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SUGGESTIONS FOR A MODEL STATUTE FOR ACCESS TO COMPUTERIZED GOVERNMENT RECORDS

by Sandra Davidson Scott*

I. INTRODUCTION: A BRIEF HISTORICAL AND PHILOSOPHICAL PERSPECTIVE

The urge for human beings to document their existence and activities is apparent in ancient pictographs and cave paintings. The phenomenon is universal, ranging from giant etchings in the earth of Peruvian plains to delicate drawings in French caves.

As the ability to communicate progressed, written languages replaced drawings. Nuances of meaning, heretofore impossible to depict, could be expressed in writings, but the process was time consuming. Even though the medium improved—from clay to paper—writing by hand remained tedious. Adding to the tedium, important books received elaborate embellishment; the margins of some hand-scribed Bibles produced by monks display intricate designs containing flowers and animals, enhanced by gold. These laboriously made books were acts of love and dedication, or at least extreme patience.

Then came Gutenberg. In the mid 1400s, Gutenberg initiated a new era, liberating human beings who wanted to be free from the work of writing by hand. The Gutenberg era of printing, from typewriters producing individual copies to printing presses churning out copies by the thousands, revolutionized communication. Of course, vestiges of pre-Gutenberg life persisted; writing letters and documents by hand did not cease. But the freedom of choice made possible by Gutenberg's revolution meant that, in large part, machine-made print replaced that made by hand.

And now we have entered another era, that of the computer and micro chip—the electronic age. Communication is undergoing a revolution controlled by a binary system of open or closed electrical pathways that unleashes power to create, store, retrieve, and duplicate information with amazing ease and speed.¹ How far this revolution may lead is not yet clear because we are only at its beginning.²

Perhaps the most striking difference between the Gutenberg and computer eras is the reduction in person-hours needed to perform given tasks. Instead of performing labor-

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¹ As an example of amazing advancement in technology, one CD-ROM disc (Compact Disc—Read Only Memory) can store the same amount of information as approximately 250,000 typewritten, double-spaced pages. U.S. CONG. OFFICE OF TECH. ASSESSMENT, *INFORMING THE NATION: FEDERAL INFORMATION DISSEMINATION IN AN ELECTRONIC AGE* 9 (Oct. 1988) [hereinafter *OTA, INFORMING THE NATION*]. Even smaller computer tapes store about as much information as roughly 75,000 pages of text. HOUSE COMM. ON GOV'T OPERATIONS, *TWENTY-FIFTH REPORT, TAKING A BYTE OUT OF HISTORY: THE ARCHIVAL PRESERVATION OF FEDERAL COMPUTER RECORDS*, H.R. REP. NO. 978, 101st Cong., 2d Sess. 29 (Nov. 6, 1990) [hereinafter, *TAKING A BYTE*].

While the computer industry uses "disk," the more common statutory spelling is "disc." For consistency, the Journal has used the latter spelling throughout the article.

² For an extensive discussion of different communication eras, see ANTHONY SMITH, *GOODBYE GUTENBERG: THE NEWSPAPER REVOLUTION OF THE 1980'S* (1980).

intensive, time-consuming searches through file cabinets or shelves filled with documents, computer researchers use narrowly-honed, database searches, thus discovering and synthesizing material literally with a few key strokes. In a short span of time, a computer researcher can accomplish searches which would have taken days, months, or even years using Gutenberg-era methods.³

The problem this article seeks to address is that many laws addressing access to computerized government records were written in the Gutenberg era, or at least with Gutenberg-era conceptions. For instance, the federal Freedom of Information Act⁴ [FOIA] was written in 1966, which predates the full-blown computer age. The Freedom of Information Act's definition of what constitutes a government agency "record" does not mention computer records.⁵ An Office of Technology Assessment [OTA] report states flatly, "Technology has outpaced the major governmentwide statutes that apply to Federal information dissemination."⁶ Few people would consider horse-and-buggy era laws to be adequate to control traffic in the age of the automobile. Yet it is precisely this same type of situation that exists when access to computerized records is governed by laws reflecting technology of the previous, noncomputerized era. Freedom of information laws, after all, are the traffic laws for access to government information.

Similar disparities between the language of the law and the reality of government record-keeping exist in state laws. For instance, some state laws mandate that computerized government records be reproduced on paper for persons seeking records.⁷ It makes no sense in the computer age for a law to mandate the more expensive paper copies of records,⁸ just as it would have made no sense in the Gutenberg era for a law to mandate that only more expensive, hand-written copies of government records be produced. Such laws could only make sense if their purpose were to restrict access to information. A law mandating hand-lettering would have abysmally slowed the production of information and ridiculously increased its cost. Likewise, laws mandating production of records on paper slow production time and increase cost. In either case, there is a mismatch between technology and law.

A primary reason to be concerned about the disparity between law and technology is that anything which slows production of a government record and/or increases its cost tends toward a closed rather than an open society. The philosophical theory underpinning this article is that one of the primary factors separating one society from another is openness. The more open a society is with its information—the more a government lets its citizens view the government's workings—the better the chances that the society is a healthy, functioning democracy. Conversely, the more closed a society is with its information—the more a government restricts its citizens from viewing the government's workings—the greater the chances that the society is suffering under a repressive, totalitarian form of government. George Brown, Jr., says:

³ For examples of how computers can ease the news gathering process, see *infra* note 52.

⁴ 5 U.S.C. § 552 (1966).

⁵ Senator Patrick Leahy has introduced a bill trying to meet that problem. See *infra* note 60 and accompanying text.

⁶ OTA, INFORMING THE NATION, *supra* note 1, at 8. For brief analyses of OTA, Informing the Nation, see S. Elizabeth Wilbor, Note, *Developments under the Freedom of Information Act—1989*, 1990 DUKE L.J. 1113, 1145-47 nn. 195-213; Lisa Guisbond, *Could computers put freedom of information at jeopardy?* PC-COMPUTING, April 1989, at 38; Judith Silver, *OTA report urges change at GPO*, NTIS: Office of Technology Assessment, Government Printing Office, National Technical Information Service, GOV'T COMPUTER NEWS, Oct. 24, 1988, at 113.

⁷ See *infra* notes 264-67 discussing reproduction methods.

⁸ See *Brownstone Publishers, Inc. v. N.Y. City Dep't of Bldgs.*, 560 N.Y.S.2d 642 (N.Y. App. Div. 1990) (describing how much more expensive paper copies can be than computerized versions).

In any society that proclaims itself to be "open" and "free," the relationship between that society and its government must be based on mutual trust and self-assurance. Each must operate from the understanding that it is functioning for the well-being and best interests of the nation as a whole. Of course, it would be fatuous to assume that all the citizenry of any nation is loyal to that nation, but every free nation must be sufficiently poised and trusting, and welcome open dissent that is not traitorous. It is on these assumptions that we must either stand or fall as a nation. In an open society, Federal information must be available to the citizenry in order for that citizenry to prosper, be confident regarding its government, and able to feel itself a part of the governing process.⁹

In other words, secrecy in government is the single greatest threat to individual freedom.¹⁰

The ideological starting point for this article can be found in works such as *On Liberty* by John Stuart Mill¹¹ and *A Theory of Justice* by John Rawls.¹² These works emphasize the importance of freedom to express one's opinions. For instance, in often quoted language, Mill says:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.¹³

Although it is vital for an open society that citizens be able to *express* opinions, it is even more critical that citizens be able to *form* opinions. Rawls comes closer to emphasizing the importance of access to government information:

We may take for granted that a democratic regime presupposes freedom of speech and assembly, and liberty of thought and conscience. . . . While rationality is not guaranteed by these arrangements, in their absence the more reasonable course seems sure to be rejected in favor of policies sought by special interests. If the public forum is to be free and open to all, and in continuous session, everyone should be able to make use of it. *All citizens should have the means to be informed about political issues. They should be*

⁹ George E. Brown, Jr., *Federal Information Policy: Protecting the Free Flow of Information*, 4 GOV'T INFO. Q. 349, 350-51 (1987). The same sentiment applies regarding access to state and local government information.

¹⁰ Another lesser threat to freedom is invasion of privacy. While computers can help citizens keep track of government activities if citizens can access government databases, computers can also help government and others keep track of citizens' activities. Computers are thus a double-edged sword in the fight for an open society. For more on privacy concerns specifically relevant to computers, see *infra* notes 21-47 and accompanying text. This article, however, leaves an in-depth analysis of invasion of privacy issues for another discussion.

¹¹ JOHN S. MILL, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 249 (Max Lerner ed., 1961).

¹² JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Another philosophical work of interest is 1 & 2 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1971). Its title alone is thought provoking.

¹³ MILL, *supra* note 11, at 269.

*in a position to assess how proposals affect their well-being and which policies advance their conception of the public good. Moreover, they should have a fair chance to add alternative proposals to the agenda for political discussion.*¹⁴

This article builds on the legacy of philosophers such as Mill and Rawls, but it shifts the emphasis from freedom of expression to the groundwork that makes this freedom possible: access to information in order to create an informed opinion. In order to express an opinion, one must first form an opinion. That opinion must be based on information; otherwise, it is merely idle speculation. To have an informed opinion, one must have access to the necessary information. Without access to information, any discussion of freedom to express one's opinion is as meaningless as the uninformed opinion itself.

Government is too often obstructing access to computer-age records with inadequate, Gutenberg-era laws. Our technology has reached beyond the Gutenberg era, and now our laws must do the same. At stake is not just access to information itself, but also the ability to formulate informed opinions. Freedom of expression, a bulwark of an open society, hinges upon freedom to access government information.¹⁵

II. LAW'S UNEASY VIEW OF INFORMATION IN THE COMPUTER AGE

Increasingly, government records are kept in government computers. One estimate is that by the year 2000, the federal government will conduct 75% of its transactions electronically.¹⁶ Paul McMasters explains, "Computers in federal agencies were rare in the 1970s. By 1982, the U.S. government was spending more than \$9 billion annually on computers. That figure will top \$15 billion this year [1990] in a government with more than 25,000 mainframes and 125,000 microcomputers."¹⁷ In a major work, the Office of Technology Assessment acknowledged both the "rapid increase in the use of electronic formats for Federal information dissemination" and the "serious conflicts" over how to "strengthen public access."¹⁸ States are also increasingly keeping their records in computer databases.¹⁹

Information in computers or on computer tapes or discs is almost infinitely malleable. Searches for information can be done with little expenditure of time. Francis

¹⁴ RAWLS, *supra* note 12, at 225 (emphasis added).

¹⁵ In one of the most metaphysical Supreme Court opinions ever written, Justice Douglas includes freedom of access to information as one of our "penumbral rights." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). According to Douglas, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. For example, "freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach. . . . Without these peripheral rights, the specific rights [speech and press] would be less secure." *Id.* at 482-83.

¹⁶ TAKING A BYTE, *supra* note 1, at 2.

¹⁷ Paul McMasters, *Penetrating the Paperless Government*, ASNE [AMERICAN SOCIETY OF NEWSPAPER EDITORS] BULLETIN, Aug. 1990, at 8. On the number of government databases, see *infra* notes 70, 71 and accompanying text.

¹⁸ OTA, *INFORMING THE NATION*, *supra* note 1, at 3. See also, UNITED STATES CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, *FEDERAL GOVERNMENT INFORMATION TECHNOLOGY: MANAGEMENT, SECURITY, AND CONGRESSIONAL OVERSIGHT* (Feb. 1986); Fred B. Wood, *Technology, Public Policy, and the Changing Nature of Federal Information Dissemination: Overview of a New Office of Technology Assessment Study*, 4 GOV'T INFO. Q. 83 (1987).

¹⁹ See, e.g., *infra* notes 260-62 and accompanying text (increasing remote on-line access in states).

Bacon's phrase, "Knowledge is power,"²⁰ is inverted to "Power is knowledge." Computer power yields knowledge, and it does so with an ease and speed that is revolutionary.

Using this power, however, raises ethical questions. Should journalists or others have such information literally at their fingertips? For instance, the state, in effect, compels individuals to divulge private information such as weight and height as a condition of driving an automobile. Then the state turns that information over to prying eyes for a nominal fee. Easy access to such information is good news for marketers who want to target certain consumers, such as overweight people or those who might want to buy platform heels.

But what about privacy concerns? State policies on the availability of driver information show diverse approaches to privacy concerns.²¹ Proposed New Hampshire legislation, aimed at protecting personal privacy and recognizing the use of social security numbers as *de facto* identification numbers, will make merchants liable, up to a \$1,000 fine, if they refuse to do business with customers who will not provide their credit card or social security numbers.²² Other privacy concerns involve the use of computerized voting records.²³ Computerizing medical records is also an issue.²⁴ Further, current

²⁰ FRANCIS BACON, *MEDITATIONES SACRAE* (1597) (quoted in, e.g., JOHN BARTLETT, *FAMILIAR QUOTATIONS* 178 (15th ed. 1980)).

²¹ A "John Doe" in Massachusetts was able to get a temporary injunction, based on privacy grounds, not to have his age and height released by the Department of Motor Vehicles (DMV). *John Doe v. Registrar of Motor Vehicles*, 543 N.E.2d 432 (Mass. App. Ct. 1989). Also in Massachusetts, public concern for privacy prompted Governor Weld to drop his proposal to allow the DMV to sell businesses on-line access to its records. One commentator explained the value of such lists to businesses:

The Registry records could provide a treasure trove of information for people marketing some goods or services. Those records include people's age, address, type of car, and driver's license number, which often is the same as their Social Security number. For example, companies could assemble a list of all Mercedes owners older than 50 in metropolitan Boston to pitch luxury goods and vacations, or a list of all 20- to 40-year-old male pickup truck owners in western Massachusetts for outdoor sporting goods.

Peter J. Howe, *Access to Registry Data Among Reforms on Weld's Agenda*, BOSTON GLOBE, Nov. 20, 1991, at 45. On the other hand, in 1991, Missouri legislation provided that "for all licenses issued or renewed after March 1, 1992, the applicant's social security number shall serve as his license number" unless the applicant objects and files the appropriate form with the Director of Revenue. MO. ANN. STAT. § 302.181 (Vernon 1992). Also, in 1990, New York did not pass proposed legislation that would have enabled drivers to request that the DMV keep their names and home addresses confidential. *Summary of Action in New York Legislature's 213th Session*, N.Y. TIMES, July 8, 1990, at A16.

²² Ralph Jimenez, *Several Bills Seek to Guard Privacy, Except in One Case: New Hampshire Weekly*, BOSTON GLOBE, Feb. 10, 1991, at 1. For more information on the social security number as a *de facto* national identifier, see Simson Garfinkel, *Social Security Numbers and Other Telling Information*, WHOLE EARTH REV., Sept. 22, 1989, at 80. Garfinkel says:

Practically anybody with a computer modem... can sign up with the National Credit Information Network, Inc., in Cincinnati, Ohio, which allows instant access to more than 200 million online consumer credit reports, as well as driver's license records from 49 states, and a nationwide telephone and address directory that includes unlisted telephone numbers.

Id.

²³ Shelby Gilje, *In Our Democracy, Public Voting Records Are Part of the Package*, THE SEATTLE TIMES, June 6, 1991, at D12; Gary Stix, *The O's Have It; Can Digital Ballot Boxes Keep Elections Honest?*, SCI. AM., Nov. 1990, at 24.

²⁴ For information on state laws, see Elizabeth Gardner, *Red Tape, Antiquated Laws Keep Computerized Records on Shaky Legal Ground*, MOD. HEALTHCARE, June 3, 1991, at 27. Proposed federal legislation would regulate federal agencies in collecting and disseminating genetic records, to protect against discrimination on the basis of genetic predisposition to health problems. *Genetic Privacy Bill Introduced*, COMPUTER-WORLD, May 20, 1991, at 6.

literature reflects many other concerns about the effects of the use of computers on privacy.²⁵

Privacy concerns are heightening, but they are not new. Partly as a result of the computer age, the United States passed the Privacy Act of 1974,²⁶ which deals with the vast record making, storing, and retrieving capabilities of federal agencies. The Act's purpose is to protect individuals against government abuse of personal data. The Privacy Act lets individuals find out what kind of files are being kept and correct them.²⁷ It also generally prohibits federal agencies from maintaining records concerning the exercise of First Amendment rights²⁸ and prevents agencies from releasing data about individuals to a third party without written consent unless a record is open for public inspection under an exemption to the Privacy Act.²⁹ The major exemption is that records are open if they are open under the Freedom of Information Act.³⁰ In 1988, Congress passed the Computer Matching and Privacy Protection Act,³¹ which amended the Privacy Act of 1974. The law regulates the "computerized comparison" not only of records of two or more agencies, but also of an agency's records with "non-Federal records."³²

Another privacy concern is the possibility of public officials, such as FBI agents or police officers, turning over confidential information in exchange for bribes. Tapping into FBI and other governmental databases is relatively easy and yields confidential information. This happened in the case of Tampa-based Nationwide Electronic Tracking [NET], which sold its clients confidential information and social security files.³³

²⁵ See generally Francis S. Chlapowski, *The Constitutional Protection of Informational Privacy*, 40 AM. U. L. REV. 957 (1991); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991); Note, *Privacy, Computers, and the Commercial Dissemination of Personal Information*, 65 TEX. L. REV. 1395 (1987); Mitchell Hartman, *Press and Public Collide as Concern over Privacy Rises*, THE QUILL, Nov.-Dec. 1990, at 3; Richard Lacayo, *Nowhere to Hide*, TIME, Nov. 11, 1991, at 34; Joe Schwartz & Brad Edmundson, *Privacy Fears Affect Consumer Behavior*, AM. DEMOGRAPHICS, Feb. 1991, at 10.

²⁶ 5 U.S.C. § 552a (1974).

²⁷ § 552a(b).

²⁸ § 552a(e)(7).

²⁹ § 552a(d).

³⁰ § 552a(b).

³¹ Pub. L. No. 100-503, 102 Stat. 2507 (1988).

³² § 552a(a)(8)(A)(i). See Comment, *Protecting Individual Privacy in the Shadow of a National Data Base: The Need for Data Protection Legislation*, 17 CAP. U. L. REV. 117 (1987) (on the purpose of computer matching legislation). Also, Congress has taken other steps to regulate governmental and commercial use of computerized information. Congressman Andy Jacobs of Indiana has conducted hearings on matching computer data by misusing social security numbers. Representative Robert Wise of West Virginia wants a federal "data protection board" overseeing both governmental and commercial use of computerized information. Annetta Miller & John Schwartz with Michael Rogers, *Would New Laws Fix the Privacy Mess?*, NEWSWEEK, June 3, 1991, at 42.

³³ *All Things Considered: Selling Secrets: A New Brokering Profession* (NPR radio broadcast, June 5, 1992). In the NET case, investigated by the Inspector General of the Atlanta office of the Department of Health and Human Services, charges included mail fraud and bribery of officials. Among those arrested were policemen from Chicago and Georgia. *Id.* In another case, a former San Francisco police officer, Tom Gerard, allegedly collected confidential information on individuals and sold it to foreign intelligence organizations. *Morning Edition: Illegal Police Surveillance Questioned in California* (NPR radio broadcast, Mar. 26, 1993). Many of Gerard's files apparently came from other police departments. Phillip Matier & Andrew Ross, *Developer Cowan May Be Harboring Money Problems*, SAN FRAN. CHRON., Mar. 8, 1993, at A15. See also Richard C. Paddock, *San Francisco Probes Private Spy Network*, L.A. TIMES, Feb. 26, 1993, at A1 (confidential files recovered from home of Tom Gerard).

Consumers are growing more uneasy about threats to privacy—and are fighting back.³⁴ The public's interest in protecting privacy is perhaps best illustrated by the *Lotus Marketplace* controversy. Equifax, the Atlanta-based credit bureau, teamed up with computer software giant Lotus Development Corporation to create *Lotus Marketplace*. In late 1990, Lotus Development Corporation raised a furor with its proposed 1991 release of *Lotus Marketplace*, which would have provided owners of personal computers access to information compiled on 80 million American households. This collection of compact discs would have offered data on households, including income, gender, marital status, buying preferences, and even so-called "psychographic categories" such as "cautious young couple."³⁵ The user could then compile a list based on address, age, sex, income estimates, or spending habits.³⁶ The launching of *Marketplace* was torpedoed by public opinion. Lotus received 30,000 telephone calls and hundreds of computer messages claiming *Marketplace* would invade privacy.³⁷

Reflecting on privacy concerns, Harvard Law Professor Laurence Tribe in March 1991 suggested a constitutional amendment to protect individuals from having private information shared without their consent.³⁸ His amendment, in full, says:

This Constitution's protections for the freedoms of speech, press, petition and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted or controlled.³⁹

Development of the "microchip" makes passage of such an amendment necessary, Professor Tribe believes.⁴⁰ Thus, he seems to follow that part of our legal tradition that mistrusts computerized information.

Some courts mistrust information when it is synthesized: It is too easy to use and should be restricted, these courts have decided. For example, in *Kestenbaum v. Michigan*

³⁴ See John Schwartz, *How Did They Get My Name?*, NEWSWEEK, June 3, 1991, at 40. There are publications dedicated to privacy issues, including the newsletter, *Privacy Journal*, and the *Privacy Times*. Additionally, computer professionals established the United States Privacy Council in the spring of 1991 because they were afraid laws have failed to keep pace with technology. Patricia J. Pane & Louise Fickel, *Industry Professionals Form Group to Protect Users' Privacy Rights*, INFOWORLD, Apr. 1, 1991, at 6.

³⁵ *What Price Privacy*, CONSUMER REP., May 1991, at 356, 360.

³⁶ *Id.* See also, Geoff Cooper, *New Software Data Base Stirs Suspicion Over Rights to Privacy, Access*, BUS. J.—MILWAUKEE, Dec. 10, 1990, § 2 at 14; Lawrence Edelman, *Is This Man Invading Your Privacy? A Solution Is Sought to Close Gap Between Technology and Law*, BOSTON GLOBE, Nov. 20, 1990, at 25.

³⁷ *Computers and Privacy*, THE ECONOMIST, May 4, 1991, at 21-22. *Consumer Reports* said:

Lotus and Equifax insisted that safeguards built into the program would have prevented users from picking a particular name off the disc. That was true enough. But a demonstration disc we obtained showed that one could easily find out a lot about a particular small group of people. Among the possibilities to be keyed in: elderly, rich widows living on Chicago's North Shore. Or even those on a particular street or in a certain building. By keying in on a specific area and asking questions, the list could be pared to fewer than 10 households with certain attributes. Lotus and Equifax officials now say that the public "misunderstood" the intent of the product, and they chose to withdraw it rather than become embroiled in a long battle over privacy issues.

What Price Privacy, *supra* note 35, at 360.

³⁸ Rosalind Resnick, *The Outer Limits*, NAT'L L. J., Sept. 16, 1991, at 1, 32.

³⁹ *Id.*

⁴⁰ *Id.*

State University,⁴¹ Kestenbaum wanted a copy of the computer tape that Michigan State University [MSU] used to produce its student directory. MSU said no, and the Supreme Court of Michigan upheld the university's decision. MSU had already released the information in a printed directory, and the court held that MSU was justified in denying Kestenbaum's request under a statutory exemption for situations where information is of a personal nature and the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. The most pertinent part of the court's language is:

[T]he same reasoning which supports the university's decision to publish the directory cannot be extrapolated to compel release of the computer tape, even though it contains identical information.

It is not seriously debated that the pervasiveness of computer technology has resulted in an ever-increasing erosion of personal privacy. There is available a larger storehouse of information about each of us than ever before. Computer information is readily accessible and easily manipulated. Data available on a single tape can be combined with data on other tapes in such a way as to create new, more comprehensive banks of information. . . .

Form, not just content, affects the nature of information. Seemingly benign data in an intrusive form takes on quite different characteristics than if it were merely printed.⁴²

In 1990, a Connecticut court held that an agency with computerized records only needs to provide a computer printout.⁴³ Connecticut's statute said, "Any public agency which maintains its records in a computer storage system shall provide a printout of any data properly identified."⁴⁴ The court read that language narrowly.

The United States Supreme Court has not necessarily been a friend to those desiring access to computerized information, either. In 1989, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,⁴⁵ the Court unanimously ruled that FBI rap sheets, which are computerized, cannot be given out because to do so would "constitute an unwarranted invasion of personal privacy."⁴⁶ The Court said, "Plainly

⁴¹ 327 N.W.2d 783 (Mich. 1982).

