons applying for or receiving
OTHER	
18.60.087	Accident and health hazards, comments and names of employees reporting
08.48.071	Architects, engineers and land surveyors, some records of the Board of Registration of
18.80.220	Civil rights, data on age, sex and race required to administer laws regarding
13.26.013	Decedents estates, guardianships and trusts, court records of proceedings regarding
13.26.109	Decedents estates, guardianships and trusts, statements made by respondents during the course of examinations of
47.24.050	Elderly, investigative reports and reports of harm received by DHSS regarding
09.25.120	Juveniles
09.25.140	Library, personal identifying information of people who have used library materials
14.43.910	Loan applications for postsecondary education
28.15.151	Motor vehicles, some information maintained by the Department of
18.60.475	Radiation sources, data obtained as a result of registration or investigation of
45.50.521	Unfair trade practices/consumer protection, records of an attorney general investigation regarding
09.25.120	Vital statistics, records of birth, death, marriage, divorce, adoption and related data, with exceptions
13.11.315	Wills deposited with a superior court for safekeeping
23.20.110	Workers' compensation, information obtained by the Department of Labor

Prepared by the House Research Agency, April 1989 (89.268B).

TABLE 3
ALASKA STATUTES RELATING TO ACCESS TO INFORMATION

§ 25.25.150	**Access to confidential information, child support enforcement** (allows access to confidential information for the purposes of child support enforcement)
§ 44.19.448	**Access to confidential information, equal Employment Opportunity** (allows the state EEO office access to confidential records necessary to carry out its functions; the office may not make public information designated as confidential under AS 39.25.080)
§ 24.20.271	**Access to confidential information, legislative budget and audit** (authorizes access to the confidential information of every state agency)
§ 39.90.010	**Access to public information** (a public employee may not be subject to disciplinary action for communicating information under AS 09.25.110 and AS 09.25.120)
§ 09.25.125	**Access to public records** (a person having control of a public record who obstructs the inspection of a public record subject to inspection under AS 09.25.110 or 09.25.120 may be enjoined by the superior court from obstructing the inspection of public records)
§ 12.40.060	**Access to public records by the grand jury** (the grand jury is entitled to access all public records)
§ 11.46.740	**Criminal use of a computer** (a person commits a crime if, having no right to do so, the person knowingly accesses a computer and as a result of that access obtains information concerning a person or introduces false information into a computer with the intent to damage or enhance the data record of a person)
§ 14.30.272	**Education** (allows parents/guardians of an exceptional child the right to review the child's records)
§ 24.60.060	**Legislators, improper disclosure of information by** (it is a conflict of interest if legislators willfully disclose or knowingly use information that by law is not available to the public and that they acquired in the course of official duties)
§ 39.52.140	**Public officers, improper disclosure of information by** (public officers may not disclose or use information acquired in the course of official duties that is confidential by law)
§ 11.56.860	**Public officers, misuse of confidential information by** (public servants commit a crime if they use confidential information learned through employment as public servants for personal gain)
§ 11.56.815-820	**Tampering with public records** (a person commits a crime if the person makes false entry in, falsely alters, destroys, mutilates, suppresses, conceals, removes, or otherwise impairs the verity, legibility, or availability of a public record; make a false entry means to change or create a public record by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or by any other means so that the changed record states or implies a fact that the maker knows is not true)

Prepared by the House Research Agency, April 1989 (89.268C).

TABLE 4
SOME OPINIONS ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL
REGARDING OPEN RECORDS LAW IN ALASKA

DATE ISSUED	SUBJECT
10/9/86	Appendix TT to the civil manual contains a 64-page discussion about public records (found in special binder at Juneau AGO)
10/9/86	Appendix TT to the civil manual contains a lengthy discussion of the "executive" or "deliberative process" privilege (found in special binder at Juneau AGO)
4/24/85	IRS computer access to confidential Employment Services Division files is not permitted under AS 23.20.110
10/3/84	Judicial council must consider constitutional right to privacy and deliberation process in deciding if particular records are confidential
10/3/84	Judicial council has authority to adopt regulations regarding confidentiality, consistent with public disclosure statutes
6/25/84	Common law privileges are state laws that may require public records to be kept confidential under AS 09.25.120
6/25/84	The "executive" or "deliberative process" privilege is meant to encourage the free flow of advice and opinions to the decision maker in state government
5/19/83	Summary of AG opinions dealing with open meetings and public records issued between 1975 and 1983
9/30/82	Providing certain information by computer to a state agency is not a release of information under confidentiality statutes
4/12/82	Under AS 09.25.110-120, an agency need not divert scarce resources, to the detriment of its public mission, to find and provide a record
4/12/82	Commentary on and administrative intent of 6 AAC 95 (public information regulations)
4/12/82	AS 09.25.110-AS 09.25.120 do not extinguish various constitutional and common law rights, principles, privileges and exemptions
4/12/82	Statutory command to disclose government records cannot be heeded when it would invade property privacy or governmental rights
4/12/82	Statutory command to disclose government records cannot be heeded where it would intrude into governor's judicial appointment power

TABLE 4 (Continued)
SOME OPINIONS ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL
REGARDING OPEN RECORDS LAW IN ALASKA

DATE ISSUED	SUBJECT
11/24/80	A federal confidentiality law or regulation must specifically include a state official before confidentiality applies
11/24/80	Federal freedom of information act exemptions do not apply to state records
11/24/80	The constitution is a state law for the state freedom of information act exemptions
11/24/80	Interest in privacy not absolute is balanced against public interest in disclosure
11/24/80	"Public records" is to be given a broad meaning
11/24/80	"Reasonable basis test" applies to agency determination on right of privacy and confidentiality
7/3/79	Agency has burden of proof identifying federal law or regulation or state law which makes record confidential
11/10/77	Records can be kept confidential when necessary to protect important public interest
6/4/76	Federal freedom of information act does not bind state
6/4/76	Privately prepared material is probably a public record if it is a part of the states' records and files
10/27/65	Voter registration list, but not the computer tape, is available for public use and reproduction

Note: More than 200 opinions are filed under the subject "public information" in the computer index of Attorney General Opinions. Those listed above are some of the general opinions and those that specifically mention computers in the heading. The above list includes Memoranda of Advice (informal opinions that are general interpretations of law), and Opinions (formal opinions interpreting more significant or complex issues of law).

Source: Index to Attorney General Opinions

Prepared by the House Research Agency, April 1989 (89.268D).

Access to Information in the Computer Age

The laws passed by Congress and state legislatures regarding access to information were written with paper records in mind; most do not adequately address the impact of computer technology on public access to information.[12] The Federal FOIA applies only to "records" maintained by "agencies" of the federal government. The statute does not distinguish information stored in computers from information on paper, but some agencies have contended that the Act does not apply to electronic records. Although federal agencies are not always consistent in interpreting whether computer data should be disclosed under the FOIA, and Congress has not amended the law to specifically include changes in technology, federal courts have ruled that electronic records, like paper records, are public under the FOIA.[13]

Significant unresolved issues remain, however, regarding access to information in an electronic age. Case law as applied to paper records under the federal FOIA establishes that agencies are not required to create new records in fulfilling requests. Electronic information technologies, however, obscure the boundaries between records and nonrecords (for example, databases resemble information "pools" rather than discrete records--does an agency "create" a record when sorting an information pool). New technologies also can change the definition of what is a "reasonable" search.

The Public Records Division of the Office of the Massachusetts Secretary of State sponsored the first national conference on issues concerning computerized public records in January 1987. Massachusetts officials organized the conference to address several problems arising from requests for access to computerized records. First, as mentioned above, it is difficult for those who maintain records to translate existing access principles into computer access principles. Second, the increased availability to gather and manipulate vast amounts of information on individuals is still a concern and may not be

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[12]Several recent reports address public access to electronic information. The following reports can be seen at this office: U.S. Congress, Office of Technology Assessment, Informing the Nation: Federal Information Dissemination in an Electronic Age (October 1988, 333 pages); Administrative Conference of the United States, Electronic Acquisition and Release of Federal Agency Information (October 1988, 135 pages) and Federal Agency Use of Computers in Acquiring and Releasing Information (Recommendation No. 88-10, December 1988, 14 pages); Office of the Massachusetts Secretary of State, Report of the First National Conference on Issues Concerning Computerized Public Records (1987); U.S. House of Representatives, Committee on Government Operations, Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview (April 1986, 70 pages).

[13]Long v IRS, 596 F.2d 362, 365 (9th Cir 1979), cert denied, 446 U.S. 917, 100 S. Ct. 1861, 64 L.Ed.2d 271 (1980), as cited in Electronic Acquisition and Release of Federal Agency Information, p.103.

adequately addressed by existing privacy laws.[14] Thirdly, the commercial value of information can be much greater than what custodians may charge under existing laws.

A 1986 nationwide survey conducted by the Public Records Division of the Massachusetts Secretary of State found that the two areas of greatest concern to state freedom of information administrators are 1) "the best method for transposing existing FOIA provisions into a form which is adaptable to computer records" and 2) "the policing of the use of the vast amounts of personal data which can now be obtained in large quantities through requests for copies of computer tapes and disks."[15]

One issue already mentioned concerns whether an agency creates a new record by compiling information from a database in response to a FOIA request. The federal FOIA and state freedom of information laws obligate agencies to allow examination of existing records. Agencies are not required to interpret information or create new records. According to the Reporters Committee for Freedom of the Press, the Justice Department (which provides FOIA guidance to all federal agencies) contends that agencies are not required to program their computers to respond to information requests.[16] In December 1988, however, the Administrative Conference of the United States (an independent federal agency established to improve the procedures of federal agencies) issued recommendations stating that "agencies using electronic databases rather than paper records should not deny access to the electronic data on the grounds that the electronic data are not "records," that retrieval of the electronic information is equivalent to the creation of a "new" record, or that programming is required for retrieval."[17]

In general, states have followed the federal practice of allowing FOI requests to seek the disclosure only of existing, identifiable records within an agency's possession and have held that agencies are not required to create or acquire records in response to a disclosure request.[18]

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[14] Electronic Record Systems and Individual Privacy, a report issued in June 1986 by the Office of Technology Assessment, addresses this issue.

[15] Public Records Division, Office of the Massachusetts Secretary of State, Report of the First National Conference on Issues Concerning Computerized Public Records, 1987, Vol. 1.

[16] "Computer Data Access is Problem," The News Media and the Law (Winter 1989), p. 4.

[17] Recommendation 88-10, see note 12.

[18] B.A. Braverman and F.J. Chetwynd, Information Law: Freedom of Information, Privacy, Open Meetings, and Other Access Laws, 1985, p. 912.

The Office of Technology Assessment (OTA) recently issued a report that urged Congress to amend the federal FOIA to maintain the Act's "integrity in an electronic environment."[19] Fred Wood, project director of the OTA study, told me that while technology has made it possible to make available many types of information, national and state policies on access to information established in a pre-electronic era are unable to adequately deal with the electronic advances. We now have increased options for accessing and disseminating information (data can be retrieved more quickly; databases can be searched for subsets of data) but we still operate with an outdated policy framework. Mr. Wood stated that Congress and state legislatures need to clarify the gray areas still unresolved in their open records laws by updating policies to reflect technological advances.

Although Alaska statute does not specifically mention computerized records, James L. Baldwin, assistant attorney general, stated that the definition of a public record is broad enough that the form of a record is not relevant to whether a record is considered public (computerized records would be considered public records). He also stated, however, that agencies would not be obligated to "create" a record in response to a request for information. Alaska laws regarding access to computerized information are no more clear than federal law. Issues concerning access to computerized records--what in a database must be disclosed, how much effort an agency must expend to sort public data within a confidential database, must an agency provide data in a format convenient for the requester, etc.--have not been adequately addressed.

COMPUTER CRIME

You requested information on several state computer crime laws; copies are included as Attachment D.[20] You also requested copies of specific computer crime legislation (Attachment E)[21] and model computer crime legislation (Attachment F).

The Computer Crime Law Reporter lists 48 states as having criminal provisions relating to computer crimes (Attachment G). The Alaska provision (AS 11.46.74) states that a person commits the crime of criminal use of a computer if "having no right to do so...the person knowingly accesses...a computer...and as a

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[19]Office of Technology Assessment, Informing the Nation.

[20]Computer crime laws from the states of Arkansas, California, Illinois, Minnesota, Missouri, New Jersey, Washington and Wisconsin are included.

[21]Federal legislation includes the Computer Fraud and Abuse Act of 1986 amends section 1030 of title 18, United States Code (the amended version of 18 USC 1030 is attached along with the text of PL 99-474, 100 Stat 1213); the Electronic Communications Privacy Act of 1986 (PL 99-508, 100 Stat 1848); and the Computer Security Act of 1987 (PL 100-235, 101 Stat 1724).

result of that access...obtains information concerning a person or...introduces false information into a computer...with the intent to damage or enhance the data record of a person..."

J.J. BloomBecker, director of the National Center for Computer Crime Data, states that legislation needs constant revision to outpace new technologies. "Computer crime confounds the legislator because it requires aiming at a moving target. It can be safely predicted that as long as our computer and communications technologies continue to advance at their current breakneck pace, criminals will continue to come up with new ways to exploit them."[22] Mr. BloomBecker contends that computer crime legislation must prohibit alteration, damage, and destruction of data, as well as disruption and denial of services.

Mr. BloomBecker said that the legislation drafted by the Data Processing Management Association (Attachment F) is the most current model legislation written. He also said that a few states, such as Pennsylvania, have adopted legislation similar to the Federal Computer Security Act of 1987 (included in Attachment E).

Dean Guaneli, assistant attorney general, knows of no cases of computer crime prosecuted in Alaska. Several sections in the criminal code, in addition to the section that prohibits criminal use of a computer, could be used to prosecute unauthorized access to computers. When asked about instances of "hackers" accessing computer records, Mr. Guaneli told me that a prosecutor would need to jump around a bit to find the relevant statute.[23] He stated that it would be useful to have all sections dealing with potential computer conflicts in one place in the statutes.

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[22]See Attachment H, "Cracking Down on Computer Crime," State Legislatures, August 1988, for more information on state computer crime legislation and a chart listing acts forbidden under current computer crime laws.

[23]AS 11.46.740 (prohibits the criminal use of a computer), AS 11.46.200 (prohibits theft of services), AS 11.46.480-484 (prohibits criminal mischief), AS 11.46.490 (defines "tamper"), and AS 11.56.815-820 (prohibits tampering with public records).

COMPUTER SURVEILLANCE AND EMPLOYEE MONITORING

You asked us to provide information about computer surveillance and employee monitoring by employers. You also requested copies of two bills relating to employee monitoring; they are included as Attachment I.[24]

Supervisors have always monitored employees. Technological advances, however, now make constant monitoring possible--counting keystrokes of employees working on computers, listening in on telephone calls of airline reservation agents, recording vehicle speed, shifting, idling and the duration of truck drivers' lunch stops. Those monitored include word processing and data entry clerks, telephone operators, customer service representatives, mail clerks, airline reservation representatives, and truck drivers.

Some aspects of employee monitoring, such as telephone monitoring, have been around for many years. Because of the increased number of computers in the workplace and the resultant ability to monitor more employees, however, the issue has become a topic of public policy debate.

Intrusive monitoring can conflict with traditional expectations of what is fair on the job. A 1987 OTA report states that monitoring, "when done without notice or warning, can contribute to a feeling of being spied upon, and may have implications for the privacy of customers as well as employees."[25] The report also states that the new information technology "might give employers power of surveillance and control in the workplace that might be abused--used simply for the sake of control, beyond what is necessary to organize the work process."