⁴² *Id.* at 789 (footnote omitted). Unfortunately, historically, judges often have been suspicious of information that is too readily available—even if the information is a matter of public record. For instance, in 1979, a monthly magazine in Madison, Wisconsin, *The Progressive*, was set to publish an article entitled, *The H-Bomb Secret: How We Got It, Why We're Telling It*. The government got a temporary injunction against publication of the article. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). The article merely synthesized information that was available in public documents. But the government argued that even though the material was in the public domain, "national security" permitted barring its publication because "when drawn together," the information presents "immediate, direct and irreparable harm to the interests of the United States." *Id.* at 991. The judge recognized that "the danger lies in the exposition of certain concepts never heretofore disclosed in conjunction with one another." In short, he thought that "synthesizing" public information changed its nature from benign to dangerous. *Id.* at 993. The judge granted the temporary injunction, but before he could issue a permanent injunction, a Madison newspaper published a letter containing a diagram of the H-bomb and a list of its components. The government dropped its case against *The Progressive* and pursued no action against the newspaper.

⁴³ *Chapin v. Freedom of Info. Comm'n*, 577 A.2d 300 (Conn. 1990).

⁴⁴ CONN. GEN. STAT. ANN. § 1-19a (West 1975). In 1991, Connecticut changed its law. Effective in 1992, requesters will be allowed to receive computerized information on disc or tape. § 1-19a (West Supp. 1992). See Peter Viles, *Connecticut Legislature Cuts the Red Tape*, UPLINK: THE FORUM FOR COMPUTER-ASSISTED REPORTING, June 1991, at 1, 3.

⁴⁵ 489 U.S. 749 (1989).

⁴⁶ *Id.* at 764.

there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the county, and a computerized summary located in a single clearing house of information."⁴⁷

As the three previous cases demonstrate, courts are not always sympathetic to reporters who want computerized data on tapes or other media.⁴⁸ Fortunately, some courts have ruled in favor of access to computer tapes.⁴⁹ Even without being forced into court, some state governments have provided access to computer tapes.⁵⁰ Several state supreme courts, in older cases, required the release of computer tapes.⁵¹ To counteract restrictive court decisions, the best strategy is to lobby for legislators to create laws that give access to government data in digital form. Legislators need to be persuaded of the importance of mandating that persons wanting public records in digital form will receive it in that form.

A strong policy argument in favor of open access is making information available for investigative reporting. Some significant news stories would take too much time or would be virtually impossible to do at all without the use of computerized information.⁵²

⁴⁷ *Id.* at 764. For differing views on this case, see Harry A. Hammitt, *High Court Alchemy: The Supreme Court Turns Public Information Private*, THE QUILL, Oct. 1989, at 28, 30-32; and William Swislow, *Access Is Good, But So Is Privacy*, THE QUILL, Oct. 1989, at 31.

⁴⁸ Another case rejecting access to computer tapes is *American Fed. of State, County and Mun. Employees (AFSCME) v. County of Cook*, 538 N.E.2d 776 (Ill. 1989) (quoting *Dismukes v. Dep't of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984): "The agency need only provide responsive, nonexempt information in a reasonably accessible format . . .").

⁴⁹ See *Brownstone Publishers, Inc. v. N.Y. City Dep't of Bldgs.*, 560 N.Y.S.2d 642 (N.Y. App. Div. 1990) (ordering the New York City Department of Buildings to release its computerized records of statistical information on all real estate in New York City on computer tapes to Brownstone Publishers, Inc. (an information services company), at a cost of only \$46, instead of \$10,000 for the one million sheets of paper needed for a hard copy of the records and the hundreds of thousands of dollars that would have been spent reconverting the information to computer form); *State ex. rel. Margolius v. Cleveland*, 584 N.E.2d 665 (Ohio 1992) (ordering Cleveland to provide a doctoral student with computer tapes of police activity from 1980 until the date of the decision; the city only wanted to provide the records in paper form, which would have been inadequate for the student's research into how effectively Cleveland deployed its police force); *State ex. rel. Recodat Co. v. Buchanan*, 546 N.E.2d 203 (Ohio 1989) (ordering the county auditor to provide Recodat, a private company, a copy of a magnetic computer tape of the county auditor's public records); *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625 (Va. 1988) (ordering disclosure of a computer disc).

⁵⁰ Max Jennings, the editor of the *Dayton Daily News*, in 1990 asked Ohio's Highway Safety Director for computer records of the 7.5 million licensed drivers in Ohio. He was told he could receive paper records for \$3.00 each, or a total of over \$21 million. After much wrangling, the paper finally received the information on computerized tapes for \$600. Telephone Interview with Max Jennings (Aug. 1991).

⁵¹ See *Martin v. Ellis*, 223 S.E.2d 415 (S.C. 1976) (ordering the Executive Director of the South Carolina Election Commission to release a copy of a computer tape containing the names and addresses of registered voters); *Menge v. City of Manchester*, 311 A.2d 116 (N.H. 1973) (ordering the city of Manchester to provide a Dartmouth College economics professor with computer tapes of field cards, which the city used to calculate real estate taxes). Note, however, that New Hampshire changed its public record law in 1986 giving custodians the option of providing only a "printout" of computerized records. N.H. REV. STAT. ANN. § 91-A:4(V) (1990). See also *Ortiz v. Jaramillo*, 483 P.2d 500 (N.M. 1971) (ordering that a computer tape of a county's voter registration affidavits be provided to a political party's chairman).

⁵² In Rhode Island, Elliot Jaspin, at the time a reporter for the *Providence Journal-Bulletin*, analyzed a computer tape containing records of 30,000 state-subsidized mortgages. The analysis showed that some of the mortgages went to politically connected, wealthy persons. The story took five days to produce. Another reporter for the paper had to make 72,000 entries into a computer from paper records to produce a story relating arson to landlords and neighborhoods. The story took two years to create. John Bender, *Today's Puzzle: What's the law? Where's the access? Who's threatened? How valuable?*, IRE J., Fall 1987, at 12. Using computerized records, Jaspin did another story for the *Journal-Bulletin* that showed that many bus drivers in Rhode Island had horrid driving records and drug convictions. *Id.* at 13.

Database access helps a larger community than just journalists, including such diverse groups as farmers and real estate agents.⁵³

In light of the need for access to computerized information, the Justice Department is working on setting rules for gaining computerized information under FOIA.⁵⁴ A House committee report discussed Federal agencies' roles in determining access to public records:

Policies regulating the electronic collection and dissemination of information by Federal agencies must necessarily reflect the existing statutory obligation of agencies to make information available to the public. New technology does not alter the requirements imposed on agencies to maintain and disclose public records. Electronic information systems must preserve public access rights without diminution and, where possible, should extend the availability and utility of government information.⁵⁵

One litigator has concluded, however, that "it is much tougher now than 10 years ago to get government records through the Freedom of Information Act."⁵⁶ Senator Patrick

The *St. Louis Post-Dispatch* used computerized records to show that East St. Louis had 2,700 more registered voters than adult residents and that at least 270 of the registered voters were dead. Tim Novak & George Landau, *The Phantom Voters of East St. Louis*, ST. LOUIS POST-DISPATCH, Sept. 9, 1990, at 1.

Cross-indexing of computerized records is often required to get a story—say cross-indexing names of registered voters with names of persons who have died. In the story on school bus drivers, Jaspin cross-indexed more than a million records of those registered to drive school buses with traffic-ticket records and other court records. As Jaspin says, "Obviously we could not have done this without a computer." Elliot Jaspin, *Out With the Paper Chase*, In *With the Data Base*, Speech at the Gannett Center for Media Studies, Columbia Univ. (Mar. 1989) in GANNETT CENTER FOR MEDIA STUDIES, at 11-12 (on file with author). *Newsday* analyzed computer tapes containing New York City Finance Department data and discovered that the city owed \$275 million to taxpayers for overpayment on real estate, water, and sewer taxes. Penny Loeb, *The City's \$275M IOU*, NEWSDAY, Jan. 7, 1991, § News, at 5.

Jeff Taylor and Mike McGraw analyzed 8.2 million computer records of the U.S. Department of Agriculture to produce a Pulitzer Prize-winning series, *Failing the Grade*, THE KANSAS CITY STAR, Dec. 8-14, 1991. CNN commissioned an analysis of Democratic Presidential Candidate Bill Clinton's 23,000 top donors. "Without a computer, we would have been lost," said CNN Consultant Larry Makinson. *Inside Politics* (CNN television broadcast, July 24, 1992) (Transcript No. 121-3).

For information on some other in-depth stories made possible by government databases, including federal databases, see Richard P. Kleeman, *Good hunting in databases*, THE QUILL, Sept. 1989, at 16; see also Teresa Leonard, *Databases in the Newsroom: Computer-Assisted Reporting*, ONLINE, May 1992, at 62 (general information on computer-assisted reporting).

⁵³ In Rockingham County, Virginia, farmers will be able to fight erosion through information gained by accessing an Agriculture Department's imaging and geographic information system. People visiting 28 Civil War parks in a few years will be able to access 5.5 million records in a National Park Service on-line database on the histories and burial data of individual Civil War soldiers. Researchers nationwide will be able to access seismology data kept by the U.S. Geological Survey's National Earthquake Information Center. *Real world; Sometimes information technology is used wisely, effectively and economically by government agencies*, GOV'T COMPUTER NEWS, Oct. 28, 1991, at 62. Real estate agents are also tapping into public records, for example, through on-line access in Colorado. Anne, *Residential Resales Rising*, COLO. BUS., Apr. 1992, at 26; see also Kevin Bumgarner, *New Service Business to Offer Governmental Records Via Computer*, WICHITA BUS. J., Jan. 31, 1992, at 4 (title company is offering real estate agents public records). Computerized public records also help track down "lost loves." Sandy, *Lost-Loves Labor Beckons Escondido Records Buff*, SAN DIEGO BUS. J., Mar. 30, 1992, at 12.

⁵⁴ Mitchell Hartman, *Investigative reporters use databases to break stories*, THE QUILL, Nov.-Dec. 1990, at 21.

⁵⁵ HOUSE COMM. ON GOV'T OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H.R. REP. NO. 56, 99th Cong., 2d Sess. 13 (1986).

⁵⁶ Tess Chichioco, *Making it hard to get records: Government Agencies are using Computers to Hide Disclosure Under the Freedom of Information Act*, EDITOR & PUBLISHER, Mar. 31, 1990, at 16 (quoting Kathy Meyer).

Leahy of Vermont, spearheading an overhaul of the Act, has been working to make it cover electronic records and increase access to information.⁵⁷ In 1991, Leahy introduced legislation, Senate Bills 1939⁵⁸ and 1940,⁵⁹ entitled the *Freedom of Information Improvement Act of 1991* and the *Electronic Freedom of Information Improvement Act of 1991*. Senate Bill 1940 was cosponsored by Senator Hank Brown. The *Electronic Act* would have defined "records" as "all books, paper, maps, photographs, data, computer programs, machine-readable materials, digitized and electronic information regardless of the medium by which it is stored, or other documentary materials, regardless of physical form or characteristic."⁶⁰ Senate Bill 1939 extended coverage of the FOIA to the President, Vice President, and Congress.⁶¹ In the *Congressional Record*, Senator Leahy had this to say:

How do we define a FOIA search? Is an automated data base search synonymous with looking through a file cabinet? My view is that not only is it a search, but that it should be faster and easier for an agency to do.

In this age of paper records and computer tapes, should requesters be given the format of their choice? My bill requires that if the requester's format of choice exists the agency should make it available, and if it does not exist, the agency should make reasonable efforts to provide it.⁶²

Other efforts include those of Representative Kleczka of Wisconsin, who, in 1991, introduced House Bill 1423,⁶³ which would have added the words "computerized, digitized and electronic information" to the FOIA definition of "government records;"⁶⁴ Representative Charles Rose, who introduced House Bill 2772⁶⁵ in 1991, which would have made the Government Printing Office the entry point to receive on-line access to many federal databases;⁶⁶ and Representative Major Owens, who introduced House Bill

⁵⁷ Elynn Ferguson, *Leahy Seeks Easier Access to Federal Info by Public*, GANNETT NEWS SERVICE, July 11, 1991, available in LEXIS, Nexis Library, GNS file. See also Miller & Schwartz, *supra* note 32.

⁵⁸ S. 1939, 102d Cong., 1st Sess. (1991).

⁵⁹ S. 1940, 102d Cong., 1st Sess. (1991). For more on S. 1940, see Julius J. Marke, *Public Access to Computerized Government Information*, N.Y. L.J., January 28, 1992 at 4.

⁶⁰ S. 1940. See George Lardner, *Computer Friendly FOIA? Data-Access Law May Be Updated*, WASH. POST, Nov. 11, 1991, at A17. The current Freedom of Information Act does not define "agency records." Katherine A. Meyer, Allan R. Adler, & Patti A. Goldman, *Agency Records*, in LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 179, 179 (Allan R. Adler ed., 1991).

⁶¹ S. 1939. See Lardner, *supra* note 60.

⁶² 137 CONG. REC. S16244-45 (daily ed. Nov. 7, 1991) (statement of Sen. Leahy).

⁶³ H.R. 1423, 102d Cong., 1st Sess. (1991).

⁶⁴ Warren Publishing, Inc., 11 COMM. DAILY, March 20, 1991, at 9. In a Ninth Circuit Court of Appeals case, *Long v. United States Internal Revenue Serv.*, 596 F.2d 362 (1979), however, the court held that the Freedom of Information Act applies to computer tapes.

⁶⁵ H.R. 2772, 102d Cong., 1st Sess. (1991). In 1993, Representative Rose introduced House Bill 1328, which is similar to his previous bill and seeks to improve public access to Federal electronic information. H.R. 1328, 103d Cong., 1st Sess. (1993).

⁶⁶ Called WINDO (GPO Wide Information Network for Data Online), the collection of databases could be accessed by anyone with a computer and modem who pays for a single business account. Rose says, "American taxpayers should not have to wade through an information maze, nor should they have to pay unreasonable prices to buy back government information created by tax dollars in the first place." Ralph Nader & James P. Love, *Public Deserves Access to Federal Databases*, COMPUTERWORLD, Nov. 11, 1991, at 25. Under Rose's bill, private information vendors would still be able to buy the various databases and then resell them, perhaps with "value-added enhancements." *Id.* But, Rose says, "The public . . . would no longer be forced to pay commercial firms as citizens for data they already paid for as taxpayers." *Id.*

3459,⁶⁷ which would have made computerized data available at cost.⁶⁸ Some attorneys worry about amending FOIA, fearing that changes in that law might impede access rather than help, but most computer information experts favor amendments explicitly covering electronic records.⁶⁹

Besides fighting the fear that disseminating information on tapes is too dangerous to allow, persons wanting access to computerized government information also have to fight the privatization of public information. No one knows for sure how many computerized databases the government maintains—maybe 800 to 4,000.⁷⁰ Many of these databases are available on-line through commercial information brokers.⁷¹ Companies such as Knight-Ridder and Dow Jones are buying government data on magnetic tapes, loading it into mainframes and granting subscribers on-line access in a multi-billion dollar industry.⁷² The bright spot about private companies selling computer information is that at least one can get the information—if one is wealthy enough.⁷³ Sometimes private companies put government information in “user-friendly form” and then sell this information back to the agencies which provided the raw data. Some groups, such as the American Library Association, are critical of private industries that become wealthy “middlemen”; they seek amendments to the Paperwork Reduction Act of 1980, which restricts governmental

⁶⁷ H.R. 3459, 102d Cong., 1st Sess. (1991). In 1993, Representative Owens introduced House Bill 629, substantially similar to his earlier bill. H.R. 629, 103d Cong., 1st Sess. (1993).

⁶⁸ *Rep. Major Owens Introduces Legislation to Require Federal Agencies to Make Data Public on 'Cost' Basis*, PACS & LOBBIES, Nov. 8, 1991. For more on costs, see *infra* notes 83-88 and accompanying text.

⁶⁹ See generally W. John Moore, *Access Denied*, 22 NAT'L J. 121 (1990).

⁷⁰ Hartman, *supra* note 25, at 21. Further, federal computer databases have sprung up so fast that there is no “up-to-date official list, printed or computerized, of what is available.” Moore, *supra* note 69. Another question is what counts as a public-record database. For instance, does “E-Mail” count? A case is still pending concerning whether back-up tapes of Oliver North’s E-Mail are public records. *Morning Edition: Electronic Mail as Official Document* (NPR radio broadcast, July 2, 1992).

⁷¹ Information brokers are highly organized: The Information Industry Association [IIA], based in Washington, D.C., represents more than 650 companies. *Copyright Protection for Computer Software to Enhance Technology Transfer: Hearing Before the Subcomm. on Tech. and Competitiveness of the House Comm. on Science, Space and Tech.*, 102d Cong., 1st Sess. 87 (1991) (statement of Steven J. Metalitz, Vice-President and General Counsel, IIA). These information brokers gain their data through private sources as well as through government sources.

Anyone wanting to know about the 400 or more government databases may contact a private firm, Information USA, and get a copy of its Federal Database Finder for \$125. Call 301-657-1200. David L. Margulius, *Uncle Sam Knows: Is Big Business Pulling the Plug?*, PC-COMPUTING, Oct. 1989, at 85. Anyone wanting information on PC-based bulletin board systems, many of which are free, may call the Department of Commerce’s Economic Bulletin Board, 202-377-3870. *Id.*

⁷² According to one source, the profit is \$1.5 billion. Margulius, *supra* note 71, at 79. *Business Weekly* speaks of a “\$3 billion-a-year information industry.” Francis Segher & Zachary Schiller, *The \$3 Billion Question: Whose Info Is It, Anyway?*, BUS. WK., July 4, 1988, at 106. According to another estimate, “[d]atabase marketing is . . . a \$50-billion-a-year industry, with over 20,000 firms in the business.” Garfinkel, *supra* note 22. The Office of Technology Assessment calls growth of the on-line information industry “phenomenal”—from revenues of under \$500 million in 1978, to \$2 billion in 1986 and \$3 billion in 1987. OTA, *INFORMING THE NATION*, *supra* note 1, at 57. The Bureau of National Affairs, Inc. estimated that the government has about 50 databases available on-line. See Moore, *supra* note 69, at 121-22.

⁷³ See McMasters, *supra* note 17, at 17; Moore, *supra* note 69, at 122. In Canada, the government of Manitoba is teaming up with a private consortium, Linnett Graphics International, Inc. The consortium will have a monopoly on government records and is supposed to build a much speedier computer information system than the government could. This plan has come under attack, however, about giving public information to a private venture. See Donald Campbell, *Manitoba Data Plan Becomes Hot Potato*, THE FIN. POST, Jan. 30, 1992, § 1, at 4.

“electronic publishing.”⁷⁴ The government, however, is concerned about protecting the private sector. The Twenty-Eighth Report by the Committee on Government Operations said:

The distribution of government information through electronic information systems . . . has a potential to allow Federal agencies to maintain a monopoly or near-monopoly over information. This potential arises because of the size, technical requirements, and expense of these systems. . . .

Concerns over monopolistic control of data are not necessarily avoided even if Agency XYZ should allow public users to search its electronic data base. Without any competition for the computerized search services, the agency would have a captive audience of users.⁷⁵

Two bills introduced into Congress, Senate Bill 1742⁷⁶ and House Bill 3695,⁷⁷ listed key factors for agencies to weigh when deciding whether to disseminate information themselves or use private companies. These factors included whether the private sector could meet the dissemination objectives of the government and whether the government could disseminate the information economically and efficiently.⁷⁸ The Office of Management and Budget has favored leaving wholesaling of information to the government and retailing to the private sector.⁷⁹ But leaving information dissemination to the private sector can result in “access denied,” according to some critics.⁸⁰

For instance, Ralph Nader and James Love criticize the current situation:

Agencies have been deliberately barred from developing methods of publishing information electronically, except in formats that are useful only to commercial vendors. In hundreds of cases, the taxpayers finance the

⁷⁴ Sheila Kaplan, *Issue Splits Public-Interest Community; Libraries, Vendors at Odds Over Electronic Data*, LEGAL TIMES, July 15, 1991, at 2. For more on the Paperwork Reduction Act, Title 44, Chapter 35 of the United States Code, see J. Timothy Sprehe, *Policy Perspectives on Electronic Collection and Dissemination of Information*, 5 GOV'T INFO. Q. 213 (1988).

⁷⁵ H.R. Rep. No. 56, *supra* note 55, at 5-6. But when a staff member of Governor George Mickelson of South Dakota tried to get information from the Department of Agriculture's database, the staff member was told it was available on-line from the Martin Marietta Corporation, with a price tag of several hundred dollars. Mickelson exploded. The long and short of it was that Reagan's plan to prevent the government agencies from giving on-line access got shelved. Still, although theoretically the agencies can give on-line access if they wish, they basically have little incentive and little funding to do so. Margulius, *supra* note 71, at 81; Moore, *supra* note 69, at 121-22.

⁷⁶ S. 1742, 101st Cong., 1st Sess. (1989).

⁷⁷ H.R. 3695, 101st Cong., 1st Sess. (1989).

⁷⁸ See *Information Policy: Action Expected on Security, Data Flow, Printing Office*, Daily Rep. for Exec. (BNA) No. 13, at S-40 (Jan. 18, 1991).

⁷⁹ Moore, *supra* note 69, at 122 (citing OMB Circular A-130 (1985)). Just because the Federal government may favor privatization of “retail” computer data, not all states follow the lead. Effective July 1, 1992, Connecticut prohibited its government from entering into exclusive, private contracts. CONN. GEN. STAT. § 1-19b, Pub. Act No. 91-347 (1991). See Viles, *supra* note 44, at 3.

⁸⁰ See Moore, *supra* note 69, at 121. For a neutral viewpoint on privatization, see Diane Sherwood, *The dissemination war; Federal government's dissemination of information to public*, INFO. TODAY, Jan. 1989, at 14; Joseph F. Caponio & Janet Geffner, *Does Privatization Affect Access to Government Information?*, 5 GOV'T INFO. Q. 147 (1988). For a viewpoint that government should “utilize the private sector to the maximum extent possible” and “avoid competition” with it, see Judith Coffey Russell, *Trends in Information Technology and Private Sector Activities*, 5 GOV'T INFO. Q. 251, 264 (1988). Also, see Sherwood, *supra* about the private company of Thompson and Thompson, which went to the expense of converting sixty years worth of trademark information from paper to tape at the request of the Patent and Trademark Office.

creation of computer databases that are available only from commercial sources, often at very high prices.

Adding insult to injury, government agencies are often forced to buy back this government information from the vendors, so their staffs can use it.⁸¹

One example of this buy-back is that the U.S. Departments of Energy, Defense and Health and Human Services have to buy on-line access to U.S. patent information from private vendors—"even though the government has already spent hundreds of millions of dollars developing an automated patent system to provide information to Patent Office employees."⁸²

Budget constraints prevented the Securities and Exchange Commission [SEC] from developing a staff that could process the deluge of information received, so the SEC hired a private firm to do so.⁸³ If a newspaper wants to keep up on SEC filings, it costs \$10 just to get a call saying that a document has been filed. A copy costs extra. For same-day service, the rate is \$50 per month per company—plus \$10 per call and more for the document.⁸⁴ In 1992, another private organization began the phase-in for the SEC's Electronic Data Gathering and Retrieval [EDGAR] project that will be hooking up companies to feed data directly from the companies' computers to the SEC.⁸⁵ Currently, 1900 companies are voluntarily on-line with the SEC.⁸⁶ Soon, thousands will be on-line.⁸⁷ Can one, now, get information directly from the SEC? The answer is that another private broker, Mead Data Central, has a contract with the government. It is funding a "dissemination subsystem," and on-line rates probably will range from \$50 to \$125 an hour.⁸⁸

An additional area causing real concern is geographic information systems [GIS]. Privatization of this information could put the information out of the financial reach of many who could benefit from it. GIS data has an astounding number of practical uses and thus great economic value.⁸⁹

Another negative example of the consequences of privatization of public information is its impact on the USDA's database. Before privatization, statistics on crops and livestock could be purchased for a \$50 annual fee plus \$30 per hour for on-line time. Thus, 50 hours of access would cost a farmer \$1,550. But when the USDA in effect gave

⁸¹ Nader & Love, *supra* note 66, at 25.