According to the OTA report, women and minorities are most likely to be monitored electronically because "the clerical work force is predominantly female, and the low-skill end of the clerical work force has a disproportionate number of minority women. Similarly, women are more likely to be employed...[-in jobs such as] routine computer programming...Because monitoring is most likely to be applied to precisely these lower level jobs, work monitoring is a topic that especially affects women and minorities."

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[24]You requested copies of a bill in the 100th Congress endorsed by the Communications Workers of America (HR 1950/S 1124--to amend title 18 of the U.S. Code to require that telephone monitoring by employers be accompanied by a regular audible warning tone) and a worker advocate bill in Massachusetts that would limit the amount of employee monitoring (Massachusetts House Bill 4383--"An Act to Prevent Potential Abuses of Electronic Monitoring in the Workplace").

[25]U.S. Congress, Office of Technology Assessment, The Electronic Supervisor: New Technologies, New Tensions, September 1987.

According to Leslie Lople of the Communications Workers of America (CWA), legislation introduced in the 100th Congress requiring that telephone monitoring by employers be accompanied by a regular audible warning tone (HR 1950 and S 1124) received more than 170 co-sponsors in the House and 13 co-sponsors in the Senate. Because of the rapid favorable response on the issue, CWA began lobbying for an expanded version of the legislation. Ms. Lople expects a revised version of the bill to be introduced in Congress within the next few weeks by Representatives Don Edwards (CA) and Bill Clay (MO). The revised version resembles the Massachusetts legislation (included as Attachment I) and mandates employees' "right to know" that they are being monitored.

The government relations division of the Communications Workers of America reports that no state has passed comprehensive employee monitoring legislation. Ms. Lople stated that the Massachusetts legislature is still considering its employee monitoring bill originally introduced in 1987. Minnesota legislators are also working on an employee monitoring bill this session. Representative Tom Hayden introduced legislation in California in 1987 that prohibited employers from any type of electronic monitoring of employees without providing notice to workers; the bill, amended to prohibit only "subliminal message programs which carry messages by suggestion of self-hypnosis on a worker without the consent of the worker," passed the Assembly and the Senate but was vetoed by Governor Deukmejian.

* * * *

I hope this information is useful. Please contact me if you have additional questions.

Attachments

Item 4

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
PO BOX O, JUNEAU, ALASKA 99811-1800 (907) 465-2600

January 22, 1990

POSITION PAPER

House Bill No. 405

"An act relating to public access to the information of the state"

Department Position

The Department supports the purposes of this bill. We are working in conjunction with the Department of Administration to fully determine its impacts.

We support the amendment of state law to allow for waiver of reproduction fees for public documents in certain cases. We believe that the cases should be spelled out in the statute. We receive many requests from non-profit organizations with very limited budgets. We support statutory language to allow us to provide copies to such groups without cost, within a reasonable limit.

We also support a statute change to ensure public access to information stored electronically. This policy must be crafted to ensure the security of computer systems. Allowing a member of the public on-line access to data files may only be allowed when the security of the underlying system can be ensured. Some computer systems are designed to allow this without security problems; others are not. Many systems allow open access and provide capability to change or destroy records once an initial password is entered. We cannot allow direct on-line access to our networked computer system and ensure the integrity of the underlying data. This is an issue that needs to be addressed in a comprehensive manner.

Item 5

M E M O R A N D U M

TO: Interested Parties

FROM: Rep. Kay Brown

DATE: Jan. 30, 1998

SUBJECT: Proposed Committee Substitute for HB 405

Thank you for your comments on HB 405, an act relating to public access to the information of the state. Attached please find a proposed Committee Substitute that incorporates a number of your suggestions.

The House State Affairs Committee will hold a public hearing on the proposed Committee Substitute at 8:30 a.m., Thursday, Feb. 1. The hearing will be teleconferenced to Anchorage, and you can testify there from the Legislative Information Office (3111 C Street).

Major changes from the original HB 405 are outlined below. The proposed CS:

- Adds a finding on privacy and intent language that any ambiguity be construed in favor of disclosure. (Section 1)

- Incorporates specific provisions from the current regulations (6 AAC 95) regarding access to public records, including
  - * the fee to obtain a public record may not exceed the cost of copying (duplication), except for very large requests. [Section 3, (b)]
  - * the fee for obtaining public records shall include the personnel costs of the search for the records and copying tasks if the production of records for one requestor exceeds 10 person-hours in a month. News organizations are not subject to this additional fee unless the requests are unreasonable, made in bad faith, or require extraordinary expenditure of state resources. [Section 3, (c)]

- Provides that fee reduction and waivers for public records [Section 3, (d)] and electronic services and products [Section 4, (b)] shall be uniformly applied among persons similarly situated.

■ Provides that the fee for duplicating an electronic file or data base may not exceed the actual incremental costs of the agency. [Section 4, (c)]

■ Requires agencies to notify the State Library Distribution and Data Access Center of electronic services and products offered to the public. [Section 4, (e)]

■ Provides that when offering on-line access to an electronic file or data base, an agency shall also provide, without charge, on-line access through one or more public terminals. [Section 4, (f)]

■ Provides that the Telecommunications Information Council (TIC) shall supervise and adopt regulations for the implementation and operation of the section by public agencies other than municipalities. [Section 4, (g)]

■ Provides that each public agency shall establishes the fees for electronic services and products. The TIC may cancel the fees established by a public agency other than a municipality if the council determines the fees are not reasonable. [Section 4, (h)]

■ Requires the TIC to adopt regulations providing for an appeal procedure for a denial of a request to inspect or copy a public record. Provides that a person who appeals a final administrative order to the superior court may not be required to post a bond for costs on appeal. This section does not cover municipalities. [Section 6]

■ Provides that a person may seek injunctive relief without exhausting administrative remedies. A person who seeks such injunctive relief may not be required to post a bond in order to begin an action for injunctive relief. [Section 7]

■ Adds additional categories of "electronic services and products":

* providing software developed by an agency or by a private contractor for an agency;
* providing maps or other standard or customized products from an electronic geographic information system. [Section 8, (1)(F) and (G)]

■ Adds a definition of "public agency." Public agencies include all administrative entities of the executive, judicial, and legislative branches of state government and municipalities; the University of Alaska, the Alaska State Housing Authority, and the Alaska Railroad. [Section 8, (5)]

■ Modifies the definition of "public records" to include items developed or received by a private contractor for an agency. [Section 8, (6)]

■ Provides that <u>prorrietary</u> software programs are not "public records." [Section 8, (6)]

■ Requires state agencies to inform individuals if personal information about them will be subject to public disclosure. This section does not apply to municipalities. [Section 13]

■ Provides that a state agency or municipality may hold copyright for software created by it or developed for it by a private contractor. [Sections 11 and 13]

■ Makes other minor and conforming amendments.

Thank you again for your help and interest. If you are unable to participate at the public hearing Feb. 1, please feel free to phone me or Mary Core of my staff with your comments (465-4998). Written comments may be submitted to Rep. Boucher, chair of the State Affairs Committee, or to me at P.O. Box V, Juneau, AK 99811.

Item 6

6-1782Hb
Bannister
2/5/90

A M E N D M E N T

OFFERED IN THE HOUSE BY REP. BROWN

TO: CSHB 405 (State Affairs)

Page 1, line 6, following "access":

Insert "and changes"

Page 1, following line 22:

Insert a new paragraph to read:

"(5) an individual should have the opportunity to change personal information contained in public records if the information is inaccurate or incomplete;"

Renumber the following paragraphs accordingly.

Page 11, following line 6:

Insert "ARTICLE 1A. PERSONAL INFORMATION IN PUBLIC RECORDS."

Page 12, lines 13 through 18:

Delete all material.

Insert the following sections to read:

"Sec. 44.99.030. INFORMATION ACCURACY AND COMPLETENESS. (a) A person who is the subject of personal information that is maintained by a state agency and subject to public disclosure under AS 09.25.-110 - 09.25.140 may challenge the accuracy or completeness of the

personal information.

(b) To challenge the accuracy or completeness of personal information under (a) of this section, the person must file with the state agency a written request that the personal information be changed. The request must provide

(1) a description of the challenged personal information;

(2) the changes necessary to make the personal information accurate or complete; and

(3) the person's name and the address where the department may contact the person.

(c) Within 30 days after receiving a written request made under (b) of this section, the state agency may request verification of the disputed personal information from the person who made the request.

(d) Within 30 days after receiving the written request under (b) of this section or the verification under (c) of this section, the state agency shall review the request and

(1) change the personal information according to the request and notify the person in writing of the change; or

(2) deny the request and notify the person in writing of the reasons for the decision and the name, title, and business address of the person who denied the request.

(e) If a request is denied under (d) of this section, the person may provide to the state agency a concise written statement that states the person's reasons for disagreeing with the decision. The state agency shall maintain in its records the request made under (b) of this section and the statement provided by the person under this

subsection. On all of the state agency's records that contain the disputed information, the state agency shall clearly note which portions of the records are disputed. If the record is in electronic form, the state agency may note the dispute in one field of the electronic form and maintain the other information about the dispute in paper form.

(f) This section does not apply to criminal intelligence or criminal investigative records, state agency personnel or retirement system records, records of applicants for employment with the state agency, or information in documents recorded under AS 40.17.

Sec. 44.99.040. DEFINITIONS. In AS 44.99.020 - 44.99.040,

(1) "person" means an individual;

(2) "personal information" means information that can be used to identify a person and from which judgments can be made about a person's character, habits, avocations, finances, occupation, general reputation, credit, health, or other personal characteristics, but does not include a person's name, address, or telephone number, if the number is published in a current telephone directory;

(3) "state agency" means a department, institution, board, commission, division, authority, public corporation, committee, or other administrative unit of the executive, judicial, or legislative branch of state government, including the University of Alaska, the Alaska State Housing Authority, and the Alaska Railroad Corporation.

ARTICLE 1B. COPYRIGHTS BY STATE AGENCIES."

Page 2, line 19:

Delete "Sec. 44.99.030"

Insert "Sec. 44.99.050"

6-1782Hc
Bannister

A M E N D M E N T

OFFERED IN THE HOUSE BY REP. BROWN

TO: CSHB 405 (State Affairs)

Page 4, line 1:

Delete "(a)"

Insert "(b)"

Page 4, line 2:

Delete "an electronic file or data base"

Insert "a public record in the electronic form kept by a public agency"

2/5/90

A M E N D M E N T

OFFERED IN THE HOUSE BY REP. BROWN

TO: CSHB 405 (State Affairs)

Page 2, line 16, following "copying":

Insert "public"

Page 4, line 17:

Delete "shall also"

Insert "also shall"

Following "charge":

Delete ","

b. Example / Checklist Contact Sheet

LEGISLATIVE SPONSOR: House State Affairs

TC DATE/DAY: Thurs, Feb 1

(Pub. Hear) Work Ses. Inv. Hear

TIME: 8:30A - 11AM

LEGISLATIVE REFERENCE: HB 405

JUNEAU ROOM: Cap 102

SUBJECT: Public Access to EDP Info

BRIDGE:

OF PORTS:

CONTACT: Ann PH: 4937

DATE TAKEN/BY: 1/29 Peg

****

TELECONFERENCE SITES:

LIO'S	LTC'S	VTS'S
(Anchorage)	Homer	See List on
Barrow *	Wrangell	Reverse Side
Bethel		
Delta Junction *		
Dillingham *		
Fairbanks		
Glennallen *	ALL LIO'S	
(Juneau)		
Ketchikan	OTHER SITES WELCOME WITH PRIOR NOTIFICATION	
Kodiak		
Kotzebue		
Mat-Su		
Nome		
Petersburg *		
Sitka		
Soldotna		
Valdez *		

OFFNETS: Ed Levine
904-255-4471
Florida

Hugh Archer
502-223-1501
Kentucky

CHAIRING SITE: Juneau

CHAIRPERSON: Bolucher

[ ] CONFORMS TO LEGISLATIVE COUNCIL POLICY 4/85

SIGNATURE OF SPONSOR/CONTACT PERSON DATE

****

SPECIAL INSTRUCTIONS

* SESSION ONLY

BENTON FOUNDATION

1710 Rhode Island Avenue, NW
4th Floor
Washington, DC 20036
(202) 857-7829
FAX: (202) 857-7841

CONSULTATION ON ELECTRONIC INFORMATION AND THE PUBLIC'S RIGHT TO KNOW

Agenda

Opening Session: October 23, 1989

8:30 am	**Coffee**
9:00 am	**Welcome**
9:10 am	**Address:** Senator Patrick Leahy "New Technology and Democratic Values"
9:40 am	Public Access to and Dissemination of Electronic Public Information: An overview of the policy debate regarding public access to and dissemination of electronic government information and the consultation agenda (Focus Paper 1)
10:00 am	The Freedom of Information Act: How courts and federal agencies have interpreted the FOIA to mandate access to public information in electronic form (Focus Papers 2 and 3)
11:00 am	**Break**
11:15 am	Resolving FOIA Electronic Information Disputes and Applying "Agency Record" Under the FOIA to New Forms of Electronic Records (Focus Paper 4)
12:30 pm	**Lunch Break** (lunch will be provided)
1:30 pm	Resolving Electronic FOIA Issues Continued: What is a reasonable search under FOIA? (Focus Paper 5)
2:15 pm	Litigating Over Redaction and Segregable Portions
2:45 pm	Requesting Information in Particular Formats
3:15 pm	Determining Costs and Granting Fee Waivers for Electronic FOIA Requests
3:45 pm	**Break**
4:00 pm	Expanding Access in the Electronic Age: The need for legislation (Focus Paper 6)
4:45 pm	Oversight and Compliance of the FOIA in the Electronic Age
5:30 pm	Reception

Second Day: October 24, 1989

Federal Electronic Information Dissemination Next Steps
Policy Goals, Institutional Roles, and Policy Choices

9:00 am Opening Remarks

9:10 am Address: Representative Bob Wise
"Expanding Federal Government Information Dissemination in the Electronic Era: The goal of public policy"

9:30 am The Principles of Federal Electronic Dissemination Policy: Is there a new consensus? (Focus Papers 7 and 8)

10:15 am **Summary/Break**

10:30 am The "Affirmative" Government Role in Electronic Dissemination (Focus Papers 9 and 10)

11:20 am **Summary/Break**

11:30 am The Role of the Private Sector in Delivering Federal Electronic Public Information (Focus Paper 11)

12:20 pm **Summary/Break**

12:30 pm **Lunch**

1:30 pm The Role of Libraries in Disseminating Electronic Public Information (Focus Paper 12)

1:45 pm **Break**

2:30 pm Implementing Federal Information Dissemination Policy (Focus Paper 13)

3:20 pm **Break**

3:30 pm A Hypothetical Case Study: The executive calendar (Focus Paper 14)

4:30 pm Technology and Institutional Roles (Focus Paper 15)

5:00 pm **Summary**

5:30 pm **Adjourn**

FOCUS PAPER 4

A SYNOPSIS OF THE "PROFS" CASE

BY
KATHERINE A. MEYER
PUBLIC CITIZEN LITIGATION GROUP

BENTON FOUNDATION
Electronic Information Conference
(October, 1989)

Armstrong v. Bush: A Synopsis of the "PROFS" Case
By Katherine A. Meyer, Public Citizen Litigation Group

This case challenges the way in which the Executive Office of the President, in general, and the National Security Council, in particular, treat information generated over the IBM Professional Office System, or "PROFS." The system is often referred to as "electronic mail," because it allows agency personnel to communicate with one another through the computer system. This is the same system that was used by Lt. Colonel Oliver North to communicate the details of the Iran-Contra arms deal to National Security Advisors Robert McFarlane and John Poindexter. In fact, had the Congressional investigators looking into that matter not been able to resuscitate North's PROFS messages from the system, neither Congress nor the Independent Counsel (nor, for that matter, the public) would have been able to unravel crucial facts concerning this important chapter of recent American history. The case has extremely broad implications for the future treatment of vast amounts of government information, since, according to a recent study by the General Accounting Office, more than half of all federal agencies and departments use an electronic mail system.

The PROFS system has been in operation since November 1986 and is widely used by White House personnel. However, except in very rare instances, the White House does not consider the information transmitted over the system to constitute "records."

Consequently, it allows its employees to delete their PROFS notes on a routine basis, and it also routinely destroys the back-up tapes that are made of the system.

On January 18, 1989, the National Security Archive learned that the White House had circulated a memorandum to its employees instructing them to delete any remaining information on the PROFS system so that the new Administration could begin working with a clean system. Concerned that this procedure would result in destroying, for all time, important information pertaining to the conduct of foreign and domestic government business, the Archive went to federal district court in the District of Columbia and obtained a temporary restraining order prohibiting the White House from destroying the PROFS information that was left on the system. On the same day, the Archive also submitted a Freedom of Information Act request for access to the data. The White House subsequently agreed to preserve, on magnetic tape, all of the information at issue, pending resolution of the merits of the dispute as to whether such information must be preserved and eventually disclosed to the public.

There are several additional plaintiffs involved in the case, including the ACLU's Center for National Security Studies, the American Historical Association, the American Library Association, and individual researchers for some of those organizations. The case raises some very interesting and important questions under the various federal records laws. Those issues and the consequences of their resolution can be

summarized as follows:

> (1) does information generated over the PROFS system constitute either "Presidential records" subject to the Presidential Records Act, or "agency records" subject to the Disposal of Records Act and the Freedom of Information Act;
>
> (2) if PROFS material constitutes "Presidential records," then the President may not allow its destruction without first consulting the Archivist of the United States and giving Congress the opportunity to stop the destruction, and such material must ultimately be sent to the National Archives for preservation and eventually made available to the public, historians, researchers;
>
> (3) if the PROFS material constitutes "agency records," then it must be disclosed under the Freedom of Information Act unless it falls under one of the nine exemptions to the Act;
>
> (4) if the PROFS materials are exempt agency records, and are no longer being used by the White House or NSC, then they must be transferred to the National Archives for preservation, unless the Archivist approves their destruction.

The defendants in the case include the President, the National Security Council, and Don Wilson -- the Archivist of the United States. They take the position that since the PROFS system is analogous to a telephone, the information cannot be considered "records" that must either be disclosed or preserved. Consequently, the Archivist has <u>never</u> reviewed PROFS material, nor required any component of the White House to account for the wholesale destruction of the material on a routine basis. Plaintiffs contend that much of the PROFS data are "records" either under the Presidential Records Act or under the other federal records laws, and that the determination that they are not is unlawful. The Presidential Records Act broadly defines

"Presidential records" as:

> documentary materials . . . created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

The term "documentary materials" is defined as including "electronic or mechanical recordations." The Act prohibits the President from destroying any Presidential records that have "administrative, historical, informational, or evidentiary value."

Under the Disposal of Records Act, agency "records" are defined as:

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States . . . and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

Under that statute, agency records may not be destroyed unless they lack "sufficient administrative, legal research, or other value to warrant their continued preservation by the Government."

The lawsuit is currently pending in federal district court. On September 15, 1989, Judge Charles Richey issued the first major ruling in the case, which allowed the plaintiffs to pursue their claims against the President. He denied the government's motion to dismiss the action on several justiciability grounds, including the government's argument that the Court would violate

the Constitutional doctrine of separation of powers by entertaining jurisdiction over the suit. The government had contended that the President has complete, unreviewable authority to decide what is a "record" (and what is not) under both the Presidential Records Act and the laws governing agency records.

Judge Richey disagreed, and held that plaintiffs could challenge the President's determination that the PROFS information need not be preserved. Although he did not issue a final ruling on the merits of plaintiffs claims -- i.e., as to whether the President has violated the law by permitting the routine destruction of PROFS material -- he did express his preliminary views that the government's fundamental premise for exempting PROFS information from the records preservation requirements is faulty. Thus, Judge Richey explained that

> a reasonable person might quarrel with the rationality of the assumption . . . that most PROFS communications are analogous to telephone messages, and thus need not be retained. It is true that telephone communications in and of themselves do not rise to the level of Presidential or agency records, unless they result in the creation of "documentary material" . . . This derives from the transitory nature of the medium by which the communication occurs; it does not suggest that the substance of a telephone communication is inherently insubstantial. Quite the contrary, were telephone conversations in the Executive Branch routinely taped, or otherwise reduced to "documentary material," a good portion would undoubtedly qualify as Presidential or agency records.

Having ruled that the plaintiffs may proceed with the litigation, Judge Richey gave them 90 days to complete any discovery they might need to demonstrate that the PROFS information constitutes "records" that must be preserved, and he

directed the parties to submit a joint memorandum to the Court by January 2, 1990, suggesting further procedures for resolving the case.

On September 27, 1989, the Department of Justice asked Judge Richey to certify his opinion for immediate appeal to the U.S. Court of Appeals. It argued that the case must be reviewed expeditiously by the Court of Appeals because the consequences of Judge Richey's holdings "are of extreme significance to the President's ability to carry out his Article II responsibilities." In addition, it argued that "because all government agencies rely on computer technology and many utilize electronic mail systems like those used by the EOP and the National Security Council, the Court's decision has far-reaching impact for the government at a whole."*

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* The Department's request for certification for immediate appeal is an extremely unusual procedure, and this aspect of the case will certainly be resolved by the time this Conference convenes.

FOCUS PAPER 5

HISTORY OF THE FREEDOM OF INFORMATION ACT REQUEST FILED BY THE NATIONAL SECURITY ARCHIVE WITH THE DEPARTMENT OF ENERGY'S OFFICE OF SCIENTIFIC AND TECHNICAL INFORMATION (OSTI), OAK RIDGE, TENNESSEE

BY
QUIN SHEA
NATIONAL SECURITY ARCHIVE

HISTORY OF THE FREEDOM OF INFORMATION ACT REQUEST FILED BY THE NATIONAL SECURITY ARCHIVE WITH THE DEPARTMENT OF ENERGY'S OFFICE OF SCIENTIFIC AND TECHNICAL INFORMATION (OSTI), OAK RIDGE, TENNESSEE

BACKGROUND. On August 4, 1987, OSTI's Technical Information Division sent a memorandum to "Recipients of DOE Microfiche", including numerous university libraries. The subject of the memorandum was "Distribution of Limited Reports in Microfiche". Each recipient was informed that it was eligible to receive limited reports with various audience (user) restrictions as indicated. The memorandum included the following language: "By electing to receive this material, you are agreeing to limit access to the microfiche to only those persons and organizations authorized to receive them." Academic libraries are always eager to receive research materials of value, but are historically very reluctant to accept materials to which access must be limited. Several recipients of the OSTI memorandum requested the National Security Archive to challenge the restrictions on access that were being imposed on them.

THE FOIA REQUEST. The Archive filed an FOIA request with OSTI, seeking: (1) a list of the limited reports covered by the August 4 memorandum, (2) copies of any other OSTI notices regarding limited reports and a list of the reports covered by each such notice, (3) copies of all documents explaining or defining the limited reports program, or which show how it in fact has operated, and (4) reading room access in Washington, D.C., to all limited reports identified as a result of parts (1) and (2) of the request.

THE INITIAL RESPONSE. Three DOE Orders identified as responsive to part (3) of the request were released in full. The Archive was informed that no list existed of the limited reports covered by the August 4 notice, that the agency was not required to create such a list for purposes of complying with the FOIA, and that the agency declined to do so as a matter of discretion. The Archive was also informed that there were no other notices regarding limited reports. As no lists of limited reports were identified pursuant to parts (1) and (2) of the request, no such lists were made available. As a final point, the Archive was informed that copies of limited reports were maintained by OSTI in Oak Ridge, where they were made available to organizations and individuals authorized to have access to them.

THE ADMINISTRATIVE APPEAL. The Archive's appeal was filed with the Department of Energy's Office of Hearings and Appeals (OHA), which decides appeals from many different kinds of administrative decisions rendered within DOE. The Archive contended that some list of the limited reports must exist, because otherwise OSTI personnel would not know what reports to supply if they were requested pursuant to the August 4 notice by a party authorized to receive them. Accordingly, the Archive asked that the matter be remanded to OSTI, with instructions, for a new search.

In processing the appeal, OHA contacted OSTI and was told that OSTI receives and processes over 1,000 limited reports per year. Information pertaining to them is maintained in a computerized database. If an authorized party requests access to all or some of the limited reports it is entitled to receive, the "profile" of that requester is entered into the computer, which produces a list of the reports available to that particular party. It was claimed that processing the Archive's request would involve programming the computer, the functional equivalent of creating a new record and not required by the FOIA.

THE APPEAL DECISION. Generally citing NLRB v Sears and Yeager v DEA, OHA held that the mere retrieval of information already existing in a data base, even if the computer must be programmed to select specific types of data, does not constitute the creation of a new record. It was viewed as more in the nature of selecting from paper records the specific content within the scope of a particular request. The case was remanded to OSTI for "a new and thorough search for responsive documents" and OSTI was directed to consult with the National Security Archive as to any questions OSTI might have as to the scope of the request.

THE REQUEST FOR RECONSIDERATION. OSTI challenged various aspects of the OHA decision as overbroad and inconsistent with FOIA requirements. It presented a detailed statement of how its existing software would have to be manipulated by its resident computer expert in order to process the Archive's request.

EXCERPTS FROM THE FINAL OHA DECISION.

"While the processes may be different, many computer searches are in substance essentially the same as manual searches and involve comparable methods and skills. For example, to search paper records a methodology must be developed and the relevant files or file drawers manually searched for the requested information. Similar methodologies must be developed and used when a computer is instructed to perform the search. A computer search may be electronic in nature, but it is not necessarily any different in essence. It merely uses different tools--the computer and its software--to conduct the search." Page 4.

"We believe, however, that to the extent that OSTI maintains records in a database and already has software that is capable of searching the database, the FOIA requires OSTI to use that software to search the database for the requested records. This is true even if the type of search that must be performed is different from the type normally performed by OSTI. A search of this nature is not, in substance, significantly different from a search of a file cabinet for paper records that are responsive to a request. If the FOIA required anything less it would allow agencies to conceal information from public scrutiny by placing it in computerized form. This would be inconsistent with the FOIA's policy of the fullest possible disclosure." Page 5.

"A more difficult issue arises where OSTI does not already possess the software necessary to comply with an FOIA request, and therefore must write or modify a program (but not manipulate data) in order to perform the search necessary to retrieve the requested data. In our view, 'programming' a computer may involve a simple procedure that can be done in a few minutes, such as changing a few lines in an existing program. It may, on the other hand, require many man-hours to write a complex program. Moreover, the distinction between writing a new program and using existing software is not always clear." Page 6.

"Based upon our understanding of OSTI's computer system and the facts presented to us, we concluded in our December 18, 1987 Decision that OSTI had software capable of searching its database in a manner that would provide the NSA with the requested list. We know of no basis for modifying that case-specific determination. Nor do we believe it appropriate at the present juncture to specify the extent, if any, to which an agency is required to write or modify a program in order to retrieve computerized information. We shall consider this matter in the future on a case-by-case basis." Page 6.

"We wish to point out that even if the FOIA might not in a particular case require an agency to 'search' a database, the entire database nevertheless would be subject to the FOIA. Thus, an agency, even where not required to reprogram its computer, would still be required to identify and provide a copy of the entire database, except for those portions falling within one of the exemptions to mandatory disclosure (or beyond the scope of the request), either in paper or computerized form (allowing the requester to perform its own search)." Page 7.

"Finally, as pointed out in our December 18 Decision, before OSTI could properly deny a request on the ground that it would require extensive reprogramming of its computer, it should consult with the requester in an effort to reformulate the request in a manner that would not require reprogramming." Page 7.

"In sum, the issues involved in the application of the FOIA to computerized records involve a relatively new and unsettled area of the law. While it is clear that the FOIA does not require agencies to use their computer capabilities to manipulate or reformulate data in response to an FOIA request, computerized records are nevertheless subject to the FOIA and agencies must use their existing software and computer facilities to retrieve such records pursuant to an appropriate request. We take no position at the present time on the extent to which agencies must reprogram their computers in order to respond to an FOIA request. We will address this issue in the future on a case-by-case basis." Pages 7-8.

THE RESULTS. From initial request until final decision took some eighteen months. OSTI produced a list of the limited reports covered by the August 4, 1987 memorandum. The National Security Archive selected a group of reports for substantive processing. Almost all of this material was found not to be exempt from mandatory disclosure under the FOIA. Access to the reports was provided in the Department of Energy FOIA Reading Room, in Washington, D.C.

FOCUS PAPER 6

A TWENTY-FIRST CENTURY FREEDOM OF INFORMATION ACT: WORKING FROM FIRST PRINCIPALS

BY
JOHN PODESTA
PODESTA ASSOCIATES

A Twenty-first Century
Freedom of Information Act:
Working from First Principles

October 13, 1989

Before Jerry Berman hands us our boarding passes to the Star Ship Enterprise for a glimpse of the Freedom of Information Act in the Electronic Information Age, it's worth reflecting back on the origins of the FOIA and the principles it embodies.

The Freedom of Information Act was enacted to replace Section 3, the public disclosure section, of the Administrative Procedure Act. Section 3, as originally enacted in 1946, provided the first general statutory directive to Executive branch agencies to publicly disclose agency rules, opinions, orders and public records.

As originally enacted, Section 3 was riddled with loopholes. It provided in part: "Except to the extent that there is involved any function of the United States requiring secrecy in the public interest...matters of official record shall in accordance with published rule be made available to persons properly and directly concerned, except information held confidential for good cause found."

The statute gave unbridled discretion to Executive branch agencies to determine that 1) whole systems of records could not be disclosed because they involved functions requiring secrecy in the public interest; (2) that certain records were not "official records" within the meaning of the Act and were thus not subject to disclosure; (3) that certain individuals requesting documents were not "properly and directly concerned with the subject matter of the record"; and (4) that there was "good cause" to deny release. Furthermore, the act failed to provide a judicial remedy for wrongfully failing to disclose information.

The Freedom of Information Act was intended to reign in such broad Executive discretion and was based on the following principles:

Any person has a right to request records. No longer could an agency deny information because a person was not directly and properly concerned with the matter.

Every record is subject to disclosure, unless it falls within the enumerated exemptions. No more could agencies rely on the distinction between "official" records and "unofficial" records.

Every agency, including defense, foreign policy and law enforcement agencies, were subject to disclosure requirements. No longer could systems of records or, indeed whole agencies, be put off limits to the public.

Disclosure would be the general rule, not the exception; the government has the burden of justifying withholding information.

Individuals denied access have a strong right to seek judicial redress; De novo review provides an effective check on an agency's failure to comply with the act.

The Act was substantially strengthened in 1974 to give practical meaning to these principles. And with the notable exception of the bill passed in 1984 excluding CIA operational files from the reach of FOIA, those principles have remained in tact, despite the best efforts of a string of hostile administrations.

Enter the Electronic Information Age. Again, individuals inside of government are attempting to utilize certain cramped interpretations to suggest that the language of the FOIA did not envision access to electronically stored information. Questions have been raised about whether information stored in data bases constitute "records" within the meaning of the Act; whether retrieving certain bits of information from a data base constitutes the creation of a new record which is not required of the agency by FOIA; whether minor reprogramming to retrieve information in response to a request constitutes a "search" within the meaning of the Act; and whether the Act gives citizens the right to request information in the most useful format, be it electronic or paper.