⁸² *Id.*

⁸³ Paul McMasters, *Government Information at a Price*, THE QUILL, Oct. 1989, at 17. Disclosure, Inc., a Bethesda, Maryland, firm, held the SEC contract from 1968 to 1985, but then lost it to Bechtel. *Id.*

⁸⁴ *Id.* Ralph Nader's group, the Taxpayers Assets Project, complains that to get SEC data through Mead Data Central, Inc., costs a minimum of \$36,000 a year. Kent Gibbons, *SEC demands reports via computer*, WASH. TIMES, Feb. 23, 1993, at C1.

⁸⁵ H.R. Rep. No. 56, *supra* note 55, at 2-3. See Margulius, *supra* note 71, at 83.

⁸⁶ Margulius, *supra* note 71, at 83. On April 26, 1993, 500 companies will be filing transactions through EDGAR on a mandatory basis. By December 1993, 3000 more will be on-line. By 1996, 15,000 companies might be using EDGAR on a mandatory basis. *SEC Issues Proposed T+3 Rule for Trade Clearance and Settlement*, Banking Rep. (BNA) No. 10, at 311 (Mar. 8, 1993).

⁸⁷ Gibbons, *supra* note 84.

⁸⁸ Margulius, *supra* note 71, at 83. The Office of Information Technology says a "typical commercial online database service charges about \$40 to \$80 per hour." OTA, *INFORMING THE NATION*, *supra* note 1, at 57.

⁸⁹ See *supra* note 53 on one of GIS's practical applications for farmers. A General Accounting Office showed that of 110 federal agencies, 95 had a GIS. Darryl K. Taft, *Execs Take Note of GIS Users' Wish List*, GOV'T COMPUTER NEWS, Aug. 5, 1991, at 45; James M. Smith, *GIS Wins Favor as Products Get Easier to Master*, GOV'T COMPUTER NEWS Aug. 5, 1991, at 47.

Martin Marietta Data Systems a monopoly on the information in 1985, prices rose dramatically to a \$150 per month fee (minimum) plus \$45 per hour on-line. Thus information now costs two and a half times what it did prior to this privatization.⁹⁰

One writer, Daniel Gross, blames the Paperwork Reduction Act and the Office of Management and Budget [OMB], in part, for privatization of information. The Paperwork Reduction Act, passed by Congress in 1980, directed agencies to cut down on costs by computerizing records where possible. The OMB was charged with the task of implementing the Act. It issued Circular A-130 in 1985, which said federal agencies should place "maximum feasible reliance on the private sector for . . . dissemination of products and services." Agencies could not duplicate private sector systems, thereby undercutting them. "Under this new regime," Gross says, "federal agencies would continue to do the heavy lifting—i.e., gathering, storing, and processing data—at taxpayer expense, and then would make their loads available to private industry at bargain prices, or no price at all."⁹¹

This is not to say that the government always sells its information at a bargain price. For instance, the U.S. Bureau of Census charges as much as \$250 for a CD-ROM which costs \$2 to make. For \$500, the Federal Reserve Board sells a hard copy of its "Bank Call Report"; a computer tape of the same information would cost \$10 to produce.⁹²

Finances are only part of the problem. Apathy, if not bewilderment, on the part of agencies is also a problem.⁹³ The Justice Department, working on rules for obtaining computerized information under the Freedom of Information Act, surveyed ninety-six federal agencies. Thirteen did not respond. Of those that did, more than half (fifty-three percent) did not think they had to use their computers to search for information sought under the Freedom of Information Act.⁹⁴

⁹⁰ Daniel Gross, *Byting the Hand That Feeds Them: Information Vendors are Robbing the Government Blind*, WASH. MONTHLY, Nov. 1991, at 11.

⁹¹ *Id.*

⁹² *Rep. Major Owens Introduces Legislation to Require Federal Agencies to Make Data Public on 'Cost' Basis*, *supra* note 68.

⁹³ State archivists in New York expressed concern that important records were being destroyed daily—not necessarily on purpose but because of ignorance on how to store records and lack of appropriate regulations. See Billy House, *State Record-Keepers Fear Loss of Information*, GANNETT NEWS SERVICE, Dec. 12, 1990, available in LEXIS, Nexis Library, GNS File.

Nassau County in New York has been particularly plagued by a backlog of records to file. For instance, filing divorce decrees has been taking the county clerk's office three months and filing of deeds and mortgages have been 22 weeks behind. The problems stem, at least in part, to the county clerk's failure to computerize records. See Celeste Hadrick & Brian Donovan, *Backlog Worsens at Nassau Office*, NEWSDAY, July 27, 1992, at 4. The New York State Land Title Association filed suit, asking the State Supreme Court in Albany to order the clerk to record real estate liens in a timely fashion. Celeste Hadrick, *Big Backlog in Office of County Clerk; Record-keeping Delays Take a Toll in Nassau*, NEWSDAY, Mar. 18, 1992, at 7. Nassau County started computerizing some records on May 14, 1992. Celeste Hadrick, *Computer to Rescue in Backlogged Office*, NEWSDAY, May 14, 1992, at 25.

John W. Lainhart, IV won an award for outstanding public service for directing five audits of 10 federal computer centers. Besides discovering weaknesses in security, he discovered roughly \$17 million worth of wasted computer storage space. See John Kador, *DOT Team Lauded for Paying Attention to Security; Department of Transportation*, GOV'T COMPUTER NEWS, Nov. 26, 1990, at 32; *AT&T Software Lets Telecommuters Answer Calls*, COMPUTERWORLD, Feb. 4, 1991, at 55.

⁹⁴ Hartman, *supra* note 25, at 21. See also *OIP Releases Results of Electronic Records Survey*, ACCESS REPORTS: FREEDOM OF INFORMATION, Nov. 14, 1990, at 1-5.

Money may well remain a problem.⁹⁵ Still, legislation can be improved to provide requesters of computerized public records the information they want in the requested medium, including computer discs or tapes.⁹⁶

A comprehensive law for access to computerized information should include, at a minimum, the following twelve elements:

1. A definition of "public record" which is broad enough to encompass computerized records. Content, not form (paper, disc, computer tape, etc.), must control whether agency records are open.

2. A presumption that information is open. Under this presumption, exceptions (exemptions) which are necessary for privacy should be explicitly stated and narrowly construed. These exemptions should be periodically reviewed, and after a passage of a specified number of years, private information should become public information. Also, special use of restricted information should be allowed for research purposes (exceptions to exemptions).

3. "Redaction." Redaction is allowing restricted information to be excised from a record and the remaining information to be released instead of restricting the whole record. Statistical information is a special form of redacted information which should be specifically allowed.

4. Access to information to all citizens regardless of the purpose for which the information is sought. Meaningful access requires both public access to terminals and appropriate instruction on how to use those terminals. Interactive access, with technological protection of the database, is ideal.

5. Cost containment. Cost containment requires three provisions:

A. Computer records shall cost no more than staff time and cost of duplication. A waiver for part or even all of the staff time is highly desirable.

B. Reduction or a total waiver of any costs when information is to be used for informing the public (i.e., a journalists' waiver).

C. In cases where raw public information is released to a private group for compilation of statistics or any other manipulation and the results are then sold to the public for a profit, the raw information should still be available to the public from the government for the costs listed in A and B above.⁹⁷

⁹⁵ Twenty-nine states face budget deficits totaling roughly \$10 billion. Joan Stableford, *State's Fiscal Machinery Needs a Drastic Overhaul*, FAIRFIELD COUNTY BUS. J., Jan. 14, 1991, §1 at 1.

⁹⁶ See THE FREEDOM OF INFORMATION COMMITTEE REPORT TO THE AMERICAN SOCIETY OF NEWSPAPER EDITORS (Apr. 1990); THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCESS TO ELECTRONIC RECORDS: A GUIDE TO REPORTING ON STATE AND LOCAL GOVERNMENT IN THE COMPUTER AGE (Aug. 1990). An update on the guide appears in a pullout in THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE NEWS MEDIA & THE LAW (Summer 1991). See also David Pritchard & Neil Nemeth, *Predicting the Content of State Public Records Law*, NEWSPAPER RES. J., Fall 1989, at 45-57.

⁹⁷ IDAHO CODE § 9-338 (Michie 1990), for instance, says, "A public agency shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions."

6. Requester's choice of form of information (tailoring). If a requester wants information in a specific form, and if a computer system can produce information in that specific form, then the requester should receive the information in that form. For example, if a requester wants a computer tape of a limited number of database fields in raw ASCII format on a specific size of tape, and if the equipment and software can produce such a tape, then the requester should receive that tape. Tailoring (or programming) should not be deemed to be creating a new record.

7. Access to and retrieval of all information on computer tapes. Custodians should have an affirmative duty to ensure that all information is functionally available, including accurate record layout of tapes that list the density, blocking, and whether the character format is in, say, ASCII or EBCDIC.

8. Time limits for production of records by custodians after a request. Specific time limits are needed to guard against sluggish custodians.

9. Guidance and technical help for custodians of records. A state board or agency to help both state and local officials is necessary to provide custodians access to expertise in maintenance and access of computer records. The board or agency should also have the duty of keeping abreast of developments in computer storage and retrieval.⁹⁸

10. Instructions to custodians on proper maintenance and storage of records. It is not enough that guidance and technical help for custodians be available. The state board or agency should promulgate and enforce appropriate regulations, for example, on correct facilities and temperatures in order to protect our legacy of information.⁹⁹

⁹⁸ The importance of selecting computers and formats that will not become obsolete is one issue requiring expertise. As an example of poor selection, the computers and format chosen to record census data in the 1960s became obsolete only a few years later. Now, only two machines exist in the world which can read the original data tapes—one in the Smithsonian Institution, another in Japan. As the Committee on Government Operations says, "If a computer record cannot be read, then for all practical purposes, the record no longer exists. Like Stonehenge, it is possible that a computer tape can be seen but not understood. Rapid innovation in computer technology guarantees that the problems of preserving the utility of machine-readable media will grow." *TAKING A BYTE*, *supra* note 1, at 3-4.

Another issue requiring expertise is that of compatibility—of hardware and software and operating systems. Even updated versions of the same type of software can cause problems with text file compatibility. "[C]omputers are like automobiles," the Committee on Government Operations explains. "All automobiles have engines, transmissions, and tires, but the parts from one will not necessarily fit on another." *Id.* at 15. In fact, for the National Archives and Records Administration, the primary challenge is "to define a means of preserving in a nonproprietary, standard manner, data bases and text information including both raw data and relationship information so that electronic records transferred to the Archives can become software/hardware independent." *Id.* at 30.

Keeping up with the breadth of technology surely requires expertise. For instance, electronic imaging can greatly increase the speed with which agencies can answer requests. The Environmental Protection Agency started testing this technique in April 1992: First the agency scans requests, and then it files the scanned images by using Lotus Notes software. See Steve Higgins, *Image Manager for Notes Goes into Beta This Week*; *Lotus Development Corp.'s Lotus Notes*, PC WK., Apr. 6, 1992, at 47.

⁹⁹ See generally *TAKING A BYTE*, *supra* note 1, at 2.

11. Instructions to custodians on destruction of records. Most paper records cannot be kept forever, in part because paper simply takes too much room to store.¹⁰⁰ On the other hand, premature destruction of paper records without appropriate microfiche, optical, magnetic, or computer backup could result in irretrievably lost information.¹⁰¹

12. Sanctions on custodians for failure to follow the statutes on access to information. Sanctions can be either criminal or civil in nature. They create the necessary teeth in the law. Any requester who has to resort to a suit should be reimbursed for all legal costs and reasonable attorney fees.

Satisfying these twelve elements should contribute to providing access to public information stored in computers, and this article's suggested model legislation satisfies these twelve elements. No one form of legislation could possibly satisfy all the demands of the diverse states forming the United States, so, in some areas the suggested model statute gives alternatives.¹⁰² The federalism that is the hallmark of this country's structure recognizes that all our states cannot fit into one mold. Wide discrepancies in size and population density alone dictate that some variations in law must exist. For instance, geography will influence the answers to questions about how centralized or decentralized a system of information technology boards should be. Current state practice in the Office of Attorney General will, in large part, determine to what degree that office should become involved in requesters' appeals of access rulings made by custodians of records.¹⁰³

¹⁰⁰ The federal government is paying millions of dollars as it scrambles to preserve records printed on acidic paper, which only lasts a few decades. TAKING A BYTE, *supra* note 1, at 2.

¹⁰¹ See, e.g., Arthur Howe, *Computer Wipes Out 10,000 Tax Records Then Duns for Nonpayment*, PHILA. INQUIRER, Jan. 30, 1985, § Nat'l Rep. If the IRS can wipe out records, then local custodians could surely do the same. Computer viruses, such as the Michelangelo virus, can also offer a scare. See, e.g., Brad Bumstead, *State Government Has "Cure" for Computer Virus*, GANNETT NEWS SERVICE, Mar. 3, 1992, available in LEXIS, Nexis Library, GNS File.

Another concern is computer security in light of deliberate tampering with government computer databases. See, e.g., U.S. GEN. ACCT. OFF., REPORT TO THE CHAIRMAN, COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY, COMPUTER SECURITY: GOVERNMENTWIDE PLANNING PROCESS HAD LIMITED IMPACT, (May 1990); John Markoff, *Science Academy Urges More Computer Security*, N.Y. TIMES, Dec. 6, 1990, at D2; John Markoff, *Military Agency Loses Authority Over Civilian Computer Security*, N.Y. TIMES, Aug. 19, 1990, at 1. Suits were filed to prevent destruction of computer tapes containing information about the Iran-Contra Affair. See *Armstrong v. Bush*, 721 F. Supp. 343 (D.D.C. 1989).

¹⁰² A single model would be even less likely, of course, to satisfy all the diverse needs of foreign countries. But this suggested model, containing alternatives, hopefully will be of use to foreign countries as well as to the United States. For instance, Eastern European countries are looking to us for a model as they try to build institutions. When it comes to access to government information, however, what we have is all too often a muddle, not a model, and we cannot offer others something which we ourselves do not yet possess.

¹⁰³ Within many states, the Office of the Attorney General, the press/bar commission, or a state freedom of information commission, or others, attempt to inform the public about policies regarding access to computerized information through handbooks and newsletters. See, e.g., THE STATE MEDIA LAW SOURCEBOOK (Dolores Jenkins & Rosalie Sanderson eds., 1992) (listing resources about state media law for all 50 states).

The model statute does not address exemptions to public disclosure laws¹⁰⁴ or fair information practices,¹⁰⁵ a necessary part of any total access package. The statute is proposed with the realization that *a priori* it is impossible to know with absolute certainty how well a model will work. Empirical evidence is always needed. Sometimes adjustments in law can have unintended consequences. But with this caveat in mind, this article offers the following suggested model statute for access to computerized information.

III. A SUGGESTED MODEL STATUTE FOR ACCESS TO COMPUTERIZED GOVERNMENT RECORDS—WITH COMMENTARY

Definitions

1. (A) "Public records" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings or other documentary materials[,] regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency.¹⁰⁶

Recognizing the need for an inclusive definition of "public record," a majority of states use the phrase "regardless of physical form or characteristic," or substantially similar language.¹⁰⁷ Several states clearly specify that records kept on computers are

¹⁰⁴ While this paper addresses the broad parameters of what model legislation on exemptions entails, the details have been left to a separate research project which will analyze the literally thousands of exemptions existing in state laws. Of course, not all of these exemptions exist within states' open records or freedom of information statutes. Many are scattered throughout statutes and only alluded to in the open-record statutes under the exemption for records which are "otherwise excluded by law from public disclosure" (or similar language).

One illustration of how scattered information on public records can be comes from New Mexico. The New Mexico Legislature created the New Mexico Open Records Task Force in 1989 to make recommendations on amendments to New Mexico's Inspection of Public Records Act. The Task Force found that "one of the problems with the current open records laws is that there are more than 113 statutory provisions dealing with open records. . . ." N.M. OPEN RECORDS TASK FORCE, FINAL REPORT 1 (Dec. 15, 1990).

Another illustration comes from North Carolina, where the Supreme Court decided on January 10, 1992, that investigative reports of a Commission investigating alleged improprieties concerning the North Carolina State University men's basketball team were public records and must be disclosed under North Carolina's Public Records Law, N.C. GEN. STAT. § 132-1 (1992). The Commission resisted, primarily citing an exemption for the records of the State Bureau of Investigation found in N.C. GEN. STAT. § 114-15 (1992). *The News and Observer Publishing Co. v. Poole*, 412 S.E.2d 7 (N.C. 1992).

¹⁰⁵ Under fair-information-practice legislation, individuals are allowed to access personal information about themselves which the government maintains, to correct any such information, and to receive notification when another individual (or corporation) is attempting to access the information. Model legislation in this area exists in the form of the Uniform Information Practices Code. 13 U.L.A. 277 (1986). The purpose of this uniform law, in part, is "to make government accountable to individuals in the collection, use, and dissemination of information relating to them." *Id.* at 280. Many states do include fair-information-practice statutes, to a greater or lesser degree. Some, such as Iowa's, are short and sketchy, leaving much of the detail up to each agency. IOWA CODE ANN. § 22.11 (West 1989). Others, such as Indiana's, are much more lengthy and detailed, spelling out with specificity what "fair information practices" demands. IND. CODE ANN. §§ 4-1-6-1 to 4-1-6-9 (Burns 1990). Still others, including Hawaii, follow the model act. HAW. REV. STAT. § 92F (Supp. 1991).

¹⁰⁶ KY. REV. STAT. ANN. § 61.870(2) (Michie/Bobbs-Merrill 1986).

¹⁰⁷ See, e.g., ALASKA STAT. § 09.25.220(6) (1975); ARK. CODE ANN. § 25-19-103(1) (Michie 1992); DEL. CODE ANN. tit. 29, §§ 502(1), 10002(d) (1991); FLA. STAT. ANN. § 119.001(1) (West 1982); HAW. REV. STAT. § 92F-3 (Supp. 1991); IND. CODE ANN. § 5-14-3-2 (Burns Supp. 1992); KAN. STAT. ANN. § 45-217(f)(1) (1986); LA. REV. STAT. ANN. § 44:1(A)(2) (West 1982); MD. CODE ANN., STATE GOV'T § 10-611(f)(ii)2 (1984); MASS. GEN. LAWS ANN. ch. 4 § 7d (West 1986); MISS. CODE ANN. § 25-61-3(b) (1991);

included in the definition of "public records."¹⁰⁸ However, a few states appear to exclude computer records from their definition of "public records."¹⁰⁹ It is important that a definition of public records clearly include information kept in *all* forms, including computerized forms. If legislation fails to mention records in computerized forms, then courts could narrowly read the language and deprive requesters of information kept in computerized form.¹¹⁰ Also, including such language would make clear to agencies that they must consider computerized records to be part of the records that must be searched. Many federal agencies apparently do not believe they must search computerized records.¹¹¹

The question of what constitutes a "public agency" has been addressed in Ohio, where state law defines a "public record" as "any record that is kept by any public office."¹¹² In *State ex. rel. Recodat Co. v. Buchanan*,¹¹³ the Supreme Court of Ohio ordered the county auditor to provide Recodat with a copy of a magnetic computer tape of the county auditor's public records.¹¹⁴ The court said that "the records . . . that are not available in [the auditor's] office for copying should be made available . . . so that the public . . . does not have to deal with a private third party in order to gain access to the records."¹¹⁵

One reason to employ the language "prepared, owned, used, in the possession of or retained by a public agency" in the definition of "public record" is to guard against those instances, such as in *Recodat* above, where an agency has shipped records to a private firm. Requesters should not have to chase down private, third parties to receive public records, and not all courts would necessarily rule in favor of requesters on this point as did the court in Ohio. Another reason to employ the language "in the possession of or retained by a public agency" is to guarantee access to all information the agency has on hand and that might enter into agency decision making.¹¹⁶

MONT. CODE ANN. § 2-6-202 (1991); NEB. REV. STAT. § 84-712.01 (1987); N.M. STAT. ANN. § 14-3-2c (Michie 1991); N.Y. PUB. OFF. LAW § 6-86.4 (Consol. 1987); N.C. GEN. STAT. § 132-1 (1991); N.D. CENT. CODE §44-04-18.6 (Supp. 1991); OKLA. STAT. ANN. tit. 51, § 24A.3.1 (West Supp. 1992); OR. REV. STAT. §192.005(5); R.I. GEN. LAWS §§ 38-1-1.1(c), 38-2-2(d) (1990); S.C. CODE ANN. § 30-4-20(c) (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §1-27-9(2) (1992); TENN. CODE ANN. §§ 10-7-301(6), 10-7-403 (1992); UTAH CODE ANN. § 63-2-103(18)(a) (Supp. 1992); VA. CODE ANN. §42.1-77 (Michie 1990); WASH. REV. CODE ANN. § 40.14.010 (West 1991); W. VA. CODE § 29B-1-2(5) (1986); WIS. STAT. ANN. § 19.32(2) (West Supp. 1992); WYO. STAT. § 16-4-201(a)(v) (1990).

¹⁰⁸ See, e.g., ME. REV. STAT. ANN. tit. 1, § 402.3 (West 1989) ("any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension"); MD. CODE ANN., STATE GOV'T § 10-611(f)(ii)2 (1984) ("in any form, including . . . a computerized record"); MICH. COMP. LAWS § 15.232(e) (1981) ("every other means of recording, . . . includ[ing] . . . magnetic or paper tapes"); MO. ANN. STAT. § 610.026(2) (Vernon 1988) ("public records maintained on computer facilities, recording tapes or discs").

¹⁰⁹ See, e.g., ALA. CODE § 41-13-1 (1975) ("all written, typed or printed books, papers, letters, documents and maps"); VT. STAT. ANN. tit. 1, § 317(b) (1985) ("all papers, staff reports, individual salaries, salary schedules or any other written or recorded matters").

¹¹⁰ As an example of narrow reading of language by a court, see *supra* note 43 and accompanying text, discussing *Chapin v. Freedom of Information Commission*.

¹¹¹ See *supra* note 94 and accompanying text.

¹¹² OHIO REV. CODE ANN. § 149.43(A)(1) (Baldwin Supp. 1991).

¹¹³ 546 N.E.2d 203 (Ohio 1989).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 205. See *infra* notes 152-53 and accompanying text.

¹¹⁶ In *Missouri Protection and Advocacy Services v. Allan*, 787 S.W.2d 291 (Mo. Ct. App. 1990), the U.S. Department of Education's Office of Special Education and Rehabilitative Services [OSEP], which administers the Education of the Handicapped Act, reviewed the Missouri Department of Elementary and Secondary Education [DESE] to determine if Missouri was following federal guidelines. OSEP then issued a preliminary report to DESE. A nonprofit corporation, the Missouri Protection and Advocacy Services,

(B) "Agency" [or "public governmental body"]¹¹⁷ means a unit of government in this State: any political subdivision or combination of subdivisions, a department, institution, board, commission, district, council, bureau, office, officer, official, governing authority or other instrumentality of state or local government, or a corporation or other establishment owned, operated, or managed by or on behalf of this State or any political subdivision, [and includes the executive office of the governor, the legislative branch of the government and administrative offices of courts].¹¹⁸

The courts themselves are not covered in this statute out of concerns for separation of powers.¹¹⁹ However, the administrative offices of the courts, like the administrative offices of the executive branch, are created by statute in most jurisdictions and thus should be subject to access laws. The argument that records by the legislature should not be covered because of separation of powers problems also does not ring true; the legislature itself would be passing the law and thus could not complain about exercising power over itself.

The federal legislation proposed by Senator Leahy would cover "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), the legislative branch of the Government, Administrative Office of the United States Courts, or any independent regulatory agency."¹²⁰ In line with Leahy's proposal that the "Executive Office of the President" should be included, this suggested model legislation adds the language, "executive office of the governor." Potential separation of powers problems could arise if the governor decided not to sign such legislation, however. If the governor signs, separation of powers problems should be nullified.

The U.S. Supreme Court considered the issue at the presidential level, holding that the Presidential Records and Materials Preservation Act¹²¹ did not violate the principle of separation of powers.¹²² Under the Act, the Administrator of the General Services Administration [GSA] can have presidential papers taken into custody and screened by government archivists. Personal, private material goes back to the president, while material with historical value is preserved and eventually made available for public access under regulations promulgated by the Administrator. The Court said, "The Executive Branch became a party to the Act's regulation when President Ford signed the Act into

wanted to see a draft of the preliminary report and sought a writ of mandamus. The Missouri Court of Appeals for the Western District concluded that the report was a public record under MO. REV. STAT. § 610.010(4) (1988): "The statute reads 'any record retained by or of any public governmental body.' [T]here are no further requirements. . . . There can be no doubt DESE has retained, in the layman's sense of the word, the draft of the OSEP report." 787 S.W.2d at 292. Further, the court rejected the argument that the record must be in its final form for disclosure: "The language is 'any record retained.' . . ." *Id.*

¹¹⁷ Whether the term "agency" or the term "public governmental body" is used is not significant. The important matter is consistency in statutory language. Every state will have to modify the statutory language to be consistent with the usage in its locale.

¹¹⁸ UNIF. INFO. PRAC. CODE § 1-105(2), 13 U.L.A. 277, 282 (1986). The language now ends: "but does not include the [name of legislative body] or the courts of this State."

¹¹⁹ In its commentary, the *Uniform Information Practices Code* explains that "potential separation of powers issues would arise if the requirement of this Code were extended to the judiciary and to records held or controlled by legislators. . . ." *Id.* at 283.

¹²⁰ S. 1939, *supra* note 58.

¹²¹ Pub. L. No. 93-526, 88 Stat. 1695 (1976).

¹²² *Nixon v. Administrator of General Services*, 433 U.S. 425 (1976).

law."¹²³ Further, the Administrator of GSA is a member of the executive branch and thus control of the material stays within that branch.¹²⁴ Thus, despite the constitutional issue of separation of powers, the holding in *Nixon* favors subjecting presidential papers to freedom of information laws.

Florida is an example of a state with a narrow definition of agency: "'Agency' means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."¹²⁵ In November 1991, the Florida Supreme Court consolidated two cases, one asking whether a legislator would have to produce records of expenditures of state money allocated to his office and the other asking whether a legislator could be compelled to produce "all public records" within her office.¹²⁶ Although the court said that these cases raised the constitutional issue of separation of powers, the court also said that it did not have to reach that question. Instead, the court relied on statutory interpretation:

We find that the term 'agency,' as used in section 119.011, was not intended to apply to the constitutional officers of the three branches of government or to their functions. We find that the term 'agency' does not include the governor, the members of the cabinet, the justices of the supreme court, judges of the district courts of appeal, the circuit courts or the county courts, or the members of the house or senate. These are officers of the separate, constitutionally created and established branches of government.¹²⁷

The court concluded that "[a]gencies are created and established by law enacted by the legislature" and that Florida's "sunshine law" applied only to those entities and not to those which the legislature could not create—"the governor, the cabinet, members of the legislature, or judicial officers."¹²⁸ The definition of "agency" proposed in this suggested model legislation is broader than that in the Florida law, explicitly covering the "executive office... the legislative branch... and administrative offices of courts."

As a guiding principle, only legitimate concerns over separation of powers should deter including a body under the definition of agency. As stated before, the judiciary does pose such a concern. Connecticut and Texas together serve as an example of how states differ on their treatment of the judiciary. According to a Connecticut statute, the term "agency" does include "any judicial office, official or body or committee thereof but only in respect to its or their administrative functions."¹²⁹ Texas law specifically states that "the Judiciary is not included within this definition."¹³⁰ However, both Texas and Connecticut specifically include boards of school districts under the definitions of "governmental body"¹³¹ and "agency,"¹³² respectively. The proposed legislation is

¹²³ *Id.* at 441.

¹²⁴ *Id.*

¹²⁵ FLA. STAT. ANN. ch. 119.011(2) (West 1985).

¹²⁶ *Locke v. Hawkes*, No. 76,090, 1991 Fla. LEXIS 1915, at *3 (Nov. 7, 1991).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ CONN. GEN. STAT. ANN. § 1-18a (West 1989).

¹³⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 6252-17a.2(1)(G) (West 1986).

¹³¹ *Id.*

¹³² CONN. GEN. STAT. ANN. § 1-18a (West 1989).

certainly broad enough to allow for the inclusion of school boards. If past experience in a jurisdiction makes greater detail seem desirable, then so be it.

(C) Notwithstanding any provision of law to the contrary, any unit of state, county or municipal government, or any court, may maintain any records by computer or other rapid access data collection system, provided that those records which are public records shall be kept in a manner which will allow the public unlimited and speedy access to them.¹³³

Declaration of Policy

2. (A) It is declared to be the public policy of this state that public records shall be [presumed to be] open for inspection by any person¹³⁴ unless otherwise provided by this act....¹³⁵

A presumption of openness is imperative. Concern for our form of government, and the importance to it of open records, is a common theme in declarations of policy.¹³⁶

¹³³ KY. REV. STAT. ANN. § 65.030 (Michie/Bobbs-Merrill 1972). Some statutes on access to computerized information may be scattered throughout a state's code. For example, Iowa, in its statute on the "Health Data Commission," says, "If the data required by the commission or the members of the commission is available on computer or electronic tape . . . a copy of this tape shall be provided when requested." IOWA CODE ANN. § 145.3(d) (West 1991). Of course, the more frequently statutes are peppered with such language, the better are the prospects for easy access to computerized tapes for all persons. However, such scattering may also make the statutes more difficult to find.

¹³⁴ A few state statutes, such as one in Delaware, limit access to records to the state's own citizens. DEL. CODE ANN. tit. 29, § 10003(a) (1975). Given the mobility of our society, these limitations could be viewed as unnecessary provincialism. Especially troubling would be the situations in which a person resides near a state line or a city straddles two states.

¹³⁵ KAN. STAT. ANN. § 45.216(a) (1986) (adding "presumed to be"). For substantially similar language, see, e.g., Illinois:

[R]estrictions on information access should be seen as limited exceptions to the general rule that the people have a right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed to this end.

ILL. ANN. STAT. ch. 116, para. 201.1 (Smith-Hurd 1988). See also MO. REV. STAT. §§ 610.022.5, 610.011 (1988) ("Public records shall be presumed to be open . . . [R]ecords . . . [shall] be open to the public unless otherwise provided by law."); WIS. STAT. ANN. § 19.31 (West 1986) ("presumption of complete public access").

¹³⁶ Texas law declares:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

TEX. CIV. PRAC. & REM. CODE ANN. § 6252-17a (West 1986). See also DEL. CODE ANN. tit. 29, § 10001 (1975) ("vital in a democratic society"); ILL. ANN. STAT. ch. 116, para. 201.1 (Smith-Hurd 1988) ("access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest"); IND. CODE ANN. § 5-14-3-1 (West 1987) ("[a] fundamental philosophy of the American constitutional form of representative government"); MICH. COMP. LAWS ANN. § 4.1801(1) (West 1989) ("people

Language emphasizing the overseeing of the activities of public agencies, however, might contribute to the view expressed in *Department of Justice v. Reporters Committee for Freedom of the Press*¹³⁷ that the only purpose of the freedom of information law is to shed light on governmental activities.¹³⁸

Some declarations of policy also emphasize a right to privacy.¹³⁹

(B) This chapter shall . . . place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.¹⁴⁰ [This chapter] shall be liberally construed and [its] exceptions strictly construed to promote this public policy.¹⁴¹

In line with the presumption that records should be open, the burden of proof should be on the agency if it wishes to restrict access to information. An agency which has no burden of proof is in a better legal position to stonewall a requester; the agency, knowing how burdensome the lawsuit would be for the requester, could tell a requester that he or she would have to go to court to prove that records are open. On the other hand, an agency carrying the burden of proof probably would not be as quick to restrict information and thus risk burdening itself with a lawsuit. Another reason to place the burden of proof on the agency is to ease the requester's task of having to search through numerous statutes to determine whether specific records are actually open.¹⁴²

Exemptions and Their Exceptions

3. (A) The policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy¹⁴³

shall be informed so that they may fully participate in the democratic process'''); N.Y. PUB. OFF. LAW § 6-84 (Consol. 1987) (''[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.''); WIS. STAT. ANN. § 19.31 (West 1986)(''a representative government is dependent upon an informed electorate'').

¹³⁷ 489 U.S. 749 (1989).

¹³⁸ *Id.* at 769. See *supra* note 136 and accompanying text.

¹³⁹ See *infra* note 143 and accompanying text.

¹⁴⁰ IND. CODE ANN. § 5-14-3-1 (West 1987).

¹⁴¹ MO. ANN. STAT. § 610.011 (Vernon 1988).

¹⁴² See *infra* notes 144-47 on how scattered exemption statutes can be.

¹⁴³ HAW. REV. STAT. § 92F-2 (1985). Other states also emphasize privacy. See, e.g., ILL. ANN. STAT. ch. 116, para. 101.1 (Smith-Hurd 1988) (''This Act is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise''); R.I. GEN. LAWS § 38-2-1 (1990) (''the individual's right to dignity and privacy.''); VT. STAT. ANN. tit. 1, § 315 (1985) (''Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer.''); *Contra* OKLA. STAT. ANN. tit. 24A, § 2 (West 1988). The Oklahoma

Open Records Act shall not create, directly or indirectly, any rights of privacy or any remedies for violation of any right of privacy; nor shall the Act, except as specifically set forth in the Act, establish any procedures for protecting any person from release of information contained in public records. The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power. The privacy interests of individuals are adequately

This section is not strictly necessary in order to meet the goal of providing *access* to government information. It does, however, emphasize the importance of privacy, which is a competing interest. Legislators, in balancing the two interests, may want to include this section as a general policy statement, but it is optional in that specific exemptions alone can adequately meet privacy needs. In short, the section is primarily a matter of emphasis rather than substance because exemptions provide the substantive privacy protection.

(B) Exemptions to Public Records:

Generally, the law should exempt as few records as possible from public disclosure, consistent with protection of bona fide privacy and security interests of human beings as well as protection of endangered flora, fauna, and archaeological sites.¹⁴⁴ Some exemptions are harder to understand.¹⁴⁵ Other exemptions are more specific than they need to be.¹⁴⁶

One very common exception is the restriction on access to computer software. This exemption is consistent with government copyrighting of software, but both the exemption and the copyrighting present serious dangers for access.

Laws in some jurisdictions permit copyrighting of software the government develops.¹⁴⁷ Some states, counties, and cities are doing just that and reaping profits.¹⁴⁸ In some situations, however, access to information which would ordinarily be public is denied because the computer software containing the information is not within the public domain. The Department of Defense has established regulations saying that computer software is not a "record" and thus is not disclosable unless "created or used as primary sources of information about organizations, policies, functions, decisions, or procedures"

protected in the specific exceptions to the Act or in the statutes which authorize, create or require the records. Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access

Id.

¹⁴⁴ See, e.g., VA. CODE ANN. § 2.1-342(36) (Michie Supp. 1992) (protecting information where disclosure would jeopardize the existence or integrity of the resource).

¹⁴⁵ See, e.g., WASH. REV. CODE ANN. § 42.17.317 (West 1991) (exempting "[i]nformation on commercial fertilizer distribution"). However, the March 1993 bomb that devastated the World Trade Center may have contained nitrates, an ingredient in fertilizer. Richard Lacayo, *Tower Terror*, TIME, Mar. 8, 1993, at 34. Perhaps Washington's exemption on commercial fertilizer distribution is an attempt to thwart terrorists. See also George J. Church, *A Case of Dumb Luck*, TIME, Mar. 15, 1993, at 26, 30 (World Trade Center explosive believed to include "so-called witches' brew of fertilizer and fuel oil").

¹⁴⁶ See, e.g., TENN. CODE ANN. § 10-7-504(a)(1) (1992) (specifically exempting records relating to organ transplants in addition to a blanket exemption for medical records).

¹⁴⁷ See, e.g., CAL. GOV'T CODE § 6254.9 (West Supp. 1992); HAW. REV. STAT. § 21D-4 (Supp. 1991); ME. REV. STAT. ANN. tit. 5, § 1890-B (West Supp. 1991); MINN. STAT. ANN. § 13.03 (West 1988); OKLA. STAT. ANN. tit. 51, § 24A.10 (West 1988 & Supp. 1992); WIS. STAT. ANN. § 19.36(4) (West 1986 & Supp. 1992).

In 1989, the Florida legislature's Joint Committee on Information Technology Resources released a comprehensive report on access to information, arguing against government copyrights on software. FLORIDA'S INFORMATION POLICY: PROBLEMS AND ISSUES IN THE INFORMATION AGE (Apr. 1989). Florida has defined specific areas in which the state may hold copyright, but its counties and cities have not been so limited. *Id.* at 83-84.

¹⁴⁸ Dade County, Florida expected to gain about \$500,000 in 1990 by selling vehicle maintenance records software. *Information Policy: States and Localities Find Profit in Selling Government Information*, Daily Rep. for Executives (BNA) No. 74, at C-1 (April 17, 1990).

within the department.¹⁴⁹ Although little case law exists in this area, in *Seigle v. Barry*,¹⁵⁰ the Florida District Court of Appeals for the Fourth District said, "The information in a computer is analogous to information recorded in code. Where a public record is maintained in such a manner that it can only be interpreted by the use of a code, then the code book must be furnished to the applicant."¹⁵¹ Another case involving software is *State ex rel. Recodat Co. v. Buchanan*,¹⁵² which held that software does not need to be furnished to the public. Recodat wanted a copy of a magnetic computer tape of a county auditor's public records and the necessary software to access the taped information. A private company, ATEK, had the tapes, and the auditor said he had entered into an agreement whereby ATEK owned the software and the auditor only owned the information on the tapes. ATEK offered to provide the tapes to Recodat and to create new software for Recodat—at the price of \$100 per hour. Recodat argued that because the software was necessary to access the taped information, the software should be deemed a public record. The Supreme Court of Ohio ordered the auditor to provide Recodat the records, but on the question of the software, the court said:

The problem of protecting ATEK's proprietary interest in its software must be resolved by ATEK and [the auditor] and should not burden the public. . . . [E]ven though the software is needed to access the information on the magnetic computer tapes, relator's argument that the software is also a public record fails because the magnetic tapes are not public records[,] copies of which must be provided to the public. The method of complying with the statutes is left to [the auditor] [The auditor has] no duty to provide the public records in the form of magnetic computer tapes and the software to access them.¹⁵³

When a person requests public information from the government, the person expects to receive information in an understandable form. Computers, however, store information in electronic languages, usually ASCII (American Standard Code for Information Interchange) or EBCDIC (Extended Binary Coded Decimal Interchange Code). There are at least four different coding schemes and a seemingly endless number of record formats. Software gives instructions to a computer, programming it to convert virtually incomprehensible computer storage language into something requesters of records can comprehend.¹⁵⁴ Clearly, information that is kept in electronic form must be decoded first,

¹⁴⁹ OTA, INFORMING THE NATION, *supra* note 1, at 223.

¹⁵⁰ 422 So. 2d 63 (Fla. Dist. Ct. App. 1982).

¹⁵¹ *Id.* at 66 (citing *State ex rel. Davidson v. Couch*, 158 So. 103 (Fla. 1934)). See also *Yeager v. Drug Enforcement Agency*, 678 F.2d 315, 326 (D.C. Cir. 1982) ("If Yeager had magnetic tapes of computer records, then the codes necessary to read and use the tapes would become more than intra-agency records," thus disclosable. The DEA, however, was not required to alter the computer information to put it into Yeager's requested format.); OTA, INFORMING THE NATION, *supra* note 1, at 222-23 (discussing public access to software and on-line databases).

¹⁵² 546 N.E.2d 203 (Ohio 1989).

¹⁵³ *Id.* at 205.

¹⁵⁴ Take the following, simple message coded in ASCII:

```
0100 1101 0100 0001 0101 0010 0101 1001
0100 1000 0100 0001 0100 0100    0100 0001
0100 1100 0100 1001 0101 0100 0101 0100 0100 1100 0100 0101
0100 1100 0100 0001 0100 1101 0100 0010
```

When the binary message is decoded through software, the message is elementary: "Mary had a Little Lamb." For decoding, see the Code Tables in IBM, SYSTEM 370 REFERENCE SUMMARY, File No. S370/4300-01, at 35 (8th ed. Feb. 1989).

making software an essential part of the production of meaningful records. The software, in short, is as important as the database in the production of the final product of comprehensible records.

Separating the "computer program" from the "database" can be difficult, as Steven Metalitz, Vice President and General Counsel of the Information Industry Association [IIA], points out. "To allow the government to assert copyright in computer programs, even with the intent to leave federal government databases in the public domain, raises thorny problems whenever it is difficult to separate the two interlinked works."¹⁵⁵

When government copyrights its software, it can demand payment from any requester who wants to acquire the copyrighted software to use on his or her own computer. For the privilege of convenient use of software—use in the requester's home or office instead of on a government computer—citizens could pay twice—once for the initial development of the software and then for the opportunity to use it. Ralph Oman, the Register of Copyrights, refers to this as the "double subsidy" argument.¹⁵⁶ Even if the price of the software were reasonable, additional teeth would be necessary to make sure that the government provided the copyrighted software in a timely fashion. Requesters need the software not only to make records comprehensible, but also to examine whether the software is functioning properly. In Florida, a computer-astute taxpayer objected to his computer-produced tax bill and asked if he could examine the software.¹⁵⁷ The tax appraiser refused his request on the grounds that the software was proprietary.¹⁵⁸ Only after legal action did examination of software occur—in *camera*.¹⁵⁹ This incident provoked a Boston tea party parody from a Florida state Senator: "No taxation without documentation."¹⁶⁰

In short, a primary concern about government copyright of software is preservation of the "right to know." The power to copyright software could mean the power to restrict

¹⁵⁵ *Hearing on S. 1581, Technology Transfer Improvements Act of 1991 Before the Comm. on Commerce, Science, & Transp.*, 102d Cong., 1st Sess. 35 (Sept. 13, 1991) [hereinafter *Hearing on S. 1581*] (statement of Steven Metalitz, Vice Pres. & Gen. Counsel of IIA). As the Committee on Government Operations explains:

The ultimate technique for decomposition of documents into relationships and data is the so-called virtual document in which the document is stored electronically as a set of relationships. At output, the document is assembled from multiple sources following the system's proprietary instructions. At the point when a document becomes a virtual document, the distinction between a data base and a document is very narrow if it exists at all.

TAKING A BYTE, *supra* note 1, at 13. In New York, almost three-fourths of data stored in mainframes are in "software dependent formats." *Id.* at 14 (citing M. Hedstrom & A. Kowlowitz, *Meeting the Challenge of Machine-Readable Records: A State Archives Perspective*, 1988 REFERENCE SERV. REV. 31, 34).

In fact, for the National Archives and Records Administration, the primary challenge is "to define a means of preserving in a nonproprietary, standard manner, data bases and text information including both raw data and relationship information so that electronic records transferred to the Archives can become software/hardware independent." *Id.* at 30 (citing NATIONAL INST. OF STANDARDS & TECHNOLOGY, FRAMEWORK AND POLICY RECOMMENDATIONS FOR THE EXCHANGE AND PRESERVATION OF ELECTRONIC RECORDS 6 (Nat'l Computer Systems Lab. 1989)).

¹⁵⁶ *Hearing on S. 1581, supra* note 155, at 25-26 (statement of Ralph Oman, Register of Copyrights, Copyright Office, Library of Congress).

¹⁵⁷ This story was told by Edwin A. Levine, staff director to the Florida legislature's Joint Committee on Information Technology Resources. *Information Policy: States and Localities Find Profit in Selling Government Information*, Daily Rep. for Exec. (BNA) No. 74, at C-1 (April 17, 1990).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ The parody is from state Sen. George Stuart Jr., (D), who chairs the joint committee. *Id.*

access to software. Without access to appropriate software, access to the information stored in computers is impossible.

At the federal level, Senate Bill 1581,¹⁶¹ a proposed amendment to the Stevenson-Wydler Technology Innovation Act of 1980,¹⁶² would have permitted the federal government to copyright software it produces.¹⁶³ In 1986, Congress amended the Stevenson-Wydler Technology Innovation Act to permit patent protection for inventions resulting from cooperative research and development agreements [CRADAs] between government and private industry.¹⁶⁴ Federal employees who helped develop the inventions may share in the royalties, and private industry may receive a license on the government's patents and then further develop the products for profit. In June 1992, the United States Department of Energy and a consortium of computer companies formed a CRADA to develop computer technology.¹⁶⁵ Senate Bill 1581, and an identical bill, House Bill 191¹⁶⁶ were called the "Technology Transfer Improvements Act of 1991" and were an attempt to further amend the Stevenson-Wydler Act by permitting copyright protection for computer software produced by CRADAs. "Technology transfer experts" at the Department of Defense drafted the bills.¹⁶⁷

Reaction to Senate Bill 1581 was mixed. An opposition letter sent to Senator Ernest F. Hollings, the Chairman of the Committee on Commerce, Science and Transportation, said:

Enactment of S. 1581 in its current form could have a significant detrimental impact on the public's right to know. Increasingly, computer software is the key to access to government data, which is frequently maintained only in electronic form. Congress should not deviate from decades of settled federal government copyright policy without a thorough examination of the potential impact of the bill upon public access to government information in the current technological environment.¹⁶⁸

Testimony from an American Civil Liberties Union representative revealed more concerns: "S. 1581 . . . threatens the public right to know in the era of electronic public information. If software which is used to make government information available or understandable is copyrighted, government can limit access by controlling price and distribution."¹⁶⁹

¹⁶¹ S. 1581, 102d Cong., 1st Sess. (1991). Although this bill was not enacted, a similar bill was reintroduced in 1993. H.R. 523, 103d Cong., 1st Sess. (1993).

¹⁶² 15 U.S.C. §§ 3701-3714 (1982).

¹⁶³ See generally, *Senate Commerce Committee Hears Views on Copyright for Government Software*, Daily Rep. for Exec. (BNA) No. 179, at A-8 (Sept. 16, 1991) (discussing proposed amendment). Under federal copyright law, a "computer program" is defined as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101 (1989). The federal government can receive copyright protection on its works, but cannot hold copyrights assigned or bequeathed to it. § 105.

¹⁶⁴ 15 U.S.C. § 3710a(b)(2) (Supp. 1993).

¹⁶⁵ Holly Hubbard, *FEDS, CSPP Kick Off Initiative to Speed Technology Development*, COMPUTER RESELLER NEWS, June 8, 1992, at 49.

¹⁶⁶ H.R. 191, 102d Cong., 1st Sess. (1991).

¹⁶⁷ 137 CONG. REC. S11223-24 (daily ed. July 29, 1991) (statement of Sen. Rockefeller).

¹⁶⁸ Letter from Jerry Berman, Director, Info. Tech. Project, ACLU & Steven J. Metalitz, Vice Pres. & Gen. Counsel, IIA to Sen. Ernest F. Hollings (Sept. 12, 1991) (read by Metalitz into record at Senate Hearing on S. 1581). See *Hearing on S. 1581*, *supra* note 155, at 39.

¹⁶⁹ *Hearing on S. 1581*, *supra* note 155, at 41 (testimony of Jerry Berman, Director, Info. Tech. Project, ACLU).

On the other hand, the benefits of federal software copyright are at least twofold. First is the benefit of spurring further development of computer software. Sales of software hit \$29 billion in 1990 and potentially could reach \$100 billion by the middle of the decade.¹⁷⁰ But currently, software developed through CRADAs cannot be copyrighted. It goes into the public domain, and there is no further economic incentive for private industry to upgrade this software. Without proprietary interests in software enhancement, such enhancement may well not occur. Currently the United States does lead the world in development of software. The importance of software to the economy may well increase, along with increasing competition. For instance, an article in *Forbes* says:

With hardware prices crashing, it's no surprise that IBM expects, by the turn of the century, to get more than half its revenue from software, service and support. Who will be its competitors in this faster-growing part of the data processing industry? The obvious answers are also American: the Electronic Data Systems unit of General Motors, Computer Sciences Corp. and Arthur Andersen.... But if a far-sighted Frenchman named Serge Kampf has his way, the market will be anything but a walkover for the U.S.¹⁷¹

If the United States is to remain the world leader in software development, it must change copyright law in relation to software, the proponents of Senate Bill 1581 argue. A great deal of scientific prowess resides in U.S. government laboratories. Senator Rockefeller says that one-sixth of our country's scientists and engineers work at the over 700 laboratories run by our government under an annual budget of \$20 billion.¹⁷² These laboratories and workers need to be able to team up with the private sector for development of software. But this team effort will not work economically so long as having the government on one's team means the public domain "kiss-of-death" for profits. Products of such a team are simply stillborn; further development of the products will languish, as will our competitive stature worldwide. One voice, expressing concern about problems with a public-private team, explained: "For software to be commercially valuable, it has to be debugged, simplified, and training materials must be written and supplied. Without a proprietary interest, a firm could not be assured of recouping the necessary investment in such services. Merely making software available without proprietary protection is insufficient to ensure its effective commercialization."¹⁷³

[S]enior officials from some agencies told us that their inability to copyright and exclusively license computer software has constrained the transfer and use of a certain portion of software that has broader commercial applications. These agencies are the Departments of Agriculture; Commerce; and Defense, including Air Force, Army, and Navy; the Environmental

¹⁷⁰ *Id.* at 7 (testimony of Deborah L. Wince-Smith, Ass't Sec. of Commerce for Technology Policy on Commercializing Federally Developed Software, Dep't of Commerce).