Frankly, the FOIA principles outlined above so strongly underlie the Act that it is likely the courts will ultimately resolve these questions in favor of access and disclosure. Thus, it seems that it will be unnecessary for FOIA advocates to resort to legislative amendment of the Act to cure these interpretations. Of course, if that prediction proves to be incorrect, our first priority must be to provide and protect citizens' rights to access electronically stored information. While our first priority must be to protect the right of access, the new information age also provides us with the opportunity to broaden the meaning of the public's right to know; to help citizens utilize the information gathered, analyzed and stored by the government; to require broader dissemination of government information; and to preserve an accurate and an accessible record of government decision making.

To arm citizens with the power that government information can provide, to paraphrase Madison, will require an affirmative agenda for changes to the FOIA.

I offer the following, hopefully provocative, list of proposals:

(1) Require every agency to produce and publish in the Federal Register a freedom of information assessment of information currently stored electronically by the agency. Require the agency to assess whether the current systems are FOIA friendly and whether public access was considered when designing databases. Agencies should make indexes available to the public and explain the search capacity of data systems. Is the database management software usable on personal computers? Is information stored on the personal computers of government officials regularly searched in response to FOIA requests? Are E-Mail systems backed up and preserved? etc.

(2) Require a FOIA impact statement of all new major data bases developed by the government. Agencies should be required in developing new data bases to design features which will improve performance under the FOIA. Proper design can make the segregation of exempt information, and consequently the release of nonexempt information easier; can enhance the ability to locate information relevant to a particular request; and can vastly improve the timeliness with which agencies respond to requests.

(3) Require that information which must be published pursuant to section 552(a)(1) and made publicly available pursuant to section 552(a)(2) be stored electronically and made available on-line. Such a requirement would provide citizens, even in the most remote locations, with access not only to Federal

Register and CFR information, but final opinions and orders from agencies ranging from the FTC to the INS. In addition, citizens would have practical access to agency practice manuals and statements of policy. Such information and access should be provided at the marginal cost of providing the on-line service.

(4) Require that agencies provide information that is electronically stored in usable electronic formats. A citizen's unbridled right to a format of choice may be unreasonable, but requests that information be provided in a standard electronic format should be complied with. Agencies should be encouraged to provide more large data base products on CD-ROM.

(5) The concept of reasonable search should be expanded to include the concept of reasonable data processing within the capacity of existing government programs. The current interpretation of the Act prevents agencies from being forced to create new documents in response to a FOIA request. That theory could permit agencies to deny requests of reasonable, even rudimentary, processing of electronically stored information. While some limits need to be placed on a right to "reasonable processing," there is no greater, indeed there is probably less of a burden on agencies to provide reasonable analysis of information than in searching a series of file cabinets for relevant documents.

(6) Documents and information released under FOIA, at least those of general public concern, should be entered into a FOIA database for inspection and access by other persons. The Senate version of the 1974 amendments to the FOIA contained a requirement that released documents "of general public concern" be made available for public inspection. This requirement was dropped in Conference. The Conference Report clearly states that all agencies should effect this policy through regulation. To date, few if any have done so. Electronic storage in retrievable form makes this requirement more reasonable and feasible.

(7) Experiments in an all-electronic FOIA should be authorized and funded for certain agencies. Agencies should experiment with systems that would permit requesters to electronically file requests and permit the agency to process and respond to the request electronically. Candidates for such an experiment might include the FDA, NHSTA and perhaps even the FBI.

(8) Agencies that store information electronically should be required to maintain backup systems that ensure important and historic documents are not lost. This proposal would not only aid citizens seeking information from an agency, but would protect the agency, itself, from losing important records and documents.

Moving an affirmative citizen empowerment agenda for the FOIA is not without risk. Opening the Act to Amendment, raises the specter of further restriction on access to national security, law enforcement and business records. But, given the potential for improvements in citizen's access and use of government information this is a risk worth exploring.

FOCUS PAPER 9

GOVERNMENT'S AFFIRMATIVE ROLE IN ELECTRONIC PUBLISHING

BY
HENRY H. PERRITT, JR.
PROFESSOR OF LAW
VILLANOVA UNIVERSITY

Government's Affirmative Role in Electronic Publishing

by Henry H. Perritt, Jr.
Professor of Law
Villanova Law School

A. Principles

1. The best public policy is one that promotes a diversity of product offerings--especially in a situation, as the present, where technologies are changing rapidly, and consumer preferences are not well understood.

2. Government should not stifle innovation by withholding the fruits of its own internal automation efforts. Neither should it indirectly protect the positions of established information companies by preserving economic barriers to entry that would fall with availability of agency information in electronic form.

3. Applying the FOIA to encourage the release of wholesale electronic information is key to creating a robust private market for electronic information.

4. The government should not limit its role to wholesaling; rather it should consider retailing at one of two levels: manufacturing an electronic information product and distributing it. Manufacturing refers to structuring the information in a database so that it is accessible-providing indexes, menus, and other mechanisms that make it easy for an unsophisticated user to retrieve information. Distribution refers to providing the telecommunications capability necessary for dialup access or to duplicating and selling optical disks. In many instances, it is appropriate for the government to manufacture electronic information, but to rely on the private sector to distribute it.

B. Rules of Thumb

1. Inventory the existing reports and documents made available to the public and the kind of individuals and groups that use them.

2. Evaluate the potential for providing the same content in electronic form. The costs of creating new retrieval systems and updating or otherwise revising software should be weighed against benefits, such as the savings from eliminating paper products, improved retrieval speed, and wider availability of

information to the public. An agency should not offer an electronic information product unless the cost-benefit analysis demonstrates that the electronic alternative analyzed is likely to be superior to existing means. Cost and benefit assessment should consider at least the categories identified in Paragraph E of ACUS Recommendation 88-10, 54 FED.REG. 5207(Feb. 2, 1989), to be codified at 1 C.F.R. § 305,88-10..

a. When a statute mandates public reference room disclosure, or paper products presently are made available through a public reference room, agencies should provide electronic disclosure in public reference rooms of information already in electronic form. Such agencies should consider the costs and benefits of upgrading from electronic disclosure to electronic publishing. Agencies should also make information disclosed electronically available to any requester in an electronic form that would be easily usable by information resellers.

b. When a statute or agency policy mandates the publishing of information, the agency should itself electronically publish the information or facilitate its electronic publication by others, unless the cost-benefit analysis suggests the desirability of restricting publishing to the paper medium, possibly accompanied by a lower level of electronic release.

c. If the agency publishes the information only on paper, it should consider electronic publication of the availability of the paper information products. Where an agency publishes information electronically, it should consider the feasibility of providing dial-up access.

d. In those instances where an agency maintaining information in electronic form has no mandate to release information other than in response to FOIA requests, the agency should consider upgrading release of appropriate parts of this information to electronic disclosure through public reference rooms and wholesaling in electronic bulk form to private sector requesters.

3. Define the most desirable public and private sector roles in providing that information and related products (including telecommunications facilities, indexes and retrieval software as well as raw data), explicitly considering cost effectiveness, product diversity, and resources for expansion. When an agency decides an electronic information product is desirable, it should then look at what is available in the private sector, and weigh the costs and benefits of public versus private dissemination, including dissemination through depository libraries. Deciding to "promote" electronic publishing does not necessarily mean a direct, retail, electronic publishing and

distribution role for the government, if private sector electronic publishing activities and commitments are more cost effective.

a. When private electronic publishers are well established and their prices are not a lot higher than the government's costs for undertaking electronic publishing itself, the government should stay out of electronic publishing. WESTLAW and LEXIS are the best examples.

b. When there is no apparent retail market for the information, and officials believe that electronic publishing will serve the public interest, the government should fill the gap.

c. Whenever electronic publishing seems desirable, agencies should explore placing the data with existing electronic publishers who sell many different kinds of information and, therefore, risk little by adding another governmental database--even if there is no obvious market for it.

d. Whenever possible, agencies should use public data networks rather than developing their own communications links for public filers or consumers.

e. An agency should not approve arrangements for electronic dissemination unless the agency information will be available on at least two multi-serve "one-stop shopping" services, such as Compuserve, WESTLAW, or LEXIS.

4. Regardless of whether agencies publish at the retail level, they should disclose wholesale electronic information so that other vendors with new ideas for providing an even better electronic information service can offer the public the benefits of public investment in electronic information.

a. an agency should determine whether private sector providers are willing to supply electronic products having features (e.g., user-friendly menus) that will give the public greater benefits or lower costs than would electronic publishing by the agency.

b. When an agency relies on the private sector for electronic publishing of agency information, the agency should seek to establish by contract the nature of the products to be provided. It may be appropriate for the government to induce a private company to enter the electronic retailing market by providing incentives, such as donated software or subsidies.

5. When an agency determines that its mission warrants new electronic means of acquisition or release of information and the private sector will not commit to provide them at ~appropriate prices, the agency should provide them, if clearly identified non-economic and economic benefits outweigh the capital and marginal costs. Agencies should recognize, however, that there may be circumstances where the costs to an agency would suggest the wisdom of creating incentives for the private provision of the desired electronic information product-for example, the free use of agency-developed software.

a. If the agency concludes that a new government product should be offered, it should negotiate with private-sector providers to determine if they are willing to provide it in a form and at a price that will encourage wide use, in exchange for the agency's limiting its role. For example, the Department of Transportation contemplates requiring airlines to provide public electronic access to tariffs filed with the Department rather than constructing its own dialup electronic system.

b. An agency generally should not grant a private party exclusive control of its electronic information or of the acquisition or release thereof. Nor should the agency itself as a general matter maintain such control in the absence of a compelling public purpose. Where an agency has, and wishes to exercise, authority to enter into an exclusive arrangement providing a private sector vendor with a preferential right to electronic information, the agency should first consider if efficiencies can be achieved through such an arrangement. The agency should also guard against the possibility that the arrangement may be inconsistent with its responsibilities under the FOIA or may impair the ability of the agency and the public to benefit from subsequent technological developments.

6. Agencies should rely on public data networks to manage dialup telephone access. Much of the manufacturing activity already has taken place: an agency needs data structures, indexes, and retrieval menus for internal use. But agencies do not need huge dialup telephone interfaces or large scale optical disk distribution facilities for their internal use of information. Such distribution mechanisms are expensive and managing them diverts agency attention from agency missions.

7. Agencies should use existing standards. Agencies should seek to base electronic information formats on existing standards efforts such as American National Standards Institute standards on Electronic Business Data Interchange before developing their own distinctive format definitions.

8. Agencies should be aggressive in providing for electronic participation in administrative proceedings. Agencies should experiment with electronic means of providing public participation in rulemaking, adjudication and other administrative proceedings, while retaining a means of effective participation for persons who lack the means to access the electronic information system.

FOCUS PAPER 12

THE ROLE OF LIBRARIES IN DISSEMINATING ELECTRONIC PUBLIC INFORMATION

BY
NANCY KRANICH
COALITION ON GOVERNMENT INFORMATION AND
NEW YORK UNIVERSITY LIBRARY

THE ROLE OF LIBRARIES IN DISSEMINATING ELECTRONIC PUBLIC INFORMATION

by

Nancy Kranich
Fall 1989

A longstanding partnership between libraries and the federal government has assured the nation's citizens ready and equal access to government information. As the information age emerges and new technologies replace the printing press for disseminating information, this partnership can continue to serve the public in even more effective ways. While the ideals of public access to government information are espoused by many, few are aware of the fragility of the public's right to know. Librarians, as information professionals, are highly sensitive to the barriers that can limit public access. Without continued vigilance, the slightest modifications in the information chain can result in huge disparities in information justice.

Librarians have a long history of managing information. Beyond the books and periodicals traditionally acquired, organized, and disseminated, they have extensive experience with providing information in numerous formats ranging from electronic databases to video, audio, and film. They have also utilized new technologies to enhance access to all formats of information through the development and utilization of standards, participation in consortia and other cooperative systems, and the utilization of telecommunications networks. Librarians have standardized the format for cataloging, describing and communicating bibliographic information nationwide which allows for the integrated cataloging of all types of information formats ranging from computer files to videorecordings, from visual materials to books and serials. Libraries were among the first institutions to adopt the international telecommunications standards for open systems interconnections (ISO/OSI standards), and have played a leadership role in urging standardization and networking among libraries, educational institutions, and scientific organizations involved with the development of the National Science Foundation network (NSFNET).

NYU's libraries offer a good illustration of the role libraries are playing in managing and promoting the use of new information technologies. The libraries at NYU were among the first in the country to offer computerized circulation services and a public computerized catalog with 100 terminals around the campus and free dial-up access for anyone with a computer and modem. NYU is in the midst of implementing the International Standards Organization/Open Systems Interconnection (ISO/OSI) telecommunications protocols which will allow for computer-to-computer communication between the library's local system and any other system using OSI protocols. This will allow library users to search any database using the commands of their local system rather than learning and executing the disparate commands and protocols used by thousands of commercial or similar systems elsewhere.

In addition to designing innovative applications of local systems, the library has worked to integrate its computerized services with other academic information initiatives at the University. Connectivity with various campus computer systems and gateways to infinite resources outside New York University has been assured through a campus network with links to national networks such as the NSFNET, ARPANET, NYSERNET, and GTE/Telenet. The Academic Computing Facility's machine-readable data files, including many government resources acquired through the Interuniversity Consortium for Political and Social Research (ICPSR), are listed in the library's catalog and available from any terminal connected to or dialed into the campus network. Librarians teach courses in the use and analysis of machine-readable data and how to directly query bibliographic and textual databases. Electronic bulletin boards and electronic mail networks are readily available and a campus video and satellite dish teleconferencing service is coordinated through the library's state-of-the-art media center. A host of computerized information services are available through the library including easy-to-use CD-ROM indexes, online interactive database services that provide access to bibliographic, numeric, and full-text files, menu-driven versions of online databases for direct user searching, and library catalogs and scholarly databases. Like many other libraries, NYU also provides students, faculty, and the general public access to locally-created databases of community, business, labor, and other resource information.

Not only have libraries such as NYU'S forged ahead in the utilization of new information technologies, they have also served as a partner with the government in disseminating federal information. Through the Depository Library Program (DLP) which was launched in the 19th century, nearly 1400 university, public, government, law and special libraries have served as host institutions for distributing government information in every Congressional district. The Depository Library Program serves as a principle mechanism for disseminating federal agency information to the American public. In return for receiving nearly 20 million free copies of some 40,000 government publications annually, depository libraries house, organize and assist with the use of the government's information resources, expending 10 times the government's outlays for this service. They are used by at least 167,000 citizens each week through the DLP program administered by the Government Printing Office under the guidance of Congressional Joint Committee on Printing.

Until now, most of the publications provided through the Government Printing Office have been in print format. But more and more, these same publications are available in electronic format only. Many libraries are already equipped and prepared to disseminate government information regardless of format and are eager to receive and service this information, just as they have print materials in earlier years.

As agencies make increasing use of electronic formats, the public

can benefit if government data is disseminated through depository and other libraries. The Joint Committee on Printing and other Congressional committees have interpreted the DLP statutory authority as extending to government information in all formats. In the fall of 1988, the GPO began a series of electronic dissemination pilot projects in libraries in order to assess this mode of delivery in terms of public access, cost and manageability. Already users at depository libraries are taking advantage of access to CD-Rom discs from the Census Bureau and online access to the Commerce Department's Electronic Bulletin Board. While many depositories may not wish to provide access to government products and services outside their collecting scope, most are eager to offer computerized versions of such documents as the Congressional Record and Federal Register as well as key Federal statistical series. Libraries that are not designated as depositories also acquire and disseminate government information and are equally interested in serving as access points for electronic resources.