¹⁷¹ John Marcom, Jr., *The Napoleon of software*, FORBES, June 24, 1991, at 112 (Kampf founded Sogeti S.A., a French computer services group that ranked number one in Europe and number four in the world in 1991.).

¹⁷² 137 CONG. REC. S11223-24 (daily ed. July 29, 1991) (statement of Sen. Rockefeller). Representative Constance Morella cited the same figures in her September 13, 1991 testimony before the Senate Committee on Commerce, Science, and Transportation. *Hearing on S. 1581, supra* note 155, at 2. Representative Morella also cited a General Accounting Office report which says that 10% of all software is developed by the federal government. *Id.*

¹⁷³ *Hearing on S. 1581, supra* note 155, at 3 (testimony of Rep. Morella).

Protection Agency (EPA); NASA; and the National Institutes of Health (NIH). Software constrained by the copyright prohibition includes, for example, artificial intelligence software that could assist doctors in diagnosing diseases or farmers in making decisions about irrigating, fertilizing, or spraying their crops.¹⁷⁴

After the 1986 amendment to the Stevenson-Wydler Act, extending patent protection on products of CRADAs, the number of such CRADAs rose from ninety-nine at the close of fiscal year 1988 to 460 only two years later.¹⁷⁵ In the last three years, the number of inventions reported by federal laboratories rose forty-eight percent.¹⁷⁶

Fear of competitors remains a problem so long as copyrights are unavailable. For instance, a research manager at the National Institute of Health said that a computer program which would help dermatologists is not being developed. A small business was interested in testing the software, but backed off because of fear that competitors could obtain the same software and, thus, the business could not recoup its investment.¹⁷⁷

The second benefit of federal software copyright is preventing foreign countries from using public-domain software without paying royalties. While the United States provides governmentally-developed software to foreign countries without charging royalties, foreign governments slap copyrights on their software. In short, they get ours for free, and we pay for theirs. This anomalous scheme is especially ill advised at a time when this country is plagued by an imbalance in trade.¹⁷⁸ Supporting Senate Bill 1581 "in principle," Ralph Oman, Register of Copyrights, says, "[T]he time seems ripe for a change. There is a viable argument that these works, in addition to being commercially valuable, are essential to national security and defense interests, distinguishing them from more traditional endeavors such as books and paintings."¹⁷⁹ David M. Ostfeld of the Intellectual Property Committee of the Institute of Electrical and Electronics Engineers, Inc., United States Activities [IEEE-USA] suggested the proposed amendment to the Stevenson-Wydler Technology Innovation Act be changed to incorporate the notion that the individual should be permitted to use software obtained directly from the U.S. government without charge, while those who commercialize the software would pay for it.¹⁸⁰ He called Senate Bill 1581 "certainly a step in the right direction."¹⁸¹

The arguments for permitting the federal government to copyright software apply to permitting states to copyright software. Florida is looking at a similar notion while fighting its battle over whether the state should be allowed to copyright software. A compromise worked out by a Florida legislative committee would allow the government to copyright and to sell software developed at public expense—with this proviso: Anyone wanting to use the copyrighted software in connection with government records could do so. However, persons so using the software would be prohibited from reselling it or making any modifications of it. Thus, Florida hopes to strike a favorable compromise of

¹⁷⁴ *Hearing on S. 1581, supra* note 155, at 17 (statement of John M. Ols, Jr., Director in the Resources Community and Econ. Dev. Div., GAO).

¹⁷⁵ 137 CONG. REC. S11223-24 (daily ed. July 29, 1991) (statement of Sen. Rockefeller).

¹⁷⁶ *Hearing on S. 1581, supra* note 155, at 12 (statement of Deborah L. Wince-Smith, Ass't Sec. of Commerce for Technology Policy on Commercializing Federally Developed Software, Dep't of Commerce).

¹⁷⁷ *Id.* at 17 (statement of John M. Ols, Jr.).

¹⁷⁸ *Id.* at 3 (testimony of Rep. Morella).

¹⁷⁹ *Id.* at 26.

¹⁸⁰ *Id.* at 30.

¹⁸¹ *Id.*

preserving the public's right to know while allowing the government to recoup money.¹⁸²

(C) Open Government Review Act. Exemptions must be periodically reviewed to determine if they are consistent with the policy of open government. It shall be the duty of the [Division of Statutory Revision of the Joint Legislative Management Committee] to establish a schedule of review and make recommendations to the state legislature on whether exemptions are (1) furthering legitimate privacy rights and therefore should be maintained or (2) are unduly restricting the free flow of information and therefore should be abolished.¹⁸³

This policy, requiring periodical review of exemptions, comes from Florida's "Open Government Sunset Review Act."¹⁸⁴ It would act as a check to ensure a proper balance between privacy rights and an open government.

(D) Review of Confidential Records and Reclassification by State Archivist and State Librarian. The state librarian and archivist or an archivist designated by the state librarian and archivist...shall be accorded access to and may examine any confidential public records for the purpose of determining, in consultation with the agency head or a representative of the agency which has title to the records, whether such records are records of archival value or whether such records are properly filed or designated as confidential. If the state librarian and archivist or such representative...should determine that certain administrative or otherwise open public records have been inappropriately filed and designated as confidential public records, then such records shall be removed from the designation of confidential and filed within the appropriate level of access designation...¹⁸⁵

The necessity for review by a designated librarian or archivist is demonstrated, for instance, by *Nixon v. Administrator of General Services*.¹⁸⁶ Under an Act upheld by the Supreme Court, government archivists determine what presidential papers have historical value and therefore should eventually be made public. Having the president unilaterally determining what presidential papers should remain private obviously could conflict with the public interest. Any determinations on what records should remain confidential must be made by more objective outsiders. No individuals should have power to withhold potentially significant historical papers on grounds of confidentiality. If there were no oversight, too much historically important but embarrassing information could be lost as officer holders, in effect, attempted to rewrite or bury history. Nevertheless, the role of such librarians is somewhat limited by the fact that the National Archives and Records Administration only treats roughly two percent of federal government records as permanent ones needing long-term preservation.¹⁸⁷ Furthermore, there is some

¹⁸² *Information Policy: States and Localities Find Profit in Selling Government Information*, Daily Rep. for Exec. (BNA) No. 74, at C-1 (Apr. 17, 1990).

¹⁸³ FLA. STAT. ANN. § 119.14 (West 1985).

¹⁸⁴ *Id.*

¹⁸⁵ TENN. CODE ANN. § 10-7-508(b) (1992).

¹⁸⁶ 433 U.S. 425 (1976).

¹⁸⁷ TAKING A BYTE, *supra* note 1, at 4.

disagreement as to who else might function in the role of reviewer or reclassifier. Tennessee, for example, adds the “director of records management” to this category.¹⁸⁸

(E) Access to Personal Records for Research.

(1) A state agency may authorize or provide access to or provide copies of an individually identifiable personal record for research purposes if informed written consent for the disclosure has been given to the appropriate department secretary, or the president of the institution, as applicable, or his or her designee, by the person to whom the record pertains or, in the case of minors and legally incompetent adults, the person’s legally authorized representative.

(2) A state agency may authorize or provide access to or provide copies of an individually identifiable personal record for research purposes without the informed consent of the person to whom the record pertains or the person’s legally authorized representative, only if:

(a) The state agency adopts research review and approval rules including, but not limited to, the requirement that the appropriate department secretary, or the president of the institution, as applicable, appoint a standing human research review board competent to review research proposals as to ethical and scientific soundness; and the review board determines that the disclosure request has scientific merit and is of importance in terms of the agency’s program concerns, that the research purposes cannot be reasonably accomplished without disclosure of the information in individually identifiable form and without waiver of the informed consent of the person to whom the record pertains or the person’s legally authorized representative, that disclosure risks have been minimized, and that remaining risks are outweighed by anticipated health, safety, or scientific benefits; and

(b) The disclosure does not violate federal law or regulations; and

(c) The state agency negotiates with the research professional receiving the records or record information a written and legally binding confidentiality agreement prior to disclosure. The agreement shall:

(i) Establish specific safeguards to assure the continued confidentiality and security of individually identifiable records or record information;

(ii) Ensure that the research professional will report or publish research findings and conclusions in a manner that does not permit identification of the person whose record was used for the research. Final research reports or publications shall not include photographs or other visual representations contained in personal records;

(iii) Establish that the research professional will destroy the individual identifiers associated with the records or record information as soon as the purposes of the research project have been accomplished and notify the agency to this effect in writing;

¹⁸⁸ TENN. CODE ANN. § 10-7-508(b) (1992).

(iv) Prohibit any subsequent disclosure of the records or record information in individually identifiable form except as provided in [3(E)]; and

(v) Provide for the signature of the research professional, of any of the research professional's team members who require access to the information in identified form, and of the agency official authorized to approve disclosure of identifiable records or record information for research purposes.¹⁸⁹

Some important research simply cannot be done without access to individually identifiable personal records. For instance, some research requires correlating material, and correlation demands some sort of identification system. While some identifier other than name or social security number may suffice, developing such identifiers could be time-consuming and expensive. Also, researchers might wish to do follow-up interviewing with some persons. As an example, a researcher may wish to correlate factors such as learning disabilities of prisoners with the educational opportunities the prisoners receive while incarcerated. The researcher might then want to do follow-up interviews to see how these prisoners fare upon release from prison—whether they become gainfully employed or whether they instead become part of the recidivism statistics. As to the research requirement of “scientific merit,” the term should be read in its broad usage, to include social sciences as well as biological sciences in order to provide confidential materials to researchers in a broad spectrum of disciplines.

(F) Disclosure by Research Professional. No research professional who has established an individually identifiable research record from personal record information pursuant to 3(D) or who has established a research record from data or information voluntarily provided by an agency client or employee under a written confidentiality assurance for the explicit purpose of research, may disclose such a record in individually identifiable form unless:

(1) The person to whom the research record pertains or the person's legally authorized representative has given prior informed written consent for the disclosure; or

(2) The research professional reasonably believes that disclosure will prevent or minimize injury to a person and the disclosure is limited to information necessary to protect the person who has been or may be injured, and the research professional reports the disclosure only to the person involved or the person's guardian, the person's physician, and the agency; or

(3) (a) The research record is disclosed in individually identifiable form for the purposes of auditing or evaluating a research program; and

(b) The audit or evaluation is authorized or required by federal or state law or regulation or is based upon an explicit provision in a research contract, grant, or other written research agreement; and

(c) No subsequent disclosure of the research record in individually identifiable form will be made by the auditor or evaluator except as provided in this section; or

¹⁸⁹ WASH. REV. CODE ANN. § 42.48.020 (West 1991).

(4) The research record is furnished in compliance with a search warrant or court order: Provided, That:

(a) The court issues the search warrant or judicial subpoena concerning the research record solely for the purpose of facilitating inquiry into an alleged violation of law by the research professional using the record for a research purpose or by the agency; and

(b) Any research record obtained pursuant to (a) of this subsection and any information directly or indirectly derived from the research record shall remain confidential to the extent possible and shall not be used as evidence in an administrative, judicial, or legislative proceeding except against the research professional using the record for a research purpose or against the state agency.¹⁹⁰

Washington's laws restricting disclosure of personal information by researchers ensures that researchers will not misuse the materials gathered through accessing personal records.

(G) Statistical Information. Statistical information, in such form that no individual person or entity can be identified, shall be open for inspection and copying.

States have a variety of approaches to their treatment of statistical information. The legislature in Washington has determined that "No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons."¹⁹¹ Statutes in Idaho and Kansas permit disclosing any statistical information.¹⁹² Arkansas has a statute allowing release of "aggregate statistics shown from [library] registration and circulation records with all personal identification removed."¹⁹³ Indiana law provides that "statistical reports" made by the "health professions bureau" are public records.¹⁹⁴ Tennessee law permits release of statistical medical or epidemiological information,¹⁹⁵ and a Virginia statute permits release of statistical summaries on abuse of mental health patients.¹⁹⁶

(H) Period of Confidentiality.

(1) Except as otherwise provided in § H(2), public records that are more than 25 years old shall be available for inspection.

There is nothing magical in the number "25," but it is the shortest period of confidentiality this author found listed among statutes. Confidentiality, of course, is important to protect privacy, but balancing must occur. The competing interest of access to information is best met in short time periods for confidentiality.

(2) The following public records remain exempt from disclosure after 25 years:

¹⁹⁰ WASH. REV. CODE ANN. § 42.48.040 (West 1991).

¹⁹¹ WASH. REV. CODE ANN. § 42.17.310(2) (West 1991).

¹⁹² IDAHO CODE § 9-338(10) (Michie 1990); KAN. STAT. ANN. § 45-221(35)(e) (1986).

¹⁹³ ARK. CODE ANN. § 13-2-705(b) (Michie Supp. 1991).

¹⁹⁴ IND. STAT. ANN. § 35-48-6-9(i) (Burns Supp. 1992).

¹⁹⁵ TENN. CODE ANN. § 68-10-113(1) (1992).

¹⁹⁶ VA. CODE ANN. § 2.1-342.3 (Michie Supp. 1992).

(a) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.¹⁹⁷

Because of the high degree of importance of maintaining privacy in medical records, this statute permits breach of such privacy *for living individuals* only if the unusually high burden of "clear and convincing evidence" is met by the requester. Again, it is a matter of balancing competing interests in privacy and access. Arguably, medical records should be the most private of all records, and thus higher burdens upon requesters are warranted.

(b) Records less than 75 years old which were sealed in compliance with statute or by court order. Such records may be disclosed upon order of a court of competent jurisdiction or as otherwise provided by law.

(c) Records of a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure for a period of 25 years after termination of such custody or supervision to the extent that disclosure thereof would interfere with the rehabilitation of the person if the public interest in confidentiality clearly outweighs the public interest in disclosure. Nothing in this subsection, however, shall be construed as prohibiting disclosure of the fact that a person is in custody.¹⁹⁸

Examples of how other states structure time limits on the right of the public to access certain materials include Georgia's restriction to records of constitutional officers to twenty-five years after their creation¹⁹⁹ and Nevada's restrictions to confidential documents in state library archives to fifty years and to restricted records of constitutional officers for twenty-five years.²⁰⁰ The slight variations are many, but all display a similarity in policy choices.²⁰¹

¹⁹⁷ OR. REV. STAT. § 192.496(1) (1991).

¹⁹⁸ §§ 192.495, .496 (1991).

¹⁹⁹ GA. CODE ANN. § 50-18-98 (1990).

²⁰⁰ NEV. REV. STAT. ANN. §§ 378.300, .310 (Michie 1986).

²⁰¹ Kansas limits restrictions to 70 years for all records but those restricted by federal law, state statute, or rule of the Kansas Supreme Court. KAN. STAT. ANN. § 45-221 (f) (1986). Tennessee has a 70-year limit for all but records restricted by federal law or records of mental illness or retardation. TENN. CODE ANN. § 10-7-50 (1992). See also ALASKA STAT. §§ 18.50.310(f), 16.05.815(d) (1992) (100 years for the date of birth, 50 for death, marriage, divorce, or annulment, and 25 for confidential fish and wildlife harvest data); GA. CODE ANN. § 50-18-100 (1990) (75 years for confidential records); IND. STAT. ANN. § 5-14-3-4(17)(e) (West 1987) (75 years for confidential records other than adoption records); MINN. STAT. ANN. § 13.03 subd. 8 (West 1987) (10 years for "nonpublic and protected nonpublic data... unless... the harm to the public or to a data subject would outweigh the benefit to the public or to the data subject").

(d) Student records required by state or federal law to be exempt from disclosure.²⁰²

(I) Separation of Exempt and Nonexempt Material.

(1) If a public record contains material which is not exempt under § 3(B), as well as material which is exempt from disclosure under § 3(B), the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

(2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.²⁰³

Redaction is deletion of exempt (nondisclosable) information from a record containing both disclosable and nondisclosable public information. Florida law on redaction takes the position that “[a]ny person who has custody of public records and who asserts that an exemption . . . applies to a particular record shall delete or excise from the record only that portion of the record for which an exemption is asserted and shall produce for inspection and examination the remainder of such record.”²⁰⁴ Indiana law provides for redaction on request, but this “does not apply to public records that are stored on computer tape [or] computer discs . . . if the disclosable information is made available for inspection and copying in some other form.”²⁰⁵ If the information cannot be disclosed in some form other than computer tape or discs, “a public agency may charge a person . . . the agency’s direct cost of reprogramming a computer system . . . to separate the disclosable information from nondisclosable information.”²⁰⁶ Given the ease with which redaction can be accomplished on computerized records as compared to paper records, this Indiana law seems puzzling.

ACCESS AND TAILORING

4. (A) Right to Inspect and Copy Records. Except as [otherwise provided in this chapter], all records [of] any public body, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to inspect and/or copy such records. [U]pon request, [a person] shall be informed of the data’s [organization and arrangement], [including the record

²⁰² This part of the statute is in line with the requirements of confidentiality for students that now exist in the Buckley Amendment, 20 U.S.C. § 1232g (1988). Whether the Buckley Amendment is too stringent in terms of denying access to various student academic records is, of course, another question. But so long as that federal law exists, state statutes must comport with its requirements in order not to jeopardize federal educational funding.

²⁰³ MICH. COMP. LAWS ANN. § 15.244 (West 1981).

²⁰⁴ FLA. STAT. ANN. § 119.07 (West 1985).

²⁰⁵ IND. CODE ANN. § 5-14-3-6(a)-(b) (West 1987). Some states use the conditional “may” redact: LA. REV. STAT. ANN. § 44:32(B) (West 1982); N.Y. PUB. OFF. LAW § 89(2)(a) (Consol. 1987); R.I. GEN. LAWS § 38-2-2(d)(22) (1990); VA. CODE ANN. § 2.1-342(A)(3) (Michie 1987).

²⁰⁶ IND. CODE ANN. § 5-14-3-6(c) (West 1987).

layout and codes, if any, of computer tapes], [and density and blocking].²⁰⁷

This section has substituted “of” for Rhode Island legislature’s “maintained or kept on file by” to be consistent with this model statute’s definition of “public records” in Section 1(A) and to avoid situations where requesters cannot receive public records because the records are in the hands of third parties. This section has also substituted “organization and arrangement” for Minnesota’s use of “meaning” because to inform a requestor of the “meaning” in the sense of the significance or import is not the proper function of the agency.²⁰⁸

The overall scope of this section is meant to require custodians to inform requesters of basic information about how information is organized in the computer system. It is similar to requiring custodians to explain the indexing system for paper files. It is not meant to require custodians to explain the minutiae of data systems, for example, how DOS functions, just as it would not be essential for a custodian to teach a requester how to read English in order to access paper files. But certainly it is imperative that custodians be required to explain their record-keeping system, whether it be computerized or paper; otherwise, access would be akin to looking for buried treasure without a map.

Statutes in Pennsylvania and Tennessee limit the public’s right to copy records, saying that “[t]he lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.”²⁰⁹ This language leaves to individual custodians’ discretion what constitutes “reasonable rules,” and such discretion presents two problems. First, not all custodians can be relied upon to know what constitutes “reasonable” rules; state statutory guidance is necessary to set guidelines for what constitutes reasonable copying rules. Second, by leaving such an important matter as copying rules to the discretion of individual custodians, requesters could encounter the problem of widely differing rules among various agencies. (“Local-yokel” rules are what such discretionary rules could be disparagingly called.) Wide variations in rules could make it very difficult for requesters, who would not be able to predict what the ground rules were from agency to agency. Less discretion among local custodians, and more guidelines and more uniformity, are necessary to aid requesters.

(B) [For computerized records,] all of the information in the computer, not merely that which a particular program accesses, [shall] be available for examination and copying in keeping with the public policy underlying [this chapter].²¹⁰

This section may give rise to complaints that agencies should not be required to reprogram and that such a statute would require that agencies create new records. In fact, what the statute does require is that agencies have appropriate software to retrieve requested information and personnel knowledgeable enough to perform the keystrokes to retrieve that information.

²⁰⁷ R.I. GEN. LAWS § 38-2-3(a) (1990). See *supra* notes 49, 112-15, 152-53 and accompanying text on the *Recodar* case.

²⁰⁸ MINN. STAT. ANN. § 13.03 (West Supp. 1993).

²⁰⁹ PA. STAT. ANN. tit. 65, § 66.3 (1959); TENN. CODE ANN. § 10-7-506(a) (1992).

²¹⁰ *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. Dist. Ct. App. 1982) (the model statute substitutes “shall” for “should” and “this chapter” for “the right-to-know statutes”).

In its 1990 Report, New York's Committee on Open Government said:

One of the problems that has arisen involves the retrieval of accessible information from a computer tape, disc or other database. It has been advised that available information that can be retrieved based upon existing computer programs must be disclosed. On the other hand, if an agency cannot retrieve the information unless it modifies its programs or reprograms, it has been advised that the act of reprogramming is the equivalent of creating a record.... However, it may often be relatively simple to alter a program to retrieve the information sought. Further, it may be more cost efficient to engage in reprogramming than to delete portions of a printout, for example, or to engage in a physical search of paper records. Redactions made manually and extensive searches are time consuming and labor intensive. Minor reprogramming may often be done quickly.²¹¹

Senator Patrick Leahy echoed the sentiment of the New York report. On the issue of whether a database search is equivalent to a search through file cabinets, the Senator said that a database search should be required because it is easier and quicker than a paper search.²¹²

Similarly, the Office of Technology Assessment said:

When additional programming is required to extract information from computer systems, agencies and courts have sometimes held that such programming would be analogous to record creation, and therefore would not be a required part of the FOIA "search" process. In the electronic age, however, some degree of reprogramming or program modification may be essential to obtain access to electronic information.²¹³

The OTA concluded that the distinction between searching and record creation traditionally applied to paper records is difficult to apply to computerized information.²¹⁴ The reason is that computer records may "reside" in computers until "specifically demanded."²¹⁵ Thus, to retrieve computer records, "application of codes or even additional programming" may be necessary.²¹⁶ Should this programming be viewed as the searching or creation of a record? Persons favoring ready access view it as searching. The OTA counsels that records not be defined as "records in being" to help prevent any manipulation of data being used as a rationale for withholding data.²¹⁷

Federal cases vary widely as to how much manipulation of data can be required under the heading of searching. Some are liberal in allowing computer alterations to be viewed as searching rather than document creation. For example, in *Long v. IRS*,²¹⁸ the Ninth Circuit concluded that deletion of names, addresses, and social security numbers did not

²¹¹ STATE OF NEW YORK DEPARTMENT OF STATE COMMITTEE ON OPEN GOVERNMENT, 1990 REPORT TO THE GOVERNOR AND THE LEGISLATURE 16 (Dec. 1990).

²¹² See 137 CONG. REC. *supra* note 62. See also Lardner, *supra* note 60.

²¹³ OTA, INFORMING THE NATION, *supra* note 1, at 20.

²¹⁴ *Id.* at 215.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 216.

²¹⁸ 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

constitute creation of new records.²¹⁹ *Public Citizen v. Occupational Safety and Health Administration*²²⁰ ultimately settled out of court, with OSHA concluding that it was able to retrieve disputed information without additional programming because of increased computer capability.²²¹

Other federal courts have gone a different direction, limiting what qualifies as a search and expanding what constitutes record creation. In *Yeager v. Drug Enforcement Agency*,²²² the Court of Appeals for the District of Columbia found the compacting of information to go beyond what would constitute reasonable searching and into what would constitute creation of a new document.²²³ The Department of Defense has actually established regulations placing computer-stored information with no existing computer program or printout beyond the reach of a FOIA request.²²⁴

An additional concern with computerized records is that requests can be overly burdensome or even vexatious. When such a situation arises, language similar to that used by the Kentucky legislature might allay the fears of custodians:

If the application places an unreasonable burden in producing voluminous public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records. However, refusal under this section must be sustained by clear and convincing evidence.²²⁵

Cameron McWhirter has reported about a case currently pending in New York that is testing the bounds of what constitutes a burdensome request.²²⁶ Wallace Nolen, who wants a database to assist lawyers in tracking debtors, has requested computer access to all of New York's civil and criminal county clerk records. Nolen says, "Whether I'm a pain in the ass and I want a copy of everything is not the issue. I have a right to public records." The cost could potentially be millions. Complicating the situation is the fact that New York's statutes were written prior to the advent of computer technology. Further complication is created by the fact that not all of New York's records are computerized.²²⁷

(C) Inquiry into purpose shall not serve as a basis for denying any person's right to access public records.

States vary in their approaches to whether a person requesting access to information is protected from having to reveal his or her purpose in seeking information. For example, in Texas the rule is: "Neither the [custodian of] public records nor his [or her] agent shall make any inquiry of any person who applies for inspection or copying of public records

²¹⁹ *Id.*

²²⁰ OTA, *INFORMING THE NATION*, *supra* note 1, at 218 (citing Civil Action No. 86-07-05 (705 D.C. Dist. Ct.)).

²²¹ *Id.* at 218-21 (commenting on this and other cases involving disputes over programming).

²²² 678 F.2d 314 (D.C. Cir. 1982).

²²³ *Id.* See also OTA, *INFORMING THE NATION*, *supra* note 1, at 216-18.

²²⁴ OTA, *INFORMING THE NATION*, *supra* note 1, at 223.

²²⁵ KY. REV. STAT. ANN. § 61.872(5) (Michie/Bobbs-Merrill 1986).

²²⁶ Cameron McWhirter, *Businessman Sues for Access to All County Clerk Records*, GANNETT NEWS SERVICE, Sept. 22, 1991, available in LEXIS, Nexis library, GNS file.

²²⁷ *Id.*

beyond the purpose of establishing . . . the public records being requested."²²⁸ Similarly, the Washington legislature has stated: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose of the request . . ."²²⁹ In some states, case law prohibits any inquiry into purpose or motives. For instance, Massachusetts has long prohibited such a practice.²³⁰

But sometimes balancing must occur, as Allan Adler points out:

Although inquiry into purpose should not be permitted to serve as a basis for denying a person's right to request access, there may be circumstances in which the requester will want to argue that a discretionary waiver of an otherwise applicable exemption from disclosure can be justified by the purpose of the request. Similarly, where an exemption require[s] balancing of competing interests—such as personal privacy versus the public interest in disclosure—or where an argument for fee waiver depends upon a "public benefit" showing, it may be necessary and desirable to explain the purpose of the request.²³¹

Setting aside motive, another commonly asked question, when a requester is asking for a public record, is whether a custodian should be able to inquire into the requester's identity. Obviously, a requester would have to be identified when requesting *nonpublic* information, say, under fair information practices legislation²³² to correct wrong information about him or her maintained in a government database. Some states do allow custodians to inquire as to the requester's identity. Kansas permits limited inquiry regarding the requester:

A public agency shall not require that a request contain more information than the requester's name and address and the information necessary to ascertain the records to which the requester desires access and the requester's right of access to the records. A public agency may require proof of identity of any person requesting access to a public record.²³³

Texas allows custodians to require proper identification.²³⁴ In contrast, Wisconsin law says that "no request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request."²³⁵

On the question of identity, Adler says:

[W]hile the statute should guard against any onerous identification requirements for requesters, it is not clear why a requester would be "unwilling to be identified" and why an agency should be required to process a request for such a person . . .

²²⁸ TEX. REV. CIV. STAT. ANN. art. 6252-17b (West 1992).

²²⁹ WASH. REV. CODE. ANN. § 42.17.240 (1991).

²³⁰ Direct Mail Service, Inc. v. Registrar of Motor Vehicles, 5 N.E.2d 545 (Mass. 1937).

²³¹ Letter from Allan Adler to the American Society of Newspaper Editors, FOI Committee 6 (July 19, 1991) (on file with author) [hereinafter Adler Letter].

²³² For more on fair information practices legislation, see *supra* note 105.

²³³ KAN. STAT. ANN. § 45-220(b) (1991).

²³⁴ TEX. REV. CIV. STAT. ANN. art. 6252-17b (West Supp. 1993).

²³⁵ WIS. STAT. ANN. § 19.35(b)(i) (West 1986).

Under the federal FOIA, most agency regulations governing the procedures for a particular agency's handling of requests specify or assume that the requester will be identified for purposes of facilitating communications regarding the request and assuring that any charges properly assessed can be billed and collected.

Moreover, as a general rule, no right of confidentiality is inherent in the status of FOIA requester. It is not uncommon for individuals to make requests regarding the requests that have been made by other individuals, either for purposes of determining the nature of their interests or the responses they have received. This frequently occurs with requests by book authors.²³⁶

Additional questions arise when information is requested for commercial use. Should agencies be able to inquire into purpose in terms of asking requesters if they will be making commercial uses out of information contained in public records? This, of course, is a judgment call made on grounds other than access to information alone. States may determine that, as a matter of *principal* (charging commercial users higher prices), they wish to abandon the *principle* of not inquiring into purpose. Regarded strictly from an access perspective, inquiry into whether use of information might fall into that somewhat nebulous category of "commercial use" should not be permitted. If information is public, it is public; that is a tautology. On what grounds can a capitalistic society deny access to public information for commercial use? Trying to distinguish acceptable public use from forbidden commercial use is fraught with problems. For instance, courts generally have not found the dissemination of information in newspapers to be primarily for commercial gain. In *Advertiser Publishing Co. v. Fase*,²³⁷ the Ninth Circuit found that "[t]he primary function of a newspaper of general circulation is to convey information and ideas,"²³⁸ and thus the primary function is not commercial gain. Traditionally, even commercial speech receives some First Amendment protection.²³⁹ Recently, however, the Supreme Court has been lessening First Amendment protection for commercial speech.²⁴⁰

The Supreme Court of Virginia has been strict in forbidding consideration of a requester's purpose, even where the purpose might be commercial. In *Associated Tax Service v. Fitzpatrick*,²⁴¹ the court held that agencies may not make judgments regarding proper purposes for use of public records. The court quoted the policy of the Virginia Freedom of Information Act, which begins, "It is the purpose of the General Assembly by providing this chapter to ensure to the people of this Commonwealth ready access to records in the custody of public officials . . ."²⁴² Using this policy, the court overturned the trial court, which had considered the only valid requests to be for the purpose of

²³⁶ Adler Letter, *supra* note 231, at 7.

²³⁷ 279 F.2d 636 (9th Cir. 1960).

²³⁸ *Id.* at 640.

²³⁹ See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

²⁴⁰ See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a statute prohibiting corporations from using general treasury funds in state elections); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (upholding a prohibition of commercial activities in dormitories, and stating that a regulation restricting commercial speech need only be a reasonable means of accomplishing the state's objective); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding a statute which stated that no gambling room be permitted to advertise to the public of Puerto Rico).

²⁴¹ 372 S.E.2d 625 (Va. 1988).

²⁴² *Id.* at 629 (citing VA. CODE ANN. § 2.1-340.1 (Michie 1990)).

monitoring the operations of government. The trial court had considered requests for information for commercial purposes to fall outside the statute's scope. The Supreme Court of Virginia found several problems with the trial court's approach:

First, the Act nowhere states that its provisions come into play only where a civic-minded request is made

In addition, the trial court's approach would turn the Act into a battleground for litigation instead of a straightforward device for the release to citizens of information created with tax dollars. This is so because every time a citizen requested information, the government could challenge the citizen's motivation. Even a citizen who professed a public purpose at the time of making a request might be challenged on the basis of having an ulterior commercial motivation

We conclude . . . that the purpose or motivation behind a request is irrelevant to a citizen's entitlement to requested information.²⁴³

The Second Circuit Court of Appeals heard a case involving New York's attempt to restrict a California corporation, Legi-Tech, from gaining access to New York's computerized database containing legislative information.²⁴⁴ Legi-Tech provided subscribers access to a computerized database on legislative information from California and New York. But New York was offering a "Legislative Retrieval Service," and it had enacted a law prohibiting sale of such information to "entities which offer for sale the services of an electronic information retrieval system."²⁴⁵ The Second Circuit Court of Appeals found First Amendment problems with the statute and remanded the case. The case settled, with New York providing information to Legi-Tech.²⁴⁶

The Information Industry Association wants the private sector to have access to public information. Ronald Plesser's paper for the Information Industry Association quotes from the Paperwork Reduction and Federal Information Resources Management Act of 1990:

[B]oth the public and private sectors play a necessary, legitimate, and distinct role in disseminating government information. By redisseminating government information, the press, libraries, nonprofit organizations, public interest groups, and the private information industry help the government meet the needs of public users by providing information products and services that the government cannot support or that are beyond the bounds of government activities. At times, the private sector, libraries, and nonprofit organizations provide essential products or service to the government that the government is unable to provide for itself. A diversity of information sources for government information, and not a monopoly, best serves the public interest.²⁴⁷

²⁴³ *Id.*

²⁴⁴ *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985).

²⁴⁵ *Id.* at 731.

²⁴⁶ See also Ronald L. Plesser & Emilio W. Cividanes, *Access Principles for State and Local Government Information: An Analysis* 18 (Apr. 1991) (on file with author).

²⁴⁷ *Id.* at 5 (quoting HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, PAPERWORK REDUCTION AND FEDERAL INFORMATION RESOURCES MANAGEMENT ACT OF 1990, H.R. REP. NO. 927, 101st Cong., 2d Sess. 28 (1990)).

One should not make the leap, however, from saying that the private sector should *also* distribute government information, to saying that *only* private organizations should distribute designated public records.²⁴⁸

Some states have separate statutes concerning the commercial use of public information. Arizona has harsh provisions on the use of public information for what it considers to be a commercial purpose.²⁴⁹ Its definition of "commercial purpose" is so broad that it is hard to see how a newspaper's use of information could be considered noncommercial. The law also renders impossible inclusion of the statutory provision forbidding inquiry into purpose. New Mexico specifically restricts commercial use of

²⁴⁸ For more on privatization of information, see *supra* notes 70-91 and accompanying text.

²⁴⁹ ARIZ. REV. STAT. ANN. § 39-121.03 (1985). The Arizona statute follows in its entirety:

Request for copies, printouts or photographs; statement of purpose; commercial purpose as abuse of public record; determination by governor; civil penalty; definition

A. A person requesting copies, printouts or photographs of public records for a commercial purpose shall, upon making such a request, provide a certified statement setting forth the commercial purpose for which the copies, printouts or photographs will be used. Upon being furnished the verified statement the custodian of such records may furnish reproductions, the charge for which shall include the following:

1. A portion of the cost to the state for obtaining the original or copies of the documents, printouts or photographs.
2. A reasonable fee for the cost of time, equipment and personnel in producing such reproduction.
3. The value of the reproduction on the commercial market.

B. If the custodian of a public record determines that the commercial purpose stated in the verified statement is a misuse of public records or is an abuse of the right to receive public records, the custodian may apply to the governor requesting that the governor by executive order prohibit the furnishing of copies, printouts or photographs for such commercial purpose. The governor, upon application from a custodian of public records, shall determine whether the commercial purpose is a misuse or an abuse of the public record. If the governor determines that the public record shall not be provided for such commercial purpose he shall issue an executive order prohibiting the providing of such public records for such commercial purpose. If no order is issued within thirty days of the date of application, the custodian of public records shall provide such copies, printouts or photographs upon being paid the fee determined pursuant to subsection A of this section.

C. A person who obtains public records for a commercial purpose without indicating the commercial purpose or who obtains a public record for a noncommercial purpose and uses or knowingly allows the use of such public record for a commercial purpose or who obtains a public record for a commercial purpose and uses or knowingly allows the use of such public record for a different commercial purpose or who obtains a public record from anyone other than the custodian of such records and uses them for a commercial purpose shall in addition to other penalties be liable to the state or the political subdivision from which the public record was obtained for damages in the amount of three times the amount which would have been charged for the public record had the commercial purpose been stated plus costs and reasonable attorneys' fees or shall be liable to the state or the political subdivision for the amount of three times the actual damages if it can be shown that the public record would not have been provided had the commercial purpose of actual use been stated at the time of obtaining the records.

D. As used in this section "commercial purpose" means the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation *or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of such public record*. Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in a judicial or quasi-judicial body of this state or a political subdivision of this state.

Id. (emphasis added).

information on computer tapes.²⁵⁰ In addition, the New Mexico statute makes improper use of public records a misdemeanor and precludes anyone so convicted from state employment for five years.²⁵¹

On the federal side, the Office of Management and Budget [OMB] said that Congress clearly intended to distinguish between commercial and noncommercial users and to shift some of the cost burden onto commercial users.²⁵² After being criticized for its initial attempt to define "commercial users,"²⁵³ the OMB came up with this definition:

The term "commercial use request" refers to a request from or on behalf of one who seeks information for a use or purpose that further the commercial, trade, or profits interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine the use to which a requester will put the documents requested. Moreover, where an agency has *reasonable cause to doubt* the use to which a requester will put the records sought, or where that use is not clear from the request itself, agencies should seek *additional clarification* before assigning the request to a specific category.²⁵⁴

The inherent delay built into this system, with language about an agency's "reasonable cause to doubt the use" and the agency's seeking "additional clarification" creates legitimate concern among individuals seeking speedy access to public records.

The term "news media" as defined by the OMB is "an entity that is organized and operated to publish or broadcast news to the public," and to be "news," the information must be "current."²⁵⁵ As for the dollars-and-cents difference, "Only requesters who are seeking documents for commercial use may be charged for time agencies spend reviewing records to determine whether they are exempt from mandatory disclosure."²⁵⁶ The "news media" pay for "cost of reproduction alone, excluding charges for the first 100 pages."²⁵⁷

²⁵⁰ N.M. STAT. ANN. § 15-1-9(C) (Michie 1992):

The state agency which has inserted data in a data base, with the approval of the secretary [of the commission of public records], may authorize a copy to be made of a computer tape or other medium containing a computerized data base of a public record for any person if the person agrees: (1) not to make unauthorized copies of the data base; (2) not to use the data base for any political or commercial purpose unless the purpose and use is approved in writing by the secretary and the state agency that created the data base; (3) not to use the data base for solicitation or advertisement when the data base contains the name, address or telephone number of any person unless such use is otherwise specifically authorized by law; (4) not to allow access to the data base by any other person unless the use is approved in writing by the council and the state agency that created the data base; and (5) to pay a royalty or other consideration to the state as may be agreed upon by the secretary and the state agency that created the data base.

²⁵¹ § 15-1-9(G).

²⁵² Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines (January 18, 1987) *reprinted in* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, *supra* note 60, at A-84.

²⁵³ *Id.* at A-85.

²⁵⁴ *Id.* at A-94 (emphasis added).

²⁵⁵ *Id.* at A-88.

²⁵⁶ *Id.* at A-95 (§ 7(c)).

²⁵⁷ *Id.* at A-97 (§ 8(c)).

Many states provide for waivers or reductions in fees for news media and others operating primarily in the public interest.²⁵⁸ Although this statute discriminates between news media and non-news media in terms of providing for waivers, it does not discriminate regarding purpose. Reviewing “purpose” smacks of censorship. A story by journalist Elliot Jaspin illustrates the danger. In 1985, a New Hampshire executive official, part of Governor Sununu’s administration, balked at legislators’ requests for access to the state’s computerized financial records, saying, “We don’t need the scrutiny of people who might draw conclusions that are not in the best interests of the state.”²⁵⁹ Any statute which gives the power to pass on “purpose” gives the power to impede access.

(D) Electronic Services and Products. [A] public agency [shall] provide electronic services and products involving public records to members of the public. A public agency is encouraged to make information available in usable electronic formats to the greatest extent feasible. The activities authorized under this section may not take priority over the primary responsibilities of a public agency.

(1) Public agencies shall include in a contract for electronic services and products provisions that

(a) protect the security and integrity of the information system of the public agency and of information systems that are shared by public agencies; and

(b) limit the liability of the public agency providing the services and products.

(2) Each public agency shall [consult with the Information Technology Office, established under this chapter, to develop] the electronic services and products offered by the public agency to the public under this section.

(3) When offering on-line access to an electronic file or database, a public agency also shall provide without charge on-line access to the electronic file or database through one or more public terminals.

(4) A public agency may not make electronic services and products available to one member of the public and withhold them from other members of the public.²⁶⁰

²⁵⁸ See *infra* notes 293-94 and accompanying text.

²⁵⁹ Jaspin, *supra* note 52, at 13.

²⁶⁰ ALASKA STAT. §§ 09.25.115 (a), (d)-(h) (1992). For selected other approaches to electronic services, see, for example, Florida, which provides in part:

As an additional means of inspecting, examining, and copying public records of the executive branch, judicial branch, or any political subdivision of the state, public records custodians may provide access to the records by remote electronic means The custodian shall provide safeguards to protect the contents of public records from unauthorized remote electronic access or alteration and to prevent the disclosure or modification of those portions of public records which by general or special law are exempt

FLA. STAT. ANN. § 119.085 (West 1982). See also Texas, which provides:

The secretary of state may establish a system to provide access by electronic data transmittal processes to information that is (1) stored in state computer record banks The secretary of state may: (1) develop computer software to facilitate the discharge of the constitutional and statutory duties of the office; and (2) enter agreements to transfer the software on the terms and conditions specified in the agreements The secretary of state shall set and charge a fee for access to information . . . in an amount reasonable and necessary to cover the costs of establishing and administering the system The secretary of state may assess a reasonable fee for a transfer of software

The word "shall" is substituted for the word "may"; and public agencies shall "consult with" the state board to "develop" electronic services instead of notifying the state board of electronic services developed by the agencies. These changes make the model statute progressive in mandating the provision of access via electronic means rather than making it optional.

States are just beginning to open up on-line access to users. Such access, of course, is the ultimate in convenience for the requester, as he or she does not have to leave home or office to gain information. Also, on-line access is extremely convenient for custodians, once an on-line system is in place, because no members of a staff have to spend time and energy making searches or duplicating records; the requester does the searching and duplicating from his or her computer. Remote access will become more and more important as there is an increase in the number of individuals with computer modems, which make possible remote electronic access. A U.S. Census Bureau study says that 15% of U.S. households had personal computers (PCs) by October 1989, and that 23% of those households, or more than 3 million, had modems.²⁶¹ A San Jose, California firm, Dataquest, estimated that 22.4% of households, or 21.1 million, had PCs in 1990, and 36% of those, or 7.6 million, had modems. The estimate for 1991 was that 42% of households with PCs had modems, for 9.9 million modems. The Dataquest forecast for 1992 is 12.7 million modems.²⁶² As the use of modems increases, the demand for access via modems is likely to increase as well, pushing legislators to change statutory language to mandate such access.

(5) Definition of "electronic services and products." "Electronic services and products" means computer-related services and products provided by a public agency, including:

(a) 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;

(b) duplicating public records in alternative formats not used by a public agency, providing periodic updates of an electronic file or database, or duplicating an electronic file or database from a geographic information system;²⁶³

(c) providing on-line access to an electronic file or database;

(d) providing information that cannot be retrieved or generated by the existing computer programs of the public agency;

TEX. GOV'T CODE ANN. §§ 405.018 (a)(1), (b)(1)-(2), (d) (West 1990).

Oregon is an example of a state authorizing electronic access to a specialized type of information: "The Secretary of State may furnish, upon request, computer remote access to the Uniform Commercial Code data base to any person upon payment of a fee prescribed by the Secretary of State and sufficient to pay at least the actual cost of such service." OR. REV. STAT. § 79.4080(4) (1992).

²⁶¹ *Computer Use in the United States: 1989*, U.S. Census Bureau, Series P-23, No. 171. See also *More Modem Numbers*, BOARDWATCH MAGAZINE, Dec. 1991, at 15.

²⁶² *More Modem Numbers*, *supra* note 261, at 15-16.

²⁶³ KY. REV. STAT. ANN. § 61.960(2) (Michie/Bobbs-Merrill 1990). See also *supra* notes 53 and 89 and accompanying text on geographic information systems. Perhaps a definition of "geographic information system" would be helpful. Kentucky defines a "geographic information system" as

an entire formula, pattern, compilation, program, device, method, technique, process, digital database, or system which electronically records, stores, reproduces, and manipulates by computer geographic and factual information which has been provided from other sources and compiled for use by a public agency, either alone or in cooperation with other public or private entities.

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(e) providing functional electronic access to the information system of the public agency; in this subparagraph, "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;

(f) providing software developed by a public agency or developed by a private contractor for a public agency;

(g) generating maps or other standard or customized products from an electronic geographic information system.²⁶⁴

In contrast to this section, many states' statutes have language attempting to minimize the work required of a public body regarding format of public records.²⁶⁵ On the positive side for requestors wanting tailoring, Oregon says:

If the public record is maintained in a machine readable or electronic form, the custodian shall provide copies of the public record in the form requested, if available. If the public record is not available in the form requested, it shall be made available in the form in which it is maintained. . . . The public body may establish fees reasonably calculated to reimburse it for its actual cost in making such records available including costs for summarizing, compiling or tailoring such record, either in organization or media, to meet the person's request.²⁶⁶

Iowa also provides some encouraging language. Voter registration lists

shall be produced in the order and form specified by the requester, so long as that order and form are within the capacity of the record maintenance system used by the registrar. . . . Beginning not later than January 1, 1977, every voter registration record shall be maintained in computer readable form according to the specifications of the registrar.²⁶⁷

(E) Mail Requests. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.²⁶⁸

Mail requests, of course, can be highly convenient for requesters, especially for those who live long distances from agencies holding the records that the requester needs. Also,

²⁶⁴ ALASKA STAT §§ 09.25.220.1 (C)-(G) (1992).

²⁶⁵ See, e.g., CAL. GOV'T CODE § 6256 (West 1983) ("Computer data shall be provided in a form determined by the agency."); IND. CODE ANN. § 5-14-3-3(c) (Burns 1987) ("a public agency may or may not, in accordance with a nondiscriminatory uniform policy of the agency, permit a person to duplicate or obtain a duplicate copy of a computer tape, computer disc, microfilm, or other similar or analogous record system that contains information owned by or entrusted to the agency"); R.I. GEN. LAWS § 38-2-3(f) (1990) (public body need not reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made); VA. CODE ANN. § 2.1-342.4 (Michie 1992) (Public bodies shall not be required to create or prepare a particular requested record if it does not already exist).

²⁶⁶ OR. REV. STAT. §§ 192.440(2), (3) (1990).

²⁶⁷ IOWA CODE ANN. §§ 48.5.2(a), 48.5.4 (West 1991).

²⁶⁸ WASH. REV. CODE ANN. § 42.17.270 (West 1991). Wisconsin has a similar provision. WIS. STAT. ANN. § 19.35(i) (West 1986).

mail requests can reduce the amount of traffic in and out of custodians' offices and the length of lines in extremely busy agencies; thus, mail requests should also reduce some of the stress on busy custodians that large numbers of in-person requests might create.

(F) Lists of Public Records to be Available. Each public body shall maintain and make available for inspection and copying a reasonably current list of all types or categories of records under its control. The list shall be reasonably detailed in order to aid persons in obtaining access to public records pursuant to this Act.²⁶⁹

Getting an index is a step toward gaining access to files themselves, and obviously the absence of an index can greatly delay access. Senator Leahy's proposed amendments to the federal Freedom of Information Act call for "an index of all information retrievable or stored in an electronic form by the agency."²⁷⁰ A recent case indicates the usefulness of indexes. Barbara Ann Crancer, daughter of former Teamsters Union boss Jimmy Hoffa, won a ruling compelling the FBI to produce an index on the voluminous records about her father's disappearance.²⁷¹ Tennessee is an example of a state which requires an "index" to be kept. The index may be kept on computer so long as a hard-copy backup exists, and if computer indexes do exist then the use of hard copies may be banned or restricted.²⁷²

(G) Descriptions for Persons Lacking Computer Knowledge. Each public body shall furnish upon request a description of the manner in which public records stored by means of electronic data processing may be obtained in a form comprehensible to persons lacking knowledge of computer language or printout format.²⁷³

This is similar to the requirement that a requestor shall be informed of the data's "organization and arrangement."²⁷⁴

(H) Times for Inspection of Public Records. Public records shall be available for inspection and copying during the customary office hours of the agency: *Provided*, that if the agency does not have customary office hours of at least 30 hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency or its representative agree on a different time.²⁷⁵

(I) Facilities. The [custodian of public records] shall provide any person who is authorized to inspect or copy a record...with facilities

²⁶⁹ ILL. ANN. STAT. ch. 116, para. 205.5 (Smith-Hurd 1988).