The Advantages of Providing Electronic Government Information Through Libraries

Libraries are ideal institutions for providing access to electronic government information. Among their advantages are:

Libraries are available in every community. There are more public library outlets than MacDonald's. They have long hours and exclude no one from use.

Libraries are non-profit institutions. Their collections are broad-based and represent all points of view.

Libraries include older materials and contemporary publications, and they continuously add new items to their holdings.

Librarians excel at identifying, acquiring, organizing, housing, preserving, and assisting in the use of information.

Libraries already provide an extensive array of automated services. Databases offered by libraries include many disseminated by the government. Their staff are well trained in delivering computerized services.

Libraries provide access to numerous related materials which can be useful in understanding or interpreting the information gathered through a government database. Because they tend to build upon their strengths, those with government depository collections are likely to acquire extensive complimentary materials such as commercial services like the CIS's American Statistics Index collections and the Congressional Information Service index collections.

Librarians are often specialists in particular subject fields or genres of information. For example, a subject specialist in economics can assist patrons with related concerns or a functional specialist with government documents can adeptly determine the appropriate sources for tracking down needed da..

Libraries maintain bibliographic and other indices that can assist users in identifying and locating specific items. They also have numerous resources that can be used to refer researchers to more appropriate repositories. They can also point people toward far more relevant though unfamiliar sources.

Libraries offer the hardware and software needed to access and reproduce a host of formats ranging from CD-Rom to 5 1/4" floppy disc, from microfiche to videotape.

Libraries have extensive experience working with community groups in providing essential local information and promoting the public's right to know. Currently, with funding from the Benton Foundation, the American Library Association is commencing a right-to-know media campaign, encouraging the public to use their libraries to locate information about the environment in general and about toxic wastes through the EPA's Toxic Release Inventory database in particular.

Access to Government Information Products and Services

It is estimated that more than 7,500 electronic databases are currently disseminated annually by the federal government. Librarians who assist the public with identifying and utilizing these vital resources have concluded that the government is best suited to assume responsibility for disseminating its information because:

Bibliographic control, already amply provided by the Government Printing Office through its Monthly Catalog and by the National Technical Information Service through its Government Reports Announcements and Index, can be extended to cover non-print formats. If citizens are to utilize databases, they must be able to identify them through widely-disseminated, standardized, comprehensive, up-to-date bibliographic tools, only available through the government.

Physical access, facilitated by the extensive GPO sales, depository library, and NTIS program, can be extended effectively and efficiently to additional government-produced electronic databases.

Standards development and implementation, a responsibility of several governmental agencies, can benefit information

dissemination efforts by facilitating the coordination of government-wide efforts, encouraging compatibility, lowering overall costs, and reducing user confusion.

Fees can be limited to marginal costs or less, and charged on equitable terms.

Cooperative efforts with other sectors of the economy are ongoing and have proven beneficial for numerous publishing projects in the past.

Market potential for most government data is very limited. While users may be few, importance is considerable.

Restrictions on redistribution of government data are limited.

Censorship is unlikely to be imposed.

Expert assistance is readily available from agency personnel who help guide users to the actual information sources cited; provide the documents listed in their databases; provide additional materials; and offer suggestions and referrals to other sources.

Continuous publication is more probable when authorized by statute rather than dependent upon market forces.

Cumulating, archiving and preserving data is more likely through agencies charged to assure the long-term retention of records.

Multiple formats can be provided to satisfy the varying needs of users.

User feedback is encouraged from interest groups already working with agency programs.

Conclusion

Government information is of inestimable value to the American public and therefore requires a democratic caretaker no smaller than the government itself. Libraries are well-suited to assist the government in communicating with citizens. Having emerged as technologically sophisticated institutions, they can extend their role in disseminating government publications by providing users electronic as well as print access to vital public information. Federal information is used by all sectors of society, as are libraries. The longstanding partnership between libraries and the federal government must continue if the nation's citizens are to be assured ready and equal access to government information.

FOCUS PAPER 14

THE EXECUTIVE CALENDAR

BY
BOB GELLMAN
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON GOVERNMENT INFORMATION

PRESS RELEASE

The General Services Administration today announced plans to begin a daily Executive Calendar of government activities for use by federal executives. The Executive Calendar was created at the direction of the President of the United States.

In ordering the start of the Executive Calendar service, the President cited the need for the White House and the Executive Branch to coordinate its own schedules and activities. There is no existing mechanism that permits the agencies to exchange information about daily schedules and activities.

The Executive Calendar will include the following:

-- Daily Schedule of the President and Vice President

-- Daily Schedule of Cabinet Secretaries

-- House and Senate Floor Schedules

-- House and Senate Committee Schedules

-- Supreme Court Argument Schedule

-- Meeting Agendas of Regulatory Agencies

-- Listing of Major Federal Register Notices

-- Advance Schedules for Major Federal Officials

-- List of Major New Federal Publications and Reports

-- List of Major Federal Contracts Awarded

-- Selected Federal Budget information

-- Selected Federal Statistical and Economic Information

Additional information may be added in the future.

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A Hypothetical Press Release
Prepared for the Benton Foundation/Bauman Family Foundation
Consultation on Electronic Public Information

The Executive Calendar will be produced each weekday by GSA using a desktop publishing system and a laser printer. A copy will be hand delivered to the head of each major federal department and agency.

GSA will also make the same information available through the Executive Calendar Electronic Bulletin Board. The bulletin board, which will be accessible to anyone using a microcomputer and a modem, will include Executive Calendars for the past year.

Information on the bulletin board will be retrievable using key words such as agency name, subject, and names of Executive Branch officials. Other electronic search tools and finding aids will also be available.

The bulletin board service will have 10 ports and will be available at no charge to federal agencies. Five of the ports will be reserved for exclusive use by federal agencies. The remaining five ports will be accessible by any person. The charge for the service will be $100 per hour of connect time.

The information contained in the Executive Calendar will be obtained from a variety of sources. Some will be collected directly from the agencies by GAS. Some of the legislative information included in the Executive Calendar will be obtained under a contract with the Democratic Study Group. Additional legislative information will be obtained from Congressional Quarterly, publishers of the daily Congressional Monitor.

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The bulletin board will be operated by the Federal Calendar Service Company, a joint venture of Congressional Quarterly, Mead Data and Arthur Anderson, under contract with GSA. The Service Company will receive a share of the revenues from public use of the bulletin board system. The Service Company will receive no federal funds. A portion of the connect charges will be shared with the information providers.

Information obtained by GSA pursuant to contract with non-governmental organizations is copyrighted by the providers and is not available to be downloaded. Other information is not copyrighted and will be available to be downloaded on a monthly basis. There will be no additional charge to the public for downloading other than standard connect charges.

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STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

DIVISION OF INFORMATION SERVICES

STEVE COWPER, GOVERNOR

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RECEIVED
JAN 18 1990

Honorable Kay Brown
Representative
Alaska House of Representatives
State of Alaska
Pouch Y
Juneau, Alaska 99811

January 17, 1990

Dear Representative Brown:

Below are some comments on House Bill 405 (HB 405), regarding public access to the information of the State, as requested by you. Please note that these comments are preliminary in nature, as the Department has not yet formulated its position on the bill. Nevertheless, I hope that the comments will help provide you with the kind of substantive and constructive feedback that this important subject deserves.

OVERALL COMMENTS:

- Overall, HB 405 may be premature because it addresses a large and complex set of issues that have not yet received much analysis or focused discussion in Alaska state government. There is little question that public access to government information is necessary and desirable, and that the issue warrants timely attention by the State of Alaska; but the process of structuring that access and integrating it with state agency operations without major disruptions is likely to be far from a simple one. Even the somewhat limited discussions of the topic to date by the Telecommunications Information Council (TIC), its Public Access Task Force and the interagency Information Systems Committee indicate the breadth and complexity of the issues involved, as well as the diversity of opinions regarding them. Given that the State is just now at the stage of identifying for the first time the kinds of electronic information and databases that it employs, and that no estimates yet exist of the nature or magnitude either of public needs or agency impacts, a more staged approach involving analysis and formal discussion of public access issues (e.g., by TIC) would seem to be a desirable prerequisite to adopting legislation. If part of the intent of HB 405 is to accelerate discussion and treatment of these issues, however, the comments below address the bill substantively.

- The bill repeatedly refers to "agencies and departments", but does not clearly state whether its provisions apply only to the executive branch, or to all branches and entities of the State of Alaska.

- Given the unknown but presumably large amount of potential public demand for public information and electronic information services, there is likely to be a significant fiscal and operational impact on agencies and the Department of Administration resulting from the administrative support and financial reporting requirements of the bill.

- The definition of "public records" (page 5, lines 17-23) deserves much attention, particularly in view of the diversity of opinions regarding the status or intent of written drafts and "memorializations of conversations". Also, it is not clear whether (e.g.) the Department of Administration should or would have the right to allow public access to centralized computer files that it maintains on behalf of agencies and departments. In short, it is not clear in the bill how its definition of "public records" relates to prevailing laws, regulations or concepts regarding the rights to privacy.

- Sections 2-3 of the bill call for the establishment of fees, implicitly leaving the determination of fee schedules to individual departments and agencies. It might be preferable in the bill to stipulate that fee schedules will be determined, or at least approved, by the Telecommunications Information Council, to ensure some level of consistency and standardization.

- For cases of fee waiver, it should be kept in mind that agencies will still be charged for any computer services involved that entail the use of Department of Administration mainframe computers. It might help, therefore, if the bill stipulated some kind of record-keeping on fee waivers, so that the aggregate and cumulative cost of such fee waivers would be known to policy makers.

- If adopted, the bill will require the institutionalization of new and additional forms of mainframe computer security for the Department of Administration (DOA), as many agencies using DOA's mainframe computers have elected not to secure their data files (security for agency data files is an agency's responsibility). Thus, at present, if a member of the public is granted on-line access to a particular data file, he or she would be able to access many other data files without restriction. The danger, here, is at least as much a risk of data files being unintentionally corrupted as it is of them being intentionally corrupted. Security is therefore a major issue that needs to be addressed comprehensively (e.g., by TIC) prior to public access being implemented.

TECHNICAL COMMENTS:

p.1, l. 23: Has text been dropped between the words "products" and "user"?

p.2, l. 7 Savs "where appropriate"; might add "as defined in AS 09.25.115(b)", which defines where fee waiver is appropriate

p.2, l. 18 It is not clear what is intended as a "reasonable" portion of the associated costs

p.2, l. 19 It is not clear whether the phrase "information system of the agency or department" refers only to the system employed in providing the electronic service or product, or to the overall information system or set of systems operated by the agency or department.

p.3, ll. 17-18 The bill stipulates that copies provided by public officers "shall in all cases be evidence of the original." Can this evidentiary standing (without notarization) be granted by statute?

p. 3, ll. 22 Not sure how or why recorders can or should make public records available for the purpose of "guaranteeing or insuring the titles of the real estate...."

p.5, ll. 20-22 There would be no need to even raise the issue of preservation (or destruction) of records if the phrase "...and that are preserved for their informational value or as evidence of the organization or operation of the agency or department..." were deleted.

I hope that these comments are useful to you in assessing the provisions of HB 405. Please don't hesitate to contact me if you have any questions, or if you would like additional information.

Sincerely,

Paul Monette
Director

cc: Gary Bader
Deputy Commissioner
Department of Administration

bcc: Commissioner Baxter
Department of Administration

Bob Evans, Legislative Liaison
Office of the Governor

The Honorable 'Red' Boucher
Alaska State Legislature

The Honorable Peter Goll
Alaska State Legislature

Joan Kasson, OMB
Office of the Governor

Jack Fargnoli, Deputy Director
Division of Information Services

TO: Terry Bannister
FROM: Rep. Brown
DATE: 1/25/90
SUBJECT: Proposed amendments to HB 405

Terry, here are the amendments I discussed briefly with you. I would appreciate receiving a new draft blank CS by Monday, if possible.

■ Add to Section 3
(e) Each state agency and department shall notify the State Library Distribution and Data Access Center of electronic services and products offered to the public, including a summary of format options and fees.

■ Amend AS 14.56.120 (b):
(b) Each state agency shall notify the center of the creation of all data published or compiled by or for it at public expense, including automated data bases, and provide for its accessibility through the center, unless the data is protected by the constitutional right to privacy or is of a type stated by law to be confidential or the agency is otherwise prohibited by law from doing so.

■ Add to Sec. 5, definition (1) at line 23:
(F) providing non-proprietary software developed by an agency or department, or developed by a private contractor for an agency or department.

■ On page 5, lines 17-23, amend definition:
(5) "public records" means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items regardless of format or physical characteristics, that are developed or received by an agency or department, or by a private contractor for an agency or department, and that are preserved for their informational value or as evidence of the organization or operation of the agency or department; "public records" does not include proprietary software programs;

■ Page 2, line 6 (fee waiver for public records): make provision conform to current fee waivers in the regulations for journalists (and any others).

■ page 2, line 6 and page 2, lines 19-23: provide that fee waivers will not be discriminatorily applied (or state positively, they will be uniformly applied to people and groups similarly situated)

■ Add general provision that nothing in this bill is intended to erode current public access rights, except as expressly provided, and any ambiguity should be construed in favor of openness.

■ Add new subsection to Sec. 3
(f) When offering on-line access to an electronic file or data base, an agency or department also shall provide, without charge to the public, on-line access to the electronic file or data base through a public terminal or terminals.

■ Page 4, lines 10-11, delete "(B) duplicating or providing periodic updates of an electronic file or data base;"

■ Sec. 2 of bill: Add language which makes it clear that a member of the public is entitled to a copy of an electronic file or d.b. in the format kept by agency, for nominal cost. (the agency isn't obligated to change the format, but must provide information in the form it is kept by the agency. If information is kept in electronic format, the public can get a copy of those files.)

■ Section 1, add finding re: privacy (see Florida bill)

■ Add provision requiring that every state form on which citizens submit information to the state contains language stating that the information being provided is public and may be disclosed. (see language in Florida bill)

(already drafted)

■ Page 1, line 23, after "establishing" insert "user fees for"; delete "user fees" after the word "products". Clarification.

■ Page 2, line 14, insert after "public.": "An agency or department is encouraged to make information available in useable electronic formats to the greatest extent feasible."

■ Page 2, line 26, after "department" insert "or of a central computer system maintained by another agency". Clarification. (Terry, see alternate language suggested by the Department of Adm., Div. of Information Services, attached)

OTHER PROPOSED AMMENDMENTS

1. Page 1, line 23, after "establishing" insert "user fees for"; delete "user fees" after the word "products". Clarification.

2. Page 2, line 14, insert after "public.": "An agency or department is encouraged to make information available in useable electronic formats to the greatest extent feasible."

3. Page 2, line 26, after "department" insert "or of a central computer system maintained by another agency". Clarification.

Public Access to Geographic Information Systems: An Emerging Legal Issue

Hugh Archer and *Peter L. Croswell*
PlanGraphics, Inc., 202 West Main Street, Suite 200, Frankfort, KY 40601-1806

ABSTRACT: Institutional issues will dominate technical issues as GIS technology becomes integrated with the information management operations of public organizations. Analysis of the legal setting in which a particular GIS is established is now recommended as part of the planning and design process, particularly as it impacts public access to the system. The form and content of information provided to the public and private user community through GIS technology demands a new and more discriminating vocabulary to avoid unintended pitfalls from traditional laws developed before an information management tool of this utility was available to government. The evolution of access policy for geographic information systems will establish a course of conduct today that could determine the control of a multi-billion dollar industry. The debate over which sector of government or industry will provide extremely valuable information products in the future has begun. Establishing institutional policy to deal with GIS technology focuses many of the most significant legal issues that should prove determinative in the debate over who controls the value of information.

THE ROLES OF GIS IN PUBLIC ORGANIZATIONS

OVER THE PAST DECADE, government agencies at all levels have become extremely cognizant of the importance of maps and geographically referenced data to support routine operations and long-term planning activities. These agencies have been turning, in increasing numbers, to GIS technology to provide the necessary capabilities to process maps and geographic data. This trend toward the implementation of geographic information systems is evidenced in a recent survey of GIS installations which shows an increase by a factor of ten, in the number of new system start-ups, each year from 1979 to 1988 (Croswell and Clark, 1989).

Over the past five years, GIS technology has matured tremendously and offers powerful capabilities for organizations which are dependent on maps and geographic data (Croswell and Clark, 1988; Dangermond, 1987). Kindleberger (1988) describes many of the challenges and opportunities facing government agencies in the use of GIS and related technologies. As the application of the technology in organizations increases, the definition of GIS itself is evolving. Two related trends are evident that will have a profound influence on GIS installations in the near future: (1) the distribution of processing power and data, and (2) the integration of diverse types and formats of geographic information.

System distribution, along with a significant decrease in hardware costs, offers the opportunity for a broad spectrum of users to gain access to GIS data and to conduct analysis and generate products. Data integration trends promise to expand the concept of a GIS to a point where it becomes a focal point to easily access and process information in traditional map and database form, as well as raster images, scanned documents, engineering drawings, and the like that are important in geographic analysis (see Figure 1).

The technology is available now to respond to a host of mapping and geoprocessing tasks that government agencies demand; and, because of the great user demand, it is improving and becoming less expensive. The greater sophistication in technology and wider options for users, however, introduce more complex institutional issues in the implementation and operation of GISs. There is a strong tendency for organizations that are initiating GIS development to overemphasize the technical aspects of the implementation process. This emphasis on the technology when it is not matched with even greater attention to the institutional factors impacting system development can lead, and too often has led, to failures or significant problems in effective use of the system (Croswell, 1989). The promise of GIS technology is great. Online access to GIS data and the many potential products of GIS spatial analysis present a broad range of unresolved public policy issues that match the broad commercial utility of this resource. This paper discusses an important institutional topic impacting the use of geographic information systems—public access policy.

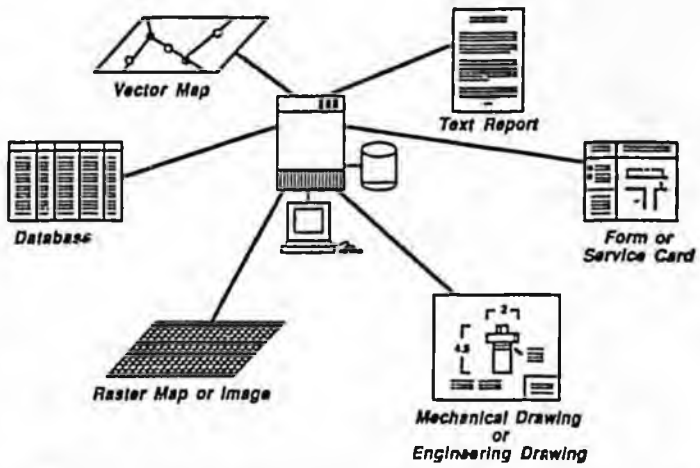

FIG. 1. Integration of different forms of geographic data and records.

IS THERE AN INSTITUTIONAL PROBLEM?

The distributed configurations of today's geographic information systems do not allow for the definition of a "typical" institutional setting. However, the examination of a hypothetical GIS with a defined institutional structure can reveal legal issues that are becoming standard problems for many GIS custodians. Information management facilities of the future will likely be government managed utilities just like the sewer, water, and power utilities of today. Refining the possible institutional options for this new technology will allow a more efficient progression from the initial efforts today to the information utility of tomorrow.

Imagine you are the manager of a county-wide GIS, which is a cooperative effort between the utility board and county government. The technical development of the system was well planned and data conversion is being completed for a large-scale GIS database consisting of the following layers:

PHOTOGRAMMETRIC ENGINEERING AND REMOTE SENSING,
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0099-1112/89/5511–1575$02.25/0

- Survey control monuments
- Detailed man-made and natural planimetry derived through photogrammetric compilation
- Digital elevation data and derived contours
- Land parcels and easements
- Water system facilities
- Sanitary sewer facilities
- Political and administrative units
- Street and highway centerlines with block address ranges.

Work is well underway in the completion of a comprehensive attribute database and the development of database linkages with the County's mainframe computer. The GIS has been designed to support a wide range of mapping tasks, as well as spatial queries and more complex geographics analysis work.

The independent water district and the county assessor declined the opportunity to participate in the funding for initial system development. The county provided funding with an $8 million bond issue, and the utility board enters into a lease arrangement for five years, agreeing to pay 30 percent of the actual annual costs for the system. County government agrees that the GIS will provide efficiency increases sufficient to merit the capital investment, but would like you to propose a way to take advantage of the utility of GIS to finance the operation, maintenance, and continuing upgrade costs of the undertaking, once the original bond money is exhausted.

System development is nearly completed, but the original development funds allocated will soon be depleted. The assessor now requests access to the system and would like your staff to develop an interface to his new computer assisted mass appraisal (CAMA) software to the database and provide regular reports to his office. The water district has purchased $500,000 worth of hardware and software and would like a complete dump of data, with periodic updates. The School of Engineering at the local university has requested on-line access using their own workstations through remote communication lines.

You ask the county attorney and a consultant for help. Your attorney responds that the universe of information collected and maintained by the county agencies are defined as "records," and the state open records law does not allow charges for anything but the cost of materials to reproduce the record (e.g., $40 for a tape, $0.20 a page for paper, and $3 for a mylar map copy). Further, the open records law does not allow the custodian to stall these requests, and a written response is due to every request for access in three days or you could go to court and face personal liability for obstruction. Your consultant suggests that the definition of "records" does not include all possible information that this technology could produce, and recommends that fees for access be established by regulation. Three months later the word is out, and several local realtors, two engineering firms, an architect, and a garage industry value-added vendor planning to sell custom maps are joining the first round of access requests.

In an attempt to deal with these requests, the attorney comes up with three types of exceptions to the open records statute that are intended to protect privacy, but can be stretched to include the GIS data, allowing you to turn down the requests from the non-government requestors. Your consultant warns that turning them down by characterizing the data as exempt records will mean you can't sell the access either, and your operational budget is due.

The county administrators direct the attorney to work with you on some acceptable solution, and you propose a fee structure for GIS access. You inform the attorney that you will need to copyright the information to protect the integrity of the official data, and to limit market competition. You learn that state government has never exercised copyright protection, and the use of copyright to protect a database is problematic. The attorney next learns that if you do sell the requested information products and services, governmental immunity is not assured, and the liability exposure is difficult to define. He also believes that "equal protection" requires you to offer to all requestors the same arrangement established with the utility board, but the big annual expenses are now paid, and annual costs are a fraction of what the utility board has invested so far. The utility board wants a rebate, and the local private mapping firm is considering an anti-trust action to prevent government from selling maps. The county administrators are considering turning over the database to a private company and becoming one of the clients rather than become a service bureau for the entire community.

This hypothetical scenario tracks a combination of several of the questions GIS managers are finding difficult to answer today. There *is* a problem with the institutional setting in which we are building our GISs. The legal setting in which we are building GISs with large investments of tax dollars does not allow for the requisite control or cost recovery that is specified for a typical public facility or utility. This is because GIS is tied up with more than building parking lots or the management of services like water and garbage disposal. GIS technology is about information, and information has not been traditionally treated as a commodity, especially when government is the source. When do raw data become information and what are their value? When does information become a record subject to the provisions of the open records act? The economics of information, defining information products and services, and defining problems presented by the limited vocabulary that currently dominates our statutes when implementing GIS are all issues to be actively addressed *before* the system matures and the access requests begin.

GIS ACCESS POLICY AND THE BIG PICTURE

The world economy of the next century is being shaped by a set of current decisions mostly having to do with information systems, and public agencies will continue to expand their use of GIS technology (Naisbitt, 1982). What standards in law and policy will help integrate and appropriately apply the information technologies that have emerged to date? The many legal and economic issues presented by efforts to manage the access to GIS will significantly impact the bigger questions about who owns and controls the value of information in the electronic age. The front-end development costs and database source material most often require GIS sponsorship by government institutions. Federal agencies, state governments, special districts and authorities, and local governments are the custodians of a majority of the country's maturing GISs (Croswell and Clark, 1989). These government institutions can be characterized as "creatures of statute" established before the electronic age was upon us. This application of old rules to new technology leads to inappropriate literal applications, or an open field for creative interpretations.

As one of the fastest growing information technologies, GIS is setting new precedents for breaking down traditional "islands of information" and promoting the sharing of information among all levels of government. The spatial analysis capabilities of GIS provide us with an ever increasing list of applications that depend on the creation of one of the most extensive collections of databases ever undertaken and financed by government. With the accelerating advancements in hardware, software, and optical storage, the potential commercial value of these databases will increase exponentially. Recognition of the resource is already growing among government agencies that may not have contributed to the initial cost of establishing a local GIS, and among the private sector users for both direct application to their businesses and for value-added purposes.

Construction of GIS databases represents a massive investment of tax dollars. This public capital investment potentially

represents a very low overhead source of information to the private sector "value-added" information brokers. If GIS custodial agencies take an active role in development of GIS access policy today, there is an opportunity for a smooth transition to an "information utility" built around GIS technology (Archer, 1988). Without the development of new concepts in the areas of open records law, information products/services definitions, proprietary authority, copyright law, commercial law, and government liability concepts, the current legal setting tends to promote the subsidy of a small sector of the private information industry with the taxpayer's investment.

The Information Industry Association, a national lobbying organization, has estimated that revenues to "on-line databases" were $12.5 billion in 1983, and should triple by 1990 (Bellin, 1988). Peter Marx, an IIA Director, testified to Congress in 1985 that there were over 400 "information service organizations" in the private sector that repackage raw government information (Marx, 1985). The large corporations involved in this industry would prefer government dissemination of information in the form of raw electronic data without searching aids or software enhancements, and oppose government dissemination of enhanced or value-added information (Office of Technology Assessment, 1988). This preserves their advantage and their market.

On the other side of the issue, we find the straightforward view that information collected and managed by government should be available for free, or for the nominal costs associated with copying records. The system was purchased with tax dollars, and the GIS should be treated the same as an electronic filing cabinet filled with digital records. The access issues should be no different than access to paper format record under the Freedom of Information Act or state open records laws.

Neither of these positions establishes a good policy basis for getting the greatest access to information to the most people. Information utilitarianism can only be achieved by allowing for the differences between today's information management technology and dissemination of information in paper format. The U.S. Office of Technology Assessment (OTA) has concluded that congressional action is urgently needed to resolve Federal information dissemination issues and to set the direction of Federal activities for years to come. The government is at a crucial point where opportunities presented by the information technologies, such as productivity and cost-effectiveness improvements, are substantial. However, the stakes, including preservation and/or enhancement of public access to government information plus maintenance of the fiscal and administrative responsibilities of the agencies, are high and need to be carefully balanced by Congress." (Office of Technology Assessment, 1988, p.3). At the state and local level, the need for action is even more urgent as more GISs mature, and the variety and volume of access requests increase.

The information dissemination roles and legal issues are not the same at the national and local levels. The Federal Government spends, conservatively, $6 billion per year on information dissemination (not including the cost of collection, processing, or a prorated share of agency automation)(Office of Technology Assessment, 1988). Congress has enacted hundreds of specific laws that assign information dissemination and related functions to Federal agencies. Federal copyright law (Public Law 94-553) expressly prohibits application of copyright protection for federal government publications, and agency rules expressly limit the charges for government publications. The traditional role for the national government agencies has been to subsidize the dissemination of information for the common good.

In contrast to this traditional federal approach, there has been a trend toward the application of user fees as a major funding source at the local government level. Local government user fees have tripled since the mid 1970s, from $30 billion in 1976, to $98 billion in 1987, or as a portion of the total revenues of local governments, including state and federal payments, they went from 17 percent to 21 percent. Nearly three-fourths of all local jurisdictions have user fees in some form or other, and they are being applied to a rapidly expanding number of public services and facilities (Lemov, 1989). The role of providing and subsidizing information distribution as a public resource decreases as government becomes more local. The tendency to consider public services optional, and to charge for services if provided, increases as we move through the progression from federal to state to local government.

The ratio of benefits to costs improves with increased distribution of GIS use when the cost of automation is contrasted to the cost of manual mapping. However, the institutional issues get more complex in direct proportion to the distributed nature of a particular system. More laws, charters, preexisting procedures, centralization of standards, interagency agreements, etc., come into play. Much of the real costs of GIS implementation can be avoided by a complete review of the institutional issues before they become advocate situations. The analysis of the legal setting is closely tied to the complexity of the institutional setting, and the job becomes exponentially more complex with the number of "players" involved. The increased commercial utility of GIS over all previous forms of government information resources is upsetting the public policy balance that has sufficed historically to deal with public access to government information.

The costs for the entire community of decision makers, public and private, may be less when the data and information are gathered, analyzed, and made compatible in anticipation of need, rather than left to actions at the time of decision making (Epstein, 1988). But this does not automatically mean that private industry should be subsidized by tax dollars in order to promote broad use of the system. Who controls the access to and, therefore, the value of information? What interpretations or changes of current laws impacting public access policy to GIS will promote cost-effective utilization of our recently available technical abilities to manage information?

The major concerns that GIS managers and custodial agencies must address in order to effectively use GIS technologies are summarized below:

- GIS applications are becoming integrated with overall information management operations of government agencies, and this trend will continue for the foreseeable future;
- After initial GIS development funding has been allocated, agencies must develop approaches for the continued operation, maintenance, and upgrade of the system;
- There is a large potential market for GIS products which is only beginning to be realized;
- Current laws, regulations, and public policies are out-of-date and are not sufficient to support an institutional framework that will meet the projected demand for GIS products and services; and
- Issues regarding cost allocation, cooperative funding, and user fees and their relationships to GIS development and operational costs must be examined.

DISTINGUISHING RECORDS FROM INFORMATION PRODUCTS

The law does not change quickly by design, and often fails to keep up with the dramatic changes modern technology brings to our society. This is very evident in a review of open records laws and their impact on issues of access to computer managed information. The most significant impact on policy in the area of GIS access issues is embodied in the state and federal freedom of information statutes and case law. Traditional rulings, statutory formulations, and current trends in this area are dominated by a balance of privacy versus right to know. The legal

precedents direct custodial agencies to release or withhold records on consideration of this balance. The limited decisions that have examined the universe of information encompassed by statutory definitions of "public records" do not provide adequate guidance to assure a smooth transition to "information utilitarianism."

Despite their ineffectiveness in addressing GIS concerns, the impact of dated laws and regulations cannot be ignored. If distinctions between "records" and "products" are necessary, the burden of showing the proper distinctions will fall on the custodial agency. "The basic premise is that a true GIS can be distinguished from other systems through its capacity to conduct spatial searches and overlays that actually generate new information" (Cowen, 1987). What about "new" information derived from records? It is clear that the range of potential products that may be generated by a GIS is nearly limitless. The GIS has unique capabilities for processing map information and conducting special geographic analysis. Because of this, the issue of "what is a record" becomes more complex in a GIS environment as opposed to more traditional information system handling tabular data alone.