²⁷⁰ S. 1939, *supra* note 58; S. 1940, *supra* note 59.

²⁷¹ Crancer v. Dep't of Justice, 950 F.2d 530 (8th Cir. 1991).

²⁷² "The use of the computer hardcopy printouts by the public may be banned or restricted by each register so long as computers or word processors are available and operable for viewing the information contained in the restricted printouts." TENN. CODE ANN. § 10-7-202(b) (1992).

²⁷³ ILL. ANN. STAT. ch. 116 para. 205 (Smith-Hurd 1988).

²⁷⁴ See *supra* notes 207-08 and accompanying text.

²⁷⁵ GA. CODE ANN. § 22.4 (Harrison 1992), IOWA CODE ANN. § 22.4 (West 1990), and WASH. REV. CODE ANN. § 42.17.280 (West 1991) are almost identical.

comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.²⁷⁶

(J) Record in Active Use or Storage. If the record is in active use or in storage and, therefore, not available at the time a person requests access, the custodian shall so inform the person and make an appointment for the citizen to examine such records as expeditiously as they may be made available.²⁷⁷

(K) Making Arrangements for Copying Records. If the custodian does not have facilities for making copies, printouts, or photographs of records which the applicant has the right to inspect, the applicant shall be granted access to the records for the purpose of making copies, printouts, or photographs. The copies, printouts, or photographs shall be made while the records are in the possession, custody, and control of the custodian thereof and shall be subject to the supervision of such custodian. When practical, they shall be made in the place where the records are kept, but, if it is impractical to do so, the custodian may allow arrangements to be made for this purpose. If other facilities are necessary, the cost of providing them shall be paid by the person desiring a copy, printout, or photograph of the records. The official custodian may establish a reasonable schedule of times for making copies, printouts, or photographs and may charge the same fee for the services rendered by him or his deputy in supervising the copying, printing out, or photographing as he may charge for furnishing copies under subsection [5 of this chapter].²⁷⁸

(L) Viewing and Reproduction Equipment for Microfiche Records. If the original records or documents are disposed of or destroyed [but copies are maintained on microfilm or microfiche], the [records custodian] shall . . . provide suitable equipment for displaying such record or document in whole or in part by projection to no less than its original size, or for preparing for persons entitled thereto copies of the record or document . . .²⁷⁹

(M) Copies of Audio Tapes. Except as otherwise provided by law, any requester has a right to receive from [a custodian] of a record

²⁷⁶ MICH. COMP. LAWS ANN. § 4.1801(3) (West 1981), N.M. STAT. ANN. § 14-2-2 (Michie 1988), and WIS. STAT. ANN. § 19.35(2) (West 1986) say reasonable facilities for inspection.

²⁷⁷ R.I. GEN. LAWS § 38-2-3(d) (1990), S.C. CODE ANN. § 30-3-30 (Law. Co-op. 1991) says the custodian shall set a date and hour within a reasonable time at which the record will be available.

²⁷⁸ COLO. REV. STAT. ANN. § 24-72-205 (2) (West 1988). In comparison, VT. STAT. ANN. tit. 1, § 316(c) (1985) does not require a public agency without photocopying facilities to provide or arrange for such service.

²⁷⁹ S.D. CODIFIED LAWS ANN. § 1-27-7 (1992). In TEX. HIGH. CODE ANN. § 6663a.1(c) (West 1992), drivers license and safety records may be created on "computer output microfilm," and the agencies "shall provide microfilm readers and printers in adequate numbers to allow the public convenient and inexpensive access to records . . ."

which is in the form of a comprehensible audio tape recording a copy of the tape recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.²⁸⁰

(N) Copies of Video Tapes. Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a video tape recording a copy of the tape recording substantially as good as the original.²⁸¹

(O) Copies of Records Not in Readily Comprehensible Form. Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.²⁸²

(P) Photographs of Noncopyable Records. Except as otherwise provided by law, any requester has a right to inspect any record... the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record [shall] permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.²⁸³

(Q) Notes of Public Meetings Available for Inspection. After the completion of a meeting of [public] bodies or agencies, every citizen, during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all notes, materials, tapes or other sources used for compiling the minutes of such meetings, and to make memoranda, abstracts, photographic or photostatic copies, or tape record such notes, materials, tapes or sources inspected, except as otherwise prohibited by statute.²⁸⁴

(R) Accessibility for Researchers. Full convenience and comprehensive accessibility shall be allowed to researchers... to carry out extensive research and complete copying of all records containing government data except as otherwise expressly provided by law.²⁸⁵

(S) Subscription to Future Issuances of Public Records. A person has a right to subscribe to future issuances of public records which are created, issued, or disseminated on a regular basis. A subscription shall

²⁸⁰ WIS. STAT. ANN. § 19.35(c) (West 1986) (model statute substitutes "a custodian" for "an authority having custody").

²⁸¹ § 19.35(d).

²⁸² § 19.35(e).

²⁸³ § 19.35(f) (model statute replaces "may" with "shall").

²⁸⁴ N.H. REV. STAT. ANN. § 91-A:4.II (1990).

²⁸⁵ MINN. STAT. ANN. § 13.03.2 (West 1988). The statute delineates the researchers by adding, "including historians, genealogists and other scholars."

be valid for up to 6 months, at the request of the subscriber, and shall be renewable.²⁸⁶

(T) Contracting with Nongovernmental Bodies Shall Not Diminish the Right to Examine Public Records. A government body shall not prevent the examination or copying of a public record by contracting with a nongovernment body to perform any of its duties or functions.²⁸⁷

While the government's contracting with nongovernmental bodies should not restrict citizens' rights to government data, statutes should not prohibit the government from entering into contracts with nongovernmental bodies. For instance, many state governments enter into contracts with West Publishing Company for the publication of state appellate court decisions. The commercial publishing company compiles and prints decisions so much faster and better than the state governments did, with more research tools included (key numbers), that most states no longer publish their own official versions of court decisions. This speed and quality benefits citizens. However, citizens can still get copies of appellate court decisions from the courts.

(U) Records to be in English. With the exception of physicians' prescriptions, all records, reports and proceedings required to be kept by law shall be in the English language or in a machine language capable of being converted to the English language by a data processing device or computer.²⁸⁸

The intent of this statute is to assure that records will be converted into comprehensible terms. Allan Adler comments:

[R]equiring that all records shall be in the English language raises a politically volatile issue, and probably does so unnecessarily. The motives of advocates of "English only" . . . have generated controversy and discord among ethnic groups in recent years. The extent to which government records, especially at the State and local level, would *not* be in the English language is probably so slight that it should be carefully considered whether the need to raise this issue is outweighed by the problems it may generate.²⁸⁹

²⁸⁶ MICH. COMP. LAWS ANN. § 4.1801(3) (West 1985).

²⁸⁷ IOWA CODE ANN. § 22.2 (West 1989). For protection of access to computerized records, see Connecticut:

Except as otherwise provided by state statute, no public agency shall enter into a contract with, or otherwise obligate itself to, any person if such contract or obligation impairs the right of the public under this chapter to inspect or copy the agency's nonexempt public records existing online in, or stored on a device or medium used in connection with, a computer system owned, leased or otherwise used by the agency in the course of its governmental functions.

CONN. GEN. STAT. ANN. § 1-19(b) (1988).

²⁸⁸ OR. REV. STAT. § 192.310 (Supp. 1991).

²⁸⁹ Adler Letter, *supra* note 231, at 9.

The point remains that all government records must be producible in *alphabetical* form, not just *binary* form.²⁹⁰

(V) Electronic information that is provided in printed form shall be made available without codes or symbols, unless accompanied by an explanation of the codes or symbols.²⁹¹

COSTS

5. (A) No Fee for Inspection. If a person requests access [to public government records] for the purpose of inspection, the responsible authority may not assess a charge or require the requesting person to pay a fee to inspect ~~data~~ [records].²⁹²

(B) Mandatory Waiver of Fees.

(1) Public Interest. In no case shall a search fee be charged when the release of said documents is in the public interest, including, but not limited to, release to the news media, scholars, authors, and taxpayers seeking to determine whether those entrusted with the affairs of the government are honestly, faithfully, and competently performing their duties as public servants.²⁹³

It is common for states to provide for reductions or waivers of fees in the public interest. These reductions or waivers are permissive in states that use "may" and "waive or reduce," and mandatory in those that use "shall" and "waive."²⁹⁴

(2) Less than \$5. A public agency [shall] waive a fee of \$5 or less if the fee is less than the cost to the public agency to arrange for payment.²⁹⁵

(3) Indigents. The public agency shall waive any fee provided for in this section when the person requesting the records is an indigent individual.²⁹⁶ [For purposes of determining indigency, Division of Family Services standards shall be used.]²⁹⁷

(4) Veterans and Government Pension Benefits. Whenever a copy of any public record is required by the Veterans' Administration [or the United States Bureau of Pensions or the Social Security Administration] to be used in determining the eligibility of any person to participate in benefits made available by the Veteran's Administration [or the United

²⁹⁰ On the difficulty of reading even a simple phrase in binary form, see note 154.

²⁹¹ ALASKA STAT. § 09.25.110(i) (Supp. 1992).

²⁹² MINN. STAT. ANN. § 13.03.3 (West 1988 & Supp. 1992). *See also* WASH. REV. CODE ANN. § 42.17.300 (West 1991) ("No fee shall be charged for the inspection of public records.").

²⁹³ OKLA. STAT. ANN. tit. 51, § 24A.5 (West 1988).

²⁹⁴ For an illustration of this difference, see CONN. GEN. STAT. ANN. § 1-15(d) (West Supp. 1992) ("shall" and "waive"); MICH. COMP. LAWS ANN. 15.234(1) (West 1981 & Supp. 1992) ("may" and "waiver or reduction").

²⁹⁵ ALASKA STAT. § 09.25.110(d) (Supp. 1992). "Shall" is substituted for "may."

²⁹⁶ CONN. GEN. STAT. ANN. § 1-15 (West Supp. 1992). MICH. COMP. LAWS ANN. § 15.234(1) (West 1981 & Supp. 1992) provides a waiver for "the first \$20.00" to indigents.

²⁹⁷ Every state has a similar division, and its standards or some other appropriate agency standards should be delineated.

States Bureau of Pensions or Social Security Administration], the official charged with the custody of such public record shall, without charge, provide the applicant for the benefit or any person acting on his [or her] behalf or the representative of the Veterans' Administration with a certified copy or copies of such records.²⁹⁸

Perhaps states would wish to expand such waivers of fees to other groups. This example is not meant to exclude other groups that need records from one agency to meet the requirements of another agency.

(5) Governmental Departments. One department of the state government shall not be required to pay any fee to any other department of the state government for the preparation and certification by the latter of any public document.²⁹⁹

This provision allows the government to avoid the time and expense required to merely shift money from one pocket to the other. Of course, agencies from whom greater demands are made should receive adequate appropriations from the state to meet those demands.

(6) Unreasonable Denial of Fee Waiver. A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney in the same manner as a person petitions when inspection of a public record is denied.... The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied.³⁰⁰

(C) Fees

(1) Use of Most Economical Means. A public body shall utilize the most economical means available for providing copies of public records.³⁰¹ Fees shall not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.³⁰²

(2) Actual Reproduction Costs. A [public body] may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of

²⁹⁸ NEV. REV. STAT. ANN. § 239.020 (Michie 1992). The language "United States Bureau of Pensions" is from NEB. REV. STAT. § 84-712.02 (1987). See also ARIZ. REV. STAT. ANN. § 39-122(A) (1985) (prohibiting charging for copies or searches when they are to be used "in connection with a claim for a pension, allotment, allowance, compensation, insurance or other benefits... to be presented to the United States or a bureau or department thereof"); COLO. REV. STAT. ANN. § 24-72-112 (West 1988); N.M. STAT. ANN. § 14-2-2.1 (Michie 1988).

²⁹⁹ HAW. REV. STAT. § 92-26 (1985).

³⁰⁰ OR. REV. STAT. § 192.440 (1991).

³⁰¹ MICH. COMP. LAWS ANN. § 15.234(3) (West 1981 & Supp. 1992). For similar requirements, see GA. CODE ANN. § 50-18-71(e) (1990); S.C. CODE ANN. § 30-4-30(b) (Law. Co-op. 1991).

³⁰² OKLA. STAT. ANN. tit. 51 § 24A.5.3 (West 1988).

the record, unless a fee is otherwise specifically established or authorized to be established by law.³⁰³

States may want to create an exception to this provision for commercially valuable information because of the increased cost that may be involved in preparing such information. Minnesota allows for the collection of fees related to the certification and compilation of the information:

When a request...involves any person's receipt of copies of public government data that has commercial value and is a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, data base, or system developed with a significant expenditure of public funds by the agency, the responsible authority may charge a reasonable fee for the information in addition to the costs of making, certifying, and compiling the copies. Any fee charged must be clearly demonstrated by the agency to relate to the actual development costs of the information. The responsible authority, upon the request of any person, shall provide sufficient documentation to explain and justify the fee being charged.³⁰⁴

Among some of the most commercially valuable data is geographic information system data.³⁰⁵ Attempts to manage requests for copies of databases or geographic information systems have resulted in legislation that is vague and gives agencies too much discretion over how much to charge for the information. For instance, Iowa's statute says:

[A] government body which maintains a geographic computer data base is not required to permit access to or use of the data base by any person except upon terms and conditions acceptable to the governing body. The governing body shall establish reasonable rates and procedures for the retrieval of specified records, which are not confidential records....³⁰⁶

Some statutes, however, go into great detail. Kentucky requires a statement of commercial purpose³⁰⁷ and provides a specific formula for calculating the fee to be charged.³⁰⁸ The statute makes obtaining a copy of all or any part of a database or a geographic

³⁰³ WIS. STAT. ANN. § 19.35 (West 1986). Statutes with similar language include CAL. GOV'T CODE § 6257 (West Supp. 1992); KY. REV. STAT. ANN. § 61.874(2) (Michie/Bobbs-Merrill 1986); WASH. REV. CODE ANN. § 42.17.300 (West 1991).

³⁰⁴ MINN. STAT. ANN. § 13.03.3 (West 1988 & Supp. 1992).

³⁰⁵ For more on GIS, see *supra* notes 53, 89, and 263 and accompanying text.

³⁰⁶ IOWA CODE ANN. § 22.2(3) (West 1989). On the inadequacy of "reasonable" rates, see *infra* notes 321-26.

³⁰⁷ KY. REV. STAT. ANN. § 61.970 (Michie/Bobbs-Merrill Supp. 1992). See *supra* notes 249-51 and accompanying text for a comparison with the restrictive statutes in Arizona and New Mexico, and for problems with distinguishing between a commercial and noncommercial purpose.

³⁰⁸ Kentucky's formula for calculating the fee is based on:

- (a) Cost to the public agency of time; equipment, and personnel in the production of the database or the geographic information system; (b) Cost to the public agency of the creation, purchase, or other acquisition of the database or the geographic information system; and (c) Value of the commercial purpose for which the database or geographic system is to be used.

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information system unlawful in certain instances,³⁰⁹ but allows for inspection of these records when not requested for a commercial purpose.³¹⁰

States may also want to create an exception to actual reproduction costs to help build an electronic services system. Alaska employs this language: "The fee for electronic services and products must be based on recovery of the actual incremental costs of providing the electronic services and products, and a reasonable portion of the costs associated with building and maintaining the information system of the public agency."³¹¹

The Office of Technology Assessment acknowledges the probable endurance of user fees: "Given the trend toward cost recovery for Federal agency information products, it seems likely that user fees will continue to help support Federal online database delivery systems."³¹² A major concern, however, is that the government will try to use on-line or other computer access as a money-making proposition. For example, in 1991, the federal Merchant Marine and Fisheries Committee proposed charging thirty-five cents per minute for access to computerized Federal Maritime Commission tariff data. Resale of the information would result in payment of a royalty. This modest money-making proposal resulted in a storm of protest from, among others, information merchants and press groups. Representative Robert E. Wise, Jr., Chairman of the Government Operations Subcommittee on Government Information, Justice and Agriculture, responded that "using federal information resources as revenue sources is dangerous and ultimately counterproductive to open government."³¹³ Critics of such proposals are concerned that government, facing budget problems, will be tempted "to treat government data like a mother lode to be sold to the highest bidder."³¹⁴

Some states specifically mention fees for computerized information. Missouri limits costs to those of copies and staff time: "Fees for providing access to public records maintained on computer facilities, recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices, shall include only the cost of copies and staff time required for making copies."³¹⁵ Maine targets computer

³⁰⁹ It shall be unlawful for a person to obtain a copy of all or any part of a database or geographic information system for a: (a) Commercial purpose without stating the commercial purpose; or (b) Specified commercial purpose, and to use or to knowingly allow the use of the database or the geographic information system for a different commercial purpose; or (c) Noncommercial purpose, and to use or knowingly allow the use of the database or the geographic information system for a commercial purpose. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the database or the geographic information system for a commercial purpose as a result of its publication or broadcast unless it has given its express permission for such commercial use.

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³¹⁰ § 61.975.

³¹¹ ALASKA STAT. § 09.25.115(b) (Supp. 1992). See also FLA. STAT. ANN. § 119.085 (West Supp. 1992) (a fee for remote electronic access shall include the direct and indirect costs of providing such access).

³¹² OTA, *INFORMING THE NATION*, *supra* note 1, at 223.

³¹³ Eliza Newlin, *Whose Information Is It Anyway?*, 23 NAT'L J. 1892 (1991).

³¹⁴ *Id.* For an idea of how much revenue is potentially at stake, see Howe, *supra* note 21, at 45 (describing Massachusetts' Governor Weld's proposal that the Registry of Motor Vehicles sell on-line computer access to its records; the Governor's aides said the state stood to gain \$5 million per year on this money-making venture, and that New York generates \$15 million per year off similar sales of information).

³¹⁵ MO. ANN. STAT. § 610.026.1(2) (Vernon 1988). See also IDAHO CODE § 9-338(8) (1990) (costs . . . may "not exceed the sum of" the "direct cost of copying" and "[t]he standard cost, if any for selling the same information in the form of a publication"); IND. CODE ANN. § 5-14-3-8(g) (Burns 1987) (costs may not exceed the sum of "the agency's direct cost of supplying the information in that form" and "the standard cost, if any, for selling the same information in the form of a publication"); KAN. STAT. ANN.

records for advance payment, as well as perhaps giving inhospitable custodians grounds for delay.³¹⁶ Advance payment of costs is required by other states for copies of records in general.³¹⁷ In balancing the interests between the state and individuals, advance payment seems reasonable.

Costs of gaining computer tapes can be unreasonably high. For instance, persons wanting voter registration lists in Arizona will pay “*five cents* for each name appearing on the register for a printed list and *ten cents* for each name for an electronic data medium, plus the cost of the blank computer tape or disc if furnished by the recorder.”³¹⁸ Some statutes, on their faces, warn of high costs. Costs in Texas might be Texas sized: “The costs of providing the record shall be in an amount that reasonably includes all costs related to providing the record, including costs of materials, labor, and *overhead*.”³¹⁹ “Overhead” could include helping to pay for the building and utilities.³²⁰

Requesters of information concerned with cost containment may find the applicable statute unclear. In a rather amusing case, the Office of the Medical Investigator in New Mexico, in effect, tried to charge Robert Johnson, Executive Director for the New Mexico Foundation for Open Government, for chair rental as he read a report; a consent decree nullified the ridiculous charge.³²¹ “Actual” or “reasonable” cost language lacks clarity in many cases. An accountant’s view would require that the cost include overhead such as real estate and utilities costs. Virginia uses both “reasonable” and “actual” cost lan-

§ 45-219(c)(2) (1986) (“the fees shall include only the cost of any computer services, including staff time required”); KY. REV. STAT. ANN. §§ 61.975(1)-(2) (Michie/Bobbs-Merrill Supp. 1992) (database or geographic information system records “not requested for a commercial purpose . . . shall be available for copying . . . at a reasonable fee not to exceed the actual cost of copying, not including the cost of staff time”); KY. REV. STAT. ANN. § 61.975(4) (Michie/Bobbs-Merrill Supp. 1992) (fees shall not exceed the cost of physical connection to the system and the reasonable cost of computer time access charges); VA. CODE ANN. § 2.1-342(A)(4) (Michie Supp. 1992) (reasonable charges, not to exceed the actual cost to the public body).

³¹⁶ Maine says:

[W]henever inspection cannot be accomplished without translation of mechanical or electronic data compilations into some other form, the person desiring inspection may be required to pay the State in advance the cost of translation and both translation and inspection may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the record sought and provided further that the cost of copying any public record to comply with this section shall be paid by the person requesting the copy.

ME. REV. STAT. ANN. tit. 1, § 408 (West 1989).

³¹⁷ See ALASKA STAT. § 09.25.110(c) (Supp. 1992); CONN. GEN. STAT. ANN. § 1-15 (West Supp. 1992) (advance payment required if charges are \$10 or more); IDAHO CODE § 9-338(8) (1990); KAN. STAT. ANN. § 45-218(f) (1986); MICH. COMP. LAWS ANN. § 15.234(2) (West 1981 & Supp. 1992) (requiring a “good faith deposit,” not to exceed one half the cost, if the fee “exceeds \$50”); MISS. CODE ANN. § 25-61-7 (1991); TEX. REV. CIV. STAT. art. 6252-17a(11) (West Supp. 1993) (requiring advance payment for an “unduly costly” record when “its reproduction would cause undue hardship to the . . . agency if the costs were not paid”); VA. CODE ANN. § 2.1-342(A)(4) (Michie Supp. 1992) (advance payment if charges are likely to exceed \$200).

³¹⁸ ARIZ. REV. STAT. ANN. § 16-168(E) (Supp. 1992); See also N.M. STAT. ANN. § 15-1-9(C) (Michie 1991) (copies of computer tapes or other mediums containing a computerized database of a public record may be accompanied by a royalty or other consideration).

³¹⁹ TEX. REV. CIV. STAT. art. 6252-17a(9)(b) (West Supp. 1993) (emphasis added).

³²⁰ CAL. REV. & TAX. CODE §§ 408.3(a), (c) (West 1987) (costs for property characteristics information may include indirect costs such as “overhead, personnel, supply, material, office, storage, and computer costs”). See also HAW. REV. STAT. § 92-21 (Supp. 1991) (reproduction costs include labor cost for search and actual time for reproducing, material cost, electricity cost, equipment cost, rental cost, cost for certification, and other related costs).

³²¹ Letter from Robert Johnson to Sandra Davidson Scott, Jan. 20, 1992 (on file with author).

guage: "The public body may make reasonable charges for the copying, search time and computer time expended in the supplying of . . . records; however, such charges shall not exceed the actual cost to the public body in supplying such records."³²² Do "actual" costs include "overhead"? Is "overhead" a "reasonable" charge?³²³ The OMB's *Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines* addresses these questions with its definition of "direct costs":

those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary for the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating and lighting the facility in which the records are stored.³²⁴

The OMB has been criticized for exceeding its statutory authorization in its "restrictive" interpretations in its schedule of fees.³²⁵ However, the report makes clear the OMB is trying to strike the balance that Congress wanted: "While . . . Congress did not intend that fees be erected as barriers to citizen access, it is quite clear that the Congress did intend that agencies recover of [sic] their costs."³²⁶

(3) Staff Fees Only In Cases of Unreasonably High Costs. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information . . . unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular

³²² VA. CODE ANN. § 2.1-342(A)(4) (Michie Supp. 1992).