One can conceive of a wide range of GIS product offerings such as those illustrated in the sample list below:

Aerial Photography and Survey Control Products

- Standard 9 inch by 9 inch prints, transparencies, or diapositives
- Photo print or transparency enlargements
- Specially formatted prints or transparencies covering defined areas
- Compiled lists of survey control and documentation on monuments

Standard Map Set Products

- 1" = 100' scale planimetric or contour base maps with standard sheet format, feature content, symbology, annotation, etc.
- 1" = 100' scale parcel maps with standard sheet format, content, etc.
- 1" = 100' scale utility maps with standard sheet format, content, etc.
- Small scale regional or county maps (scale of 1" = 1,000') with standard content, symbology, etc.

Special Variations on Standard Map Sets

This product category includes variations of a standard map product in which specifications of scale, sheet format, area of coverage, feature content, symbology, or annotation are customized for a particular use.

Special Thematic Maps

This category of products consists of any specially designed shaded or symbolized maps based on features in the GIS and their nongraphic attributes. Some examples may include the following:

- Shaded maps of existing land use based on attributes assigned to parcels
- Shaded maps depicting categories of appraised value of residential property
- Demographic maps depicting income or population by census tract or other enumeration district
- Incident maps showing the distribution of permit sites or business licenses by type.

Special Reports

A range of tabular reports using query and analysis capabilities of the system, such as those listed below, may be generated:

- Lists of names and addresses organized by property characteristics, demographic characteristics, or location within a political or administrative district
- Summary lists of demographic characteristics by enumeration district
- Voter registration lists
- Reports on permitting and development activities
- Reports on utility service by parcel or district

Special Geographic Analysis and Services

- Environmental impact assessment analysis
- Spatial model to evaluate site suitability for development
- Analysis of demographic and infrastructure data for market analysis
- Utility demand modeling to evaluate expansion of network (e.g., for water systems or electric distribution systems)
- Network analysis for optimal route determination

What are the impacts of on-line access to the database or requests for special GIS products when it would interfere with the agency doing its job? The taxpayer cannot enter the office and take the typewriter simply because it was purchased with tax dollars and is used to create records. When is the database more like the typewriter (i.e., part of an information processing tool), and when is it more like a full filing cabinet (i.e., electronically stored records)? The open records law was not written to deal with the issues raised by these new tools. A sufficiently discriminating policy must be designed and implemented now before the wrong precedents are established, either by courts or overly conservative managers.

Institutional Roles

Agencies planning for a GIS must take an active role in molding the access policy and not wait for the state legislature to catch up with the technological progress and the implementation of GIS in government agencies. Without active guidance, the legislature won't catch up in time to deal efficiently with the many systems that are currently reaching maturity. However, literal application of the current statutory language in most states causes more potential restriction of information access than it promotes in the GIS environment. We cannot expect the courts, in isolation from any policy formulated by the professionals in information management, to find the best solutions based only on the current statutes and meager case law precedents. That pre-electronic age line of policy is based on a very different set of priorities. Any case that comes before the court involving the sale of GIS products or the provision of GIS information should be based on a course of conduct established by the agency from the inception of the GIS program.

Open records law can render the cost of owning a GIS prohibitive because of unanticipated impacts that result from the statutory language dealing with response time to a records request, and cost recovery limitations. Rules that adequately protect the public's right to know in the world of paper records can prove counterproductive in the world of information management through computer technology.

While it would be a losing argument to propose that open records laws do not apply to computerized *records*, the lesson being learned now is that once a map is in the computer you can do an awful lot more than just plot it out again. You can calculate areas, optimize routes, balance sales territories, and take advantage of other new applications as they appear. This can be accomplished without ever again recreating the map in pictorial form. We are now able to manage the map as a database and not as a picture.

According to current interpretations of open records law, a GIS product would be classified as a public record if it was produced using public funds or to support the formation of public policy. For instance, a special zoning case map produced to support a rezoning decision must be available to requests under open records law. But is there any public policy basis for providing access relatively free for the commercial applications of information that did not exist before the request? Is there any public policy basis for granting access in a fashion not restricted by open records statutory procedures?

Records Policy: Foundations and Expansion

State open records laws have by no means reached a point of uniformity, but there are basic principles and trends that can be isolated:

- Definitions of "records" and "open records" are very broad. Formerly, release limitations based on the purpose of the requestor (i.e., commercial purpose) or the form in which the record is stored (i.e., electronically) were commonly found, but are disappearing. It is more common today to prohibit any inquiry into the intended use of requested information to avoid abuse of custodial discretion.
- Applicable statutes, in a majority of states, severely limit the freedom of the custodial agency in defining what constitutes a "record."
- Recovery of costs is very limited, usually allowing a charge only for the direct cost of producing copies for distribution. This assures that the custodian does not abuse purse string control to defeat the records request. Capital costs are almost never allowed, search or staff time charges are prohibited or very limited, reproduction costs are often specified based on paper format records only, and all costs are mandated to be minimal.
- The time frame for meeting a request is specified to assure that delays are not used to defeat the public's right to know. A written refusal with the basis for the refusal specified is most often required.
- The time frame for judicial review of any effort to restrict access is often given priority over other types of cases.

The need to assure accountability for the decisions of government, especially in the area of expenditure of public funds, has overridden the potential problems that a broad access policy places on the custodial agencies. (In several states, statistical analysis of records that would otherwise meet privacy exceptions, has been required. This is called "redaction," and constitutes a requirement that the custodial agency produce information that did not exist but for the request.) A balance was struck over the history of the evolving open records policy to allow the broadest possible access in spite of the taxpayer's expense, and specifying exceptions only in narrow rules protecting privacy for personal, national, and commercial security (Massachusetts Secretary of State, 1987).

Given the economy of scale we face with the potential "market" for GIS access, however, the balance traditionally considered by the courts is shifting. The utility of these new tools for managing government's information is such that outside requests can predictably reach a level that could severely limit any control over staff time and the agency's budget. The balance is also significantly affected by the ever increasing costs to taxpayers to meet the increasing costs of increasing access. Automated information management changes the impact of the old policy in ways that require immediate correction. The refinement of outdated policies in the case of GIS can be accomplished eventually through statutory changes, but currently requires an interim strategy, one that involves the creation of a defensible course of conduct under the current open records statutes and case law.

The dilemma facing organizations in the distribution of GIS products and services is illustrated in Figure 2.

Two basic and quite diverse policy approaches visible today in different jurisdictions are being used by policymakers to meet the requirements of the applicable state open records law (Archer, 1988):

(1) Find a statutory basis to refuse as many requests as possible.

An agency faced with dealing with open records requests at their own expense in terms of staff time, capital investment in the system, and especially operation and maintenance costs has little incentive to operate as a utilitarian information processor. Absent cost recovery options, a GIS manager could elect to refuse as many requests as possible on any basis they can invent that could meet specified statutory open records exceptions. These might include, "...the information is not final, the information requires proprietary software, the information is not available in the form requested, the request is not specific enough to identify the record, etc." The open records provisions in this scenario are utilized as a stick to force the resisting agency to grant access on a case by case basis, and the exceptions are used as a defense necessary to protect the custodial agency from becoming an unaffordable service bureau. Information access becomes a black-and-white issue: release information for nominal costs, or withhold information and be subjected to severe judicial scrutiny. Creative applications that could benefit the entire community are never explored.

(2) Establish a defendable policy to grant requests for information and to address cost recovery issues in this policy.

The context in which many GIS administrators are planning for record/product distinctions is one in which the broadest possible access to products and services is to be offered. A defensible course of conduct, based on existing statutes and legal precendents, can establish the primary difference between records and products. This clear differentiation will promote broader access and will merit more favorable judicial treatment than efforts to restrict information. Control of frivolous requests, control of timing access to the GIS that does not interfere with governmental duties, and funding for system operations, maintenance, and expansion become available policy choices for the particular jurisdiction. Promotion of GIS use by the custodian for the entire community becomes the guiding policy.

Most GIS managers would like to grant broader access to information, as described above in Approach 2, but they must be able to afford the exercise. Approach 1 is a convenient policy to pursue, because it results in less expenditures from the organization's budget to handle the potentially large cost of fulfilling requests for GIS products. When no defendable policy is in place to achieve any cost recovery for system development or ongoing system maintenance, Approach 1 is by default the only realistic option for many GIS custodial agencies.

It is easy to see that maintaining a policy that would effectively limit access to GIS products will vastly reduce the potential tangible and intangible benefits of the system, and will not allow an agency to fully capitalize on significant investments in the GIS database, hardware, and software.

We make the assumption that taxpayers will receive benefits from the implementation of a GIS if that system has been well designed and is managed effectively. If this assumption is correct, policies should support the increased use of tools provided by GIS and related technologies. Taxpayers, particularly those with a commercial purpose, have access to more and better information as do the public policy makers once a GIS is available for their service area. Wouldn't it be more acceptable for this improved access ability (which is in line with the underlying purpose of the open records laws) to be paid for in part by the users who will profit from the access? Then the financial roadblock to an expanded GIS use will be reduced, and more taxpayers will enjoy the fruits of the information management systems which they could not begin to afford to initiate in the private sector.

It is in the interest of all parties to remove this incentive for

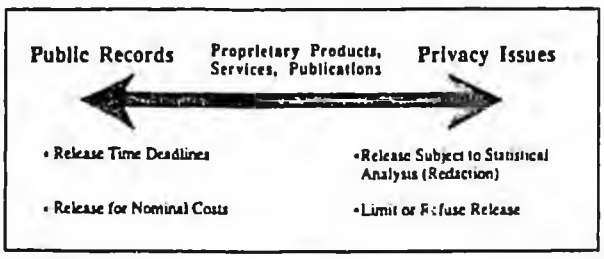

FIG. 2.

the agencies to try to limit access within the confines of the current statutory framework. This is possible only if we can make reasonable distinctions between what information is a "record," and what is a product, publication, custom report, custom map, a service, etc. A reasonable distinction must not erode the purposes of the open records laws – particularly the accountability of government (Roitman, 1988). A reasonable distinction must promote the agency to in turn promote enhanced access for the general public. Establishing an access policy based on these reasonable distinctions can act as a carrot to work with the stick represented by the open records law. An agency that unreasonably limits access to government records is subject to being hit with an open records suit. An agency that promotes broad use and creative new uses for the GIS may obtain funding for necessary system enhancements and staff that are necessary to provide the service.

The most easily defended policy for distributing products from a GIS at this time is far from the best. This would be to simply grant all requests for traditional textual material in raw printout or map form, or deliver a database "dump" on magnetic tape media when asked. Under this scenario, the agency would absorb the real costs of the exercise, and turn down all requests that don't fit a standard mode. Enhanced data, on-line access, and the most useful applications resulting from the spatial analysis made available by GIS technology are lost to the community.

A dilemma faces GIS managers who must respond to information requests through a strict interpretation of open records law. On the one hand, if the access request is analyzed exclusively under the open records law, and an exception category fits well enough to refuse access, the exception will not allow for subsequent sale or distribution of a wide range of potential GIS products. On the other hand, if the access request is met merely because no open records exception applies, then a precedent is established and no subsequent control is retained for similar requests in the future, no matter how burdensome or expensive they might prove to be.

Jurisdictions adopting the simple solution and treating all GIS access requests under the state's open records law are not serving the underlying utilitarian principles of the law as well as those seeking a reasonable distinction for identifiable products and services. They are also failing to adequately plan for the increase demand on these systems that will come with time. In the big picture, they are also not serving their taxpayers' financial interests as well, because they are missing the opportunity to distribute some of the costs to specific users, and limit the impact on the average taxpayer.

Those jurisdictions that are developing the distinctions between certain products and services and traditional records are finding the hidden carrot. They are finding themselves in an environment where it will be an advantage to promote outside access by educating the public as to the system's capabilities, marketing the existing applications to the commercial sector, looking for new applications and new products, and planning for staff and equipment to make broad access possible. They will retain the requisite control necessary to give priority to real records requests and to place governmental use ahead of commercial use of the system. They have increased the potential for financial survival of the GIS by spreading the tax burden in part to commercial users while providing more utility to the commercial users.

Given the state of the case law in most jurisdications, an open records challenge to any distinctions between records and other kinds of products and services is likely to have a chilling effect on any proposed strategy to allow for cost recovery. However, a cautiously constructed policy should be able to avoid premature challenges until a course of conduct can be established, regulations formulated, and eventual statutory changes made with a more discriminating breakdown of what is a record and what is not. The answer to an access request should be either "yes" (e.g., It is a public record and you may have it within three days) or "yes, but..." (e.g., It is a service/product we intend to provide, and you may have it, when we have time to produce it, for $50). Not turning down any reasonable request is critical to avoiding open records challenges. This approach is most attractive and practical if the custodial agency decides to actively provide and sell access from the GIS from the beginning.

SUMMARY

The creation of an institutional setting that will provide an appropriate organizational home for GIS technology requires more than a group of agencies that have enough funding to establish the initial configuration and database. GIS planners must consider access policy and the limitations and opportunities that the particular legal setting, equipment and database configuration, and demand for access provide. If access is to be controlled so as to allow reasonable use of the system by the custodial agency, some form of purse string control must evolve. The opportunity to spread the tax burden of establishing the system should not be lost by default. If government does exercise proprietary authority over GIS to establish user fees for access to the system, many corollary issues arise. To some extent, government must learn to operate as a private corporation and deal with marketing, liability disclaimers, and protections of proprietary value from third party commercial use.

Public agencies implementing GISs and the GIS managers who are overseeing their operation should take public access issues into account at the earliest possible implementation stage. Consideration of the following issues and tasks are recommended as significant aspects of any GIS operational plan:

- Establish support for distinguishing GIS products and services from public records by including house counsel or the agency records custodian in the GIS planning process
- Gain an understanding of known, probable, and potential GIS users, and a long-term perspective on the potential "market" for particular GIS products and services in the community.
- Develop a thorough understanding of the open records rules for the jurisdiction, and establish operating procedures and provide staff training to assure no abuse of *records* access will occur. Define particular products and services and liberally treat all unclassifiable requests as records requests.
- Develop an initial list of computer products and services based on past and projected requests for maps and special analysis from other public agencies and the private sector.
- Develop a schedule for product and service availability, and work with the identified major users in the development of required GIS applications.
- Based on local policy, make a decision about whether pricing GIS access is to achieve reasonable control over "outside use," or whether cost recovery is a major objective.
- Develop a fee structure for products and services based on the actual and estimated costs for the GIS over a defined time period
- Establish GIS on-line access or GIS product availability conditions by contract, subscription agreement, etc., with particular attention to disclaiming product liability or duty of care as appropriate
- Codify course of conduct for GIS access once a clear line between records and GIS products can be established: user fees, definitions of particular products and services, and user fee waivers or reductions (e.g., allowed for acadamic research, journalism, or nonprofit use) should all be subjected to regulatory review processes
- Seek statutory modifications when clarifications in light of the impact of this new technology are merited: definition of "open records" (e.g., distinguishing information products and services, treatment of in-house and licensed computer programs, "value-added," etc.), express authority to establish the proprietary service with any public utility-like checks and balances desired by the legislative branch, and policy to support GIS access as a "state action" exception under the antitrust law provisions
- On the national level, join the debate over who controls the value

of information: should the capital investment of the taxpayers be spread through user fees, or should government turn this resource over to the segment of the private sector "information industry" currently making a bid for control at the federal level; will the copyright law or some other grant of federal rights suffice to protect proprietary rights in databases?

- Approach the institutional issues surrounding information sharing and the cost of the exercise early in the planning process with the participation of the highest level policy makers in the organization; the major opportunities and the major roadblocks to GIS implementation are at stake.

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→ CS - Reflects comments / testimony

1. Edgworth - Privacy sec. 1, 13 provisions - purpose FLORIDA - let people know when info was available
2. Public Records (PAPER) present Regs incorporated - be available at copy cost - standard charge included for excessive Requests
3. ACLU - waiver / Reductions - Tuttle on Get + SAME TX

M E M O R A N D U M

TO: Interested Parties

FROM: Rep. Kay Brown

DATE: Jan. 30, 1998

SUBJECT: Proposed Committee Substitute for HB 405

4. Fee = incidental cost of Agency
5. TIC - Adopt Regs OR Act except Municipalities - implement this

Thank you for your comments on HB 405, an act relating to public access to the information of the state. Attached please find a proposed Committee Substitute that incorporates a number of your suggestions.

The House State Affairs Committee will hold a public hearing on the proposed Committee Substitute at 8:30 a.m., Thursday, Feb. 1. The hearing will be teleconferenced to Anchorage, and you can testify there from the Legislative Information Office (3111 C Street).

Major changes from the original HB 405 are outlined below. The proposed CS:

- Adds a finding on privacy and intent language that any ambiguity be construed in favor of disclosure. (Section 1)

- Incorporates specific provisions from the current regulations (6 AAC 95) regarding access to public records, including
  - * the fee to obtain a public record may not exceed the cost of copying (duplication), except for very large requests. [Section 3, (b)]
  - * the fee for obtaining public records shall include the personnel costs of the search for the records and copying tasks if the production of records for one requestor exceeds 10 person-hours in a month. News organizations are not subject to this additional fee unless the requests are unreasonable, made in bad faith, or require extraordinary expenditure of state resources. [Section 3, (c)]

- Provides that fee reduction and waivers for public records [Section 3, (d)] and electronic services and products [Section 4, (b)] shall be uniformly applied among persons similarly situated.

Fees - Adopt Fees / Disapprove Fees ?
Appeal procedure for denial / choose Admin route or go to court -

■ Provides that the fee for duplicating an electronic file or data base may not exceed the actual incremental costs of the agency. [Section 4, (c)]

■ Requires agencies to notify the State Library Distribution and Data Access Center of electronic services and products offered to the public. [Section 4, (e)]

■ Provides that when offering on-line access to an electronic file or data base, an agency shall also provide, without charge, on-line access through one or more public terminals. [Section 4, (f)]

■ Provides that the Telecommunications Information Council (TIC) shall supervise and adopt regulations for the implementation and operation of the section by public agencies other than municipalities. [Section 4, (g)]

■ Provides that each public agency shall establishes the fees for electronic services and products. The TIC may cancel the fees established by a public agency other than a municipality if the council determines the fees are not reasonable. [Section 4, (h)]

■ Requires the TIC to adopt regulations providing for an appeal procedure for a denial of a request to inspect or copy a public record. Provides that a person who appeals a final administrative order to the superior court may not be required to post a bond for costs on appeal. This section does not cover municipalities. [Section 6]

■ Provides that a person may seek injunctive relief without exhausting administrative remedies. A person who seeks such injunctive relief may not be required to post a bond in order to begin an action for injunctive relief. [Section 7]

■ Adds additional categories of "electronic services and products":

* providing software developed by an agency or by a private contractor for an agency; PROPRIETARY SOFTWARE
* providing maps or other standard or customized products from an electronic geographic information system. [Section 8, (1)(F) and (G)]

■ Adds a definition of "public agency." Public agencies include all administrative entities of the executive, judicial, and legislative branches of state government and municipalities; the University of Alaska, the Alaska State Housing Authority, and the Alaska Railroad. [Section 8, (5)] PRESENT LAW

■ Modifies the definition of "public records" to include items developed or received by a private contractor for an agency. [Section 8, (6)]

STATE : PROP SOFTWARE NOT PUBLIC / NON-PROP IS PUBLIC RECORD
COPYRIGHTING - DISTRIBUTION PROVISIONS HOWEVER - AT REASONABLE COST - GOV COULD DEVELOP SOFTWARE / DEAL WITH RESTRICTIONS INCLUDING COPYRIGHT

■ Provides that proprietary software programs are not "public records." [Section 8, (6)]

■ Requires state agencies to inform individuals if personal information about them will be subject to public disclosure. This section does not apply to municipalities. [Section 13]

■ Provides that a state agency or municipality may hold copyright for software created by it or developed for it by a private contractor. [Sections 11 and 13]

■ Makes other minor and conforming amendments.

Thank you again for your help and interest. If you are unable to participate at the public hearing Feb. 1, please feel free to phone me or Mary Core of my staff with your comments (465-4998). Written comments may be submitted to Rep. Boucher, chair of the State Affairs Committee, or to me at P.O. Box V, Juneau, AK 99811.

"INFORMATION UTILITY"

AMENDED IN SENATE AUGUST 21, 1989

AMENDED IN ASSEMBLY JUNE 19, 1989

AMENDED IN ASSEMBLY JUNE 5, 1989

AMENDED IN ASSEMBLY MAY 4, 1989

AMENDED IN ASSEMBLY APRIL 24, 1989

AMENDED IN ASSEMBLY APRIL 12, 1989

AMENDED IN ASSEMBLY MARCH 28, 1989

CALIFORNIA LEGISLATURE—1989-90 REGULAR SESSION

ASSEMBLY BILL No. 539

Introduced by Assembly Member Moore

February 8, 1989

An act to add Chapter 2 (commencing with Section 1798.80) to Title 1.8 of Part 4 of Division 3 of the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 539, as amended, Moore. Privacy: personal information.

Existing law specifies procedures for the collection, maintenance, and dissemination of personal information maintained by any state agency, as defined, for the purpose of protecting the privacy of individuals and limiting the dissemination of personal information.

This bill would require, among other things, notification, as specified, to the individual that personal information, as *defined,* is being collected and distributed for commercial purposes, as defined, disclosure of the identity of any 3rd persons to whom that information is collected for or distributed to, and would also require that the individual be

provided a true copy of the information being provided upon his or her request and that personal information in a data dossier, as defined, be accorded the same legal protections as the most secure information, as specified.

This bill would also establish that every individual about whom personal information is being collected *and distributed* has certain rights, among other things, including the right to inspect all records and sources of information, make corrections, as specified, and the right to inquire and be notified as to whether any person, organization, or entity maintains a record about himself or herself.

This bill would also provide that, any person who uses a computer network, as defined, with prescribed exceptions, to collect ~~or~~ *and* distribute personal information in a manner other than as specified in this act, as defined, about an individual is liable to him or her in an amount equal to the sum of all of the following: (1) any actual damages sustained by that individual or $500, whichever is greater, except in a class action, and, (2) the costs of any successful action together with reasonable attorney's fees. The court may also enjoin any person, organization, or entity that fails to comply with this act and may make any order or judgment, as specified.

This bill would also make a declaration of legislative intent.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 1798.80) is added to Title 1.8 of Part 4 of Division 3 of the Civil Code, to read:

CHAPTER 2. THE PERSONAL INFORMATION INTEGRITY ACT OF 1989

Article 1. General Provisions and Legislative Findings

1798.80. This chapter shall be known and may be cited as the Personal Information Integrity Act of 1989.

1798.81. The Legislature hereby finds and declares that:

(a) In a democratic society, rights are ~~bestowed on~~ *inherent to* individuals, and that among these rights is the right to privacy, as declared in Section 1 of Article I of the California Constitution.

(b) For the individual to be able to exercise the right to privacy, the individual must be able to choose when to release personal information, and to whom; and that reasonable laws requiring the individual to surrender such control should be propounded and enforced only when it is deemed absolutely necessary for society's welfare.

(c) In an age of computer networks and global telecommunications, the integrity of the person is only as secure as the integrity of the information about the person which may be collected and distributed via these proliferating information technologies; and to this end, the Legislature has caused this legislation to be enacted.

Article 2. Definitions

1798.82. As used in this chapter:

(a) "Personal information" means any individually identifiable information obtained through a commercial transaction for personal, family, or household purposes or through an exchange of information with the state or local governments from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics.

(b) *"Personal information" does not mean:*

(1) An individual's name and address.

(2) An individual's telephone number if the telephone number is published in a current telephone directory.

(3) Disclosures from public records relating to land and land titles.

(c) "Computer network" means two or more computers joined by a telephone line, coaxial cable, fiber optic cable, any other connecting cable, or radio

transmitters for the exchange of data.

~~(c)~~

(d) "Data dossier" means a collection of records, documents, images, or other devices used to store personal information about an individual.

~~(d)~~

(e) "Commercial purpose" means any purpose which has financial gain as a major objective. It does not include the gathering or dissemination of newsworthy facts by a publisher or broadcaster.

1798.83. Any person using a computer network to collect ~~or~~ *and* distribute personal information about an individual for commercial purposes shall do all of the following:

(1) Notify the individual within seven days from the date that personal information is first collected or distributed. If the personal information is being collected for or distributed to a third person, the identity of the third person shall be provided to the individual as part of this notice. The notice shall include a statement of the individual's right of access to records containing personal information which are maintained by the person, organization, or entity.

(2) Provide, upon request of the individual, a true copy of all personal information so collected or distributed.

(3) Accord all personal information contained in a data dossier the same legal protections, including all noticing and disclosure requirements, as is required for the most secure information within the dossier.

(4) Maintain the source or sources of the personal information.

(5) Permit the inspection of all records and sources of information by the person about whom information is being collected.

(6) Permit an individual to request in writing an amendment of a record and, shall within 30 days of the date of receipt of the request:

(A) Make each correction in accordance with the individual's request of any portion of a record which the

individual believes is not accurate, relevant, timely, or complete and inform the individual of the corrections made in accordance with his or her request; or

(B) Inform the individual of its refusal to amend the record in accordance with the individual's request, the reason for the refusal; and shall clearly note any portion of the record which is disputed and shall include the individual's concise statement of disagreement.

1798.84. (a) Any person who uses a computer network to collect ~~or~~ *and* distribute personal information in a manner other than as specified in this chapter is liable to the individual about whom the personal information pertains in an amount equal to the sum of all the following:

(1) Any actual damages sustained by the injured individual as a result of the collection or distribution or, except in the case of class actions, five hundred dollars ($500), whichever sum is greater.

(2) In the case of any successful action to enforce any liability under this chapter, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) The court may enjoin any person, organization, or entity that fails to comply with this chapter, and may make any order or judgment as may be necessary to prevent any practices which violate this chapter.

1798.85. This act shall not apply to the following:

(a) The collection ~~or~~ *and* distribution within or by an organization, person, or entity of personal information about an individual if all of the following conditions are met:

(1) The individual voluntarily provides, or authorizes another person, organization, or entity to provide, the personal information to the organization, person, or entity and signs a written notice to that effect.

(2) At the time the individual provides, or authorizes another person, organization, or entity to provide, the personal information to the organization, person, or entity, the individual is notified in writing of the intended uses of the personal information and the names of other

persons or types of organizations, persons, or entities to which the personal information may be distributed.

(3) *The notification provided by the person, organization, or entity to the individual is supplemented by written notice to the individual if the personal information is be provided to persons or types of organizations, persons, or entities other than those about which the individual was initially notified.*

(4) The organization does not collect ~~or~~ *and* distribute the personal information about the individual for purposes other than those about which the individual is notified.

(b) The collection ~~or~~ *and* distribution of personal information by a person, organization, or entity legally authorized, and acting within the scope of the authorization, to collect and distribute personal information, as prescribed, and for the purposes intended, by state or federal law. These organizations, persons, or entities include, but are not limited to:

(1) State and local governmental agencies, including law enforcement agencies and courts.

(2) Credit reporting agencies which collect and distribute personal information, provided that they report the collection and distribution of this personal information in compliance with the regulations of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681 and following) and the Consumer Credit Reporting Agencies Act (Title 1.6 (commencing with Section 1785.1) of Part 4 of Division 3).

(3) Investigative consumer reporting agencies.

(4) Licensed private investigators.

(5) Regulated financial institutions, including banks, savings and loans, *thrifts,* industrial loan companies, personal property brokers, consumer finance lenders, and commercial finance lenders.

(6) Public utilities.

(7) Providers of health care, as defined in subdivision (d) of Section 56.05.

(8) A nongovernmental organization which regulates professional practitioners and which collects ~~or~~ *and*

distributes information about those professional practitioners in a manner that is regulated by a state or federal agency.

~~(9) An entity possessing a license or certificate under Chapter 1 (commencing with Section 12340) of Part 6 of Division 2 of the Insurance Code, or facilities under the joint ownership or control of these entities.~~

~~(10)~~

(9) An insurance company.

~~(11)~~

(10) Licensed real estate brokers.

(c) A seller, buyer, lessor, or lessee of real property or an organization that collects information about transactions in real property from sellers, buyers, lessors, or lessees if the seller, buyer, lessor, or lessee providing the information has given written permission for the collection and distribution of the information relating to the transaction.

(d) A seller or lessor of personal property *services* if the individual about whom the personal information is being collected has been notified of the seller's or lessor's intended use of the personal information and has given written permission for the collection and distribution of the personal information for that sole purpose.

(e) A person compiling or distributing a mailing list which contains only the names and addresses of individuals and which does not reveal personal information as defined in Section 1798.82 if, at the request of an individual appearing on the list, the person promptly removes from the list the name and address of the individual and informs the individual of the source of the individual's name and address.

1798.86. (a) Nothing in this chapter shall be construed to deny or limit any right of privacy under Section 1 of Article I of the California Constitution.

(b) The rights, remedies, and causes of action set forth in this chapter shall be nonexclusive and are in addition to all other rights, remedies, and causes of action for invasion of privacy, provided in Section 1 of Article I of the California Constitution.

(c) Every individual shall have the right to inquire and be notified as to whether any person, organization, or ~~entity maintains a record about himself or herself.~~ *entity maintains a record of personal information, as defined in Section 1798.82, about himself or herself, unless otherwise provided by law.*

Kay Brown

Alaska State Legislature
House of Representatives

TO: House members

FROM: Representative Kay Brown

DATE: February 28, 1990

SUBJECT: CSHB 405 (Finance)

I would appreciate your support for CSHB 405 (Finance), which deals with public access to state and local government records. The bill will come before the House for a vote in the near future.

The major provisions of the bill:

- **Govern access to and fees for obtaining public records.** The provisions cover all agencies of the executive, legislative, judicial branches of state government, and of municipalities.

- **Establish discretionary authority for public agencies to offer to the public electronic services and products, and criteria for setting fees.** The intent is that electronic services and products would be offered if there is sufficient public demand to generate enough fees (program receipts) to cover the costs.

- **Authorize state agencies and municipalities to copyright software.**

- **Address privacy rights of individuals** by requiring state agencies to inform individuals that personal information may be subject to public disclosure, and providing a process to correct inaccurate personal information in public files. The bill also provides that in the event of ambiguity regarding whether personal information should be released, the ambiguity must be resolved in favor of the right to privacy.

- **Define terms,** including "public records," electronic services and products," and "personal information."

P. O. Box 20-2661
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During Session:
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Juneau, AK 99811
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A sectional analysis prepared by Legislative Counsel is attached for your information.

Since passage from the House Finance Committee, questions have arisen regarding Section 11 of the bill, which expands the confidentiality provisions affecting data collected by the Department of Fish and Game. **I am holding a work session at 8 a.m., Friday, March 2, in the House Finance Committee Room to discuss an amendment to this section that will be offered on the House floor.**

Please let me know if I can answer any questions about the bill. Thank you for your interest and support.