³²³ Effective July 1, 1992, CONN. GEN. STAT. ANN. § 1-15(b) (West Supp. 1992) spells out that costs for computerized information "other than a printout" shall include "only" staff time, the cost to the agency if an "outside professional electronic copying service" or an outside "computer storage and retrieval service" is used, or, if agency equipment is used, "the actual cost of the storage devices or media provided to the person making the request in complying with such request" (emphasis added). In short, the new language will not avoid the old problem of the unclear language of "actual cost."

States using "actual cost" or "cost" language include: CONN. GEN. STAT. ANN. § 1-15 (West Supp. 1992); ILL. ANN. STAT. ch. 116, para. 206(a) (Smith-Hurd 1988 & Supp. 1992); IOWA CODE ANN. § 22.3 (West 1989); MICH. COMP. LAWS ANN. § 15.234(1) (West 1981 & Supp. 1992); MINN. STAT. ANN. § 13.03.3 (West 1988 & Supp. 1992); MISS. CODE ANN. § 25-61-7 (1991); N.H. REV. STAT. ANN. § 91-A:4(IV) (1990); N.Y. PUB. OFF. LAW § 87.1(b) (Consol. 1987); VT. STAT. ANN. tit. 1, § 316(b) (1985); W. VA. CODE § 29B-1-3(5) (1993).

States using "reasonable" cost language include: ARIZ. REV. STAT. ANN. § 39-121.03 (1985); COLO. REV. STAT. § 24-72-205 (1988 & Supp. 1992); KAN. STAT. ANN. § 45-219(c) (1989); LA. REV. STAT. ANN. § 44:32(C) (West 1982 & Supp. 1992); MD. CODE ANN., STATE GOV'T § 10-621(a) (1984); MASS. GEN. LAWS ANN. ch. 66, § 10(a) (West 1988 & Supp. 1992); MINN. STAT. ANN. § 13.03.3 (West 1988 & Supp. 1992); R.I. GEN. LAWS § 38-2-4 (1990 & Supp. 1992) (\$15 per hour maximum for search charges); S.C. CODE ANN. § 30-4-30 (Law. Co-op. 1991); UTAH CODE ANN. § 63-2-66 (1989); WYO. STAT. § 16-4-204 (1990).

Some states use fixed prices for various records, e.g., CONN. GEN. STAT. ANN. § 1-15 (West 1988 & Supp. 1992); HAW. REV. STAT. § 92-24 (1985); MASS. GEN. LAWS ANN. ch. 66-10(a) (West 1988 & Supp. 1992) (uses a hodge-podge: "reasonable fee," "actual expense of . . . search," and a list of fees); MONT. CODE ANN. § 2-6-103 (1991); N.J. STAT. ANN. § 47:1A-2 (West 1989 & Supp. 1992); N.M. STAT. ANN. § 14-8-13 (Michie 1988).

³²⁴ LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, *supra* note 60, at A-93, 94.

³²⁵ *Id.* at 198.

³²⁶ *Id.* at A-92, 93.

instance, and the public body specifically identifies the nature of these unreasonably high costs.³²⁷

The language from Illinois is also good: “[F]ees shall exclude the costs of *any* search for and review of the record, and shall not exceed the actual cost of reproduction and certification, unless otherwise provided by State statute.”³²⁸ But Illinois tempers that language with another provision, which says: “Each public body may charge fees reasonably calculated to reimburse its actual cost of reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records.”³²⁹ Charges for use of equipment could be abusive if “actual cost” of “use” included overhead.

Another variation in containing staff fees would exclude from costs a specified number of hours of staff time.³³⁰ Language restricting fees for staff time is highly favorable to requesters. It is also controversial. The argument for such language is that agency staff should be considered to be like most other state employees—police, street sweepers, highway engineers—and should receive payment from general revenue funds. In short, tax dollars should support the highly important governmental activity of maintaining public records and making those records available to the public. Of course, in times of tight government budgetary restraints, user fees have great appeal. However, the critical function of access in an open society militates toward greater general-fund support, including support for staff time.

(4) A public body shall establish and publish procedures and guidelines to implement subsections (C)(1) - (C)(3).³³¹

Michigan had said that these provisions did “not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public”³³² Sale of governmental information by nongovernmental entities operating under contract, of course, is of concern.³³³

(5) [If the public body meets the requirements of subsection (C)(3), [t]he personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks.³³⁴

(6) Estimates. A public body shall provide an estimate of the costs of a request for [information] prior to providing copies.³³⁵

³²⁷ MICH. COMP. LAWS § 4.1801(4).4(3) (1991) (note that Michigan has repealed this statute).

³²⁸ ILL. ANN. STAT. ch. 116, para. 206 (Smith-Hurd 1991).

³²⁹ *Id.*

³³⁰ ALASKA STAT. § 09.25.110(c) (Supp. 1992) (excluding from costs the first five hours per month of staff time and providing: “The personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks.”); MD. CODE ANN., STATE GOV’T § 10-621(b) (1991) (excluding from costs “the first two hours that are needed to search for a public record and prepare it for inspection”).

³³¹ MICH. COMP. LAWS § 4.1801(4).4(3) (1991) (repealed).

³³² § 4.1801(4).4(4) (1991) (repealed).

³³³ See § 4(T) of the model statute.

³³⁴ ALASKA STAT. § 09.25.110 (Supp. 1992).

³³⁵ R.I. GEN. LAWS § 38-2-4 (1991) (substituting “information” for “documents”). According to Virginia law, “charges . . . shall be estimated in advance at the request of the citizen.” VA. CODE ANN. § 2.1-342.4 (Michie 1992).

If agencies have to publish their procedures and guidelines for determining costs, then requesters should be able to determine a ball-park figure for fees prior to making requests. This may aid requesters, for instance, in making long-term plans if they need many records for large projects. Also, it will ensure for requesters that agencies have at least put some thought and effort into determining fees in advance of the requester's asking for records. For custodians, this requirement has the advantage of making them think through their fee-determining procedures in a deliberate, cohesive fashion instead of making decisions on an ad hoc, piecemeal basis.

(7) The [Information Technology Office, established by this chapter,] may cancel the fees established by a public agency . . . if the [Information Technology Office] determines that the fees are unreasonably high.³³⁶

(8) [E]ach public governmental body . . . shall [retain] all [fees received] pursuant to this section.³³⁷ [Such fees shall be used for enhancing access to public records or offsetting access costs.]³³⁸

Giving access to and copying records should not be a money-making proposition for an agency; on the other hand, it should not prove a drain.

Release of Records

6. (A) Prompt Action on Requests for Access. Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body. This period for document production may exceed three days [only under the provisions of 6(A)(2)].³³⁹

Specific time limits are needed to guard against sluggish custodians.

³³⁶ ALASKA STAT. § 09.25.115(g) (Supp. 1992). Alaska exempts the Alaska State Housing Authority and the University of Alaska from this subsection.

³³⁷ This is a modification of Missouri's statute: "[E]ach public governmental body of the state shall remit all moneys received by or for it from fees charged pursuant to this section to the director of revenue for deposit to the general revenue fund of the state." MO. REV. STAT. § 610.026 (1991). See also ILL. ANN. STAT. ch. 116, para. 206(a) (Smith-Hurd 1991) ("Each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records."); W. VA. CODE § 29B-13(5) (1993) ("The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of such records.").

³³⁸ Allan Adler points out that the current federal practice is for fees generated by agencies to go into the U.S. Treasury's "general fund." He says:

For years, there has been an ongoing debate regarding whether allowing the agencies to keep the fees would help offset budgetary burdens and improve FOIA processing, or simply serve as an incentive for the agencies to maximize fee charges to requesters. Within this unresolved debate, it has generally been thought that if fees are to be retained by the agencies, it must be expressly for the purpose of application to FOIA processing costs.

Adler Letter, *supra* note 231, at 10.

³³⁹ MO. REV. STAT. § 610.023(3) (1991) (substituting bracketed material for "for reasonable cause"). See also KY. REV. STAT. ANN. § 61.880 (Michie/Bobbs-Merrill 1986) (three days); LA. REV. STAT. ANN. § 44:32(D) (West 1992) (three days). But see ARK. CODE ANN. § 25-19-105(B) (Michie 1992) (24 hours); MISS. CODE ANN. § 25-16-5(2) (1991) (1 day).

(1) Immediately Available Records. If the public record is immediately available . . . at the time of the application, the public record shall be immediately presented to the . . . person applying for it.³⁴⁰

(2) If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately so notify the applicant and shall designate a place, time and date, for inspection of the public records, not to exceed three (3) [business] days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time and earliest date on which the public record will be available for inspection.³⁴¹

This language from Kentucky is preferable to language in some other state statutes because it expedites the process by not demanding that notification be in writing. Also, it recognizes that three days will not always be sufficient for the custodian to produce records.³⁴²

(3) If the person to whom the application is directed does not have custody or control of the public record requested, such person shall [promptly] so notify the applicant and shall furnish the name and location of the custodian of the public record, if such facts are known to him [or her].³⁴³

(4) If a record does not exist, the custodian shall certify in writing that the record does not exist under the name given to him [or her] by the applicant or by any other name known to the custodian.³⁴⁴

The certification in writing serves the same purpose as requirements of written documentation in other areas of law. One hope is that having to state something *in writing* will lead to greater care on the part of the individuals doing the writing. In this case, a custodian who must certify in writing that a particular record does not exist would perhaps devote more care to a search than if the custodian could merely give a verbal response. In addition, written documentation has an evidentiary value. If a custodian were attempting to delay or thwart a requester's rightful attempts to gain access, the custodian would be precluded from the defense of "but you did not request that record." The requester would have written documentation that indeed he or she sought the record and that the custodian said it did not exist.

(B) Written Statement of Denial Grounds. If a request for access is denied, the custodian shall provide, upon request, a written statement

³⁴⁰ LA. REV. STAT. ANN. § 44:33(B) (West 1992). The words "because of its not being in active use" and "authorized" are omitted, respectively.

³⁴¹ KY. REV. STAT. ANN. § 61.872(5) (Michie/Bobbs-Merrill 1986).

³⁴² See LA. REV. STAT. ANN. § 44:33(B) (West 1992) ("If the public record applied for is not immediately available, because of its being in active use at the time of the application, the custodian shall promptly certify this in writing to the applicant, and in his certificate shall fix a day and hour within three days, exclusive of Saturdays, Sundays, and legal public holidays, for the exercise of the right granted by this chapter."). See also IND. CODE ANN. § 5-14-3-9(c) (Burns 1992) ("If a request is made orally, a public agency may deny the request orally."). A written request requires a written denial, along with the specific exemption and the name and title of the person making the denial. *Id.*

³⁴³ KY. REV. STAT. ANN. § 61.872(3) (Michie/Bobbs-Merrill 1986). "Promptly" is added from Louisiana's use of it in LA. REV. STAT. ANN. § 44:34 (West 1992).

³⁴⁴ VT. STAT. ANN. tit. 1, § 318(a)(4) (1985).

of the grounds for such denial. Such statement shall [include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.] [Such statement] shall be furnished to the requester no later than the end of the third [business] day following the date that the request for the statement is received.³⁴⁵

(C) Every...denial of a request...shall inform the requester that...the determination is subject to review [under provisions [] of this chapter].³⁴⁶

(D) Records Being Audited. The fact that the public records are being audited shall in no case be construed as a reason or justification for a refusal to allow inspection of the records except when the public records are in active use by the auditor.³⁴⁷

(E) Requests for All Records Within a Category; Unduly Burdensome Requests. Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.³⁴⁸ [R]efusal under this section must be sustained by clear and convincing evidence.³⁴⁹

A mandatory written response, coming after the public body extends an opportunity to reduce a request, seems reasonable. The language saying categorical requests "shall be complied with unless," combined by the ease with which such responses can be complied

³⁴⁵ MO. REV. STAT. § 610.023.4 (1988). Missouri requires the denial "cite the specific provision of law under which access" is disallowed. The first bracketed material is from KY. REV. STAT. ANN. § 61.880(1) (Michie/Bobbs-Merrill 1986). It adds the requirement of explaining how the exception is applicable. While WASH. REV. CODE § 42.17.320 (1991) says "denials of requests must be accompanied by a written statement of the specific reasons therefore," "upon request" seems preferable because some denials might satisfactorily be communicated verbally.

³⁴⁶ WIS. STAT. § 19.35(4)(6) (1989-90).

³⁴⁷ LA. REV. STAT. ANN. § 44:33(B)(2) (West 1992).

³⁴⁸ ILL. ANN. STAT. ch. 116, para. 203(f) (Smith-Hurd 1991).

³⁴⁹ KY. REV. STAT. ANN. § 61.872(5) (Michie/Bobbs-Merrill 1986). The Kentucky statute says in full:

If the application places an unreasonable burden in producing voluminous public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records. However, *refusal under this section must be sustained by clear and convincing evidence.*

Id. (emphasis added).

with if the information is computerized, makes this statutory provision desirable. As a practical matter, some categorical requests, if information is not computerized, could be tremendously burdensome. Balancing of interests is necessary if the goal is to have legislators approve proposed legislation.

The clear and convincing evidence language offers some protection to requesters because it elevates the level of evidence, which must be provided by the custodian denying the request, from a mere preponderance. The higher burden of proof should operate in the area of access as it does in other areas of law: It should impress individuals having that increased burden with the importance the law attaches to the interests of the other party. In this case, custodians would be put on notice of the high importance the state places on the interests of requesters. Custodians should be less inclined to make a hasty and perhaps incorrect decision that a request would be too burdensome if they know that they might be called upon to prove the burdensomeness by clear and convincing evidence. In short, the higher degree of proof should increase the amount of deliberation by a custodian before he or she rejects a request. On the other hand, in cases where requests clearly would be burdensome or are clearly made to harass, the custodian would have the option of refusal.

Appeals of Denials

7. (A) Appeals to the Freedom of Information Commission.

(1) Any person denied the right to inspect or copy records under [this chapter]... or denied any other right conferred by [this chapter], may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with the commission. A notice of appeal shall be filed within 30 days after such denial... For purposes of this subsection, such notice of appeal shall be deemed to be filed on the date it is received by the commission or on the date it is postmarked, if received more than 30 days after the date of the denial from which such appeal is taken. Upon receipt of such notice, the commission shall serve upon all parties, by certified or registered mail, a copy of such notice together with any other notice or order of such commission... Any such appeal shall be heard within 30 days after receipt of a notice of appeal and decided within [five] days after the hearing....³⁵⁰

The shortened time frame is advantageous to requesters, of course. Such an expedited procedure demonstrates the importance government places on access to information. For journalists making requests, this expedited procedure is particularly important. The difference of a few days, of course, can make all the difference, say, between reporting of a planned event and reporting about an event that has already occurred. Such timing can also make a difference to the public. A government which can delay journalists and other citizens in accessing information is a government which may be able to do what it wants, unfettered by public oversight, because information will only be made available after the fact and after long court delays. Access delayed can be access—and oversight of government activity—denied.

³⁵⁰ "Five" is substituted for "60" days; 60 days is Connecticut's time frame under this statute for deciding if open meetings are being held illegally. CONN. GEN. STAT. ANN. § 1-21i(b) (West 1990).

Such order may require the production or copying of any public record. In addition, the commission, upon the finding that a denial of any right created by [this chapter], was without reasonable grounds may, in its discretion, impose a civil penalty, against the custodian or other official directly responsible for such denial, of not less than \$20 nor more than \$1,000, after such custodian or other official has been given an opportunity to be heard at a hearing....³⁵¹

This penalty serves, as in other areas of the law, to stress the importance that the government places on abiding by the particular law. It places "teeth" in the law, instead of merely giving an individual (the custodian of records) a duty but providing no penalty for the breach of that duty. The dollar amounts should allow for some flexibility, in recognition that some breaches are more egregious than others.

(2) If the commission finds that a person has taken an appeal to the commission under this subsection frivolously, without reasonable grounds and solely for the purpose of harassing the agency against which the appeal has been taken, it may, in its discretion, impose a civil penalty against such person of not less than \$20 nor more than \$1,000, after such person has been given an opportunity to be heard at a hearing.... In the case of failure to pay any such penalty levied by the commission pursuant to this subsection, within 30 days of written notice sent by certified or registered mail to such person, [and upon application by the commission,] the [superior, district, circuit] court for the judicial district of [the state capital], shall issue an order requiring such person to pay the penalty imposed.³⁵²

Here the penalty serves the purpose of conserving the commission's time to hear meritorious appeals. No penalties could issue without the requester's first having a hearing. The possibility of penalty should help thwart vexatious appeals taken, in the language of the statute, "solely for the purpose of harassing the agency." This penalty again stresses the importance the government places on access by penalizing those who would attempt to tie up the system and, effectively, deny access to others.³⁵³

(3) Any party aggrieved by the decision of the commission may appeal therefrom [to the district, superior, circuit court]....[I]n any such appeal of a decision of the commission, the court may conduct an *in camera* review of the original or a certified copy of the records which are at issue in the appeal but were not included in the record of the commission's proceedings, admit the records into evidence and order the records to be sealed or inspected on such terms as the court deems fair and appropriate, during the appeal. The commission shall have standing to defend, prosecute or otherwise participate in any appeal of any of its decisions and to take an appeal from any judicial decision overturning or modifying a decision of the commission....[L]egal counsel employed or retained by the commission shall represent the

³⁵¹ CONN. GEN. STAT. ANN. § 1-21i(b) (West 1988).

³⁵² § 1-21i(b).

³⁵³ For evidence that such cases unfortunately can occur, see discussion of Wallace Nolen, McWhirter, *supra* note 226.

commission in all such appeals and in any other litigation affecting the commission. . . . [A]ll process shall be served upon the commission at its office.³⁵⁴

This safeguarding of records—through allowing in camera review and orders that records be sealed during appeal if the court considers such actions warranted—recognizes that in some cases when courts are balancing the competing interests between access and privacy, privacy considerations must be paramount. Also, this safeguarding recognizes the practical fact that once information is released, it, unlike a tangible item, cannot truly be returned.

(4) Any appeal taken pursuant to this section shall be privileged in respect to its assignment for trial over all other [matters].³⁵⁵

The privileged position of such appeals again demonstrates the importance that government places on timely access to information. Access delayed can mean access denied, for all practical purposes.

(5) If the court finds that any appeal taken pursuant to this section . . . is frivolous or taken solely for the purpose of delay, it shall order the party responsible therefor to pay to the party injured by such frivolous or dilatory appeal costs or attorney's fees. . . . Such order shall be in addition to any other remedy or disciplinary action required or permitted by statute or by rules of court.³⁵⁶

This language serves the purpose of stressing the importance that the government places on timely production of records, as well as on conserving the commission's time. Custodians who wish to cost the requester more time and court costs and attorney fees by engaging in frivolous appeals would have something to lose—money. The possibility of paying the costs and attorney fees should help thwart vexatious delaying tactics. Connecticut limits attorney's fees to \$1,000, but if reasonable attorney fees exceed that amount, then such a limit seems arbitrary.

(6) Any member of any public agency who fails to comply with an order of the Freedom of Information Commission shall be guilty of a class B misdemeanor and each occurrence of failure to comply with such order shall constitute a separate offense.³⁵⁷

This language puts teeth in the law and an increased amount of power in the hands of the commission. In order for the commission to be an effective tool in ordering and disciplining recalcitrant custodians, it simply must have power. For those custodians who are undeterred by monetary penalties, the threat of being guilty of a criminal infraction might offer the needed deterrent power.

³⁵⁴ § 1-21i(d).

³⁵⁵ § 1-21i(d) (substituting "matters" for "actions except writs of habeas corpus and actions brought by or on behalf of the state, including information on the relation of private individuals").

³⁵⁶ CONN. GEN. STAT. ANN. § 1-21i(d) (West 1988).

³⁵⁷ § 1-21k(b).

(7) A person or governmental unit need not exhaust the remedy under this section before filing suit.³⁵⁸

(A1) Freedom of Information Commission

(1) **Establishment of 5-Member Commission. Terms. Party Affiliation.** There shall be a Freedom of Information Commission consisting of five members appointed by the governor, with the advice and consent of [the house of representatives] of the general assembly, who shall serve for terms of four years from the July first of the year of their appointment, except that of the members appointed prior to [include dates and appropriate provisions for staggered terms]. No more than three members shall be members of the same political party.³⁵⁹

(2) **Remuneration.** Each member shall receive \$50 per day for each day such member is present at a commission hearing or meeting, and shall be entitled to reimbursement for actual and necessary expenses incurred in connection therewith....³⁶⁰

(3) **Chairman. Office.** The governor shall select one of its members as a chairman. The commission shall maintain a permanent office at [state capital].... All papers required to be filed with the commission shall be delivered to such office.³⁶¹

(4) **Powers of the Commission.** The commission shall, subject to the provisions of [this chapter], promptly review the alleged violation of the [chapter] and issue an order pertaining to the same. The commission shall have the power to investigate all alleged violations of [this chapter] and may for the purpose of investigating any violation hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, have the power to subpoena witnesses under procedural rules adopted by the commission to compel attendance and to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question. In case of a refusal to comply with any such subpoena or to testify with respect to any matter upon which that person may be lawfully interrogated, the [superior, district, circuit] court for the judicial district of [the state capital], on application of the commission, may issue an order requiring such person to comply with such subpoena and to testify; failure to obey any such order of the court may be punished by the court as a contempt thereof.³⁶²

This statute is yet another method of giving the commission true power in order to be an effective instrument for access. Without subpoena and contempt power, the commission could be throttled in its attempts to gain knowledge necessary for decision-making. If the commission is to act as a viable alternative to the court system in matters of access, then the commission must be given power equivalent to that of the court system in matters of access.

³⁵⁸ MD. CODE ANN., STATE GOV'T § 10-622(c) (1984). Maryland allows administrative review.

³⁵⁹ CONN. GEN. STAT. ANN. § 1-21j(a) (West 1988) (substituting "the house of representatives" for "either house").

³⁶⁰ § 1-21j(b).

³⁶¹ § 1-21j(c).

³⁶² § 1-21j(c).

(5) **Training Sessions.** The freedom of information commission and the office of information and technology with respect to access to and disclosure of computer-stored public records, shall conduct training sessions, at least annually, for members of public agencies for the purpose of educating such members as to the requirements of sections [this chapter].³⁶³

(6) When the general assembly is in session, the governor shall have the authority to fill any vacancy on the commission, with the advice and consent of [the house of representatives] of the general assembly. When the general assembly is not in session any vacancy shall be filled pursuant to the provisions of section 4-19. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission and three members of the commission shall constitute a quorum.³⁶⁴

(7) **Commission Employees.** The commission shall...employ such employees as may be necessary to carry out the provisions of this chapter. The commission may enter into such contractual agreements as may be necessary for the discharge of its duties, within the limits of its appropriated funds and in accordance with established procedures.³⁶⁵

(8) The commission shall make available to the public the printed reports of its decisions, opinions and related materials at a reasonable cost not to exceed the actual cost thereof to the commission.³⁶⁶

ALTERNATIVE [Or Addition] to 7

Some states may not want the expense of a Freedom of Information Commission. The following section is a possible alternative that permits the state to use existing governmental entities to perform the functions intended of a Freedom of Information Commission. Perhaps both should be used, giving the requester the option of which path to pursue.³⁶⁷

³⁶³ § 1-21j(e) (as amended, effective July 1, 1992).

³⁶⁴ § 1-21j(f) (substituting "the house of representatives" for "either house").

³⁶⁵ § 1-21j(g).

³⁶⁶ § 1-21j(h). In 1992, the legislature expanded this section by defining a minimum cost of "not less than twenty-eight dollars per item" for the materials.

³⁶⁷ Allan Adler comments:

The first option, requiring establishment of a "Freedom of Information Commission," raises numerous broad policy issues regarding the entity's funding, jurisdiction, and authority that often get mired in debates over cost-benefit analysis and separation of powers among the Executive, Judicial and Legislative branches of government. Although this has not prevented Connecticut and Canada from utilizing such models (or variations thereon), it is a construct which has resisted proposals for application to the federal FOIA in the United States. This is worth a great deal of careful discussion.

The second option, utilizing the existing office and authority of the State Attorney General, avoids many of the problems noted above, but raises doubts among requesters regarding the degree of sympathetic or, at least, independent and objective consideration such appeals can be expected to receive. Ultimately, however, the judicial review mechanism which is also a part of this option is the more favored and familiar appeal path. To the extent that *de novo* judicial review may still be had by the requester after denial of an administrative appeal, either option would have credibility. To the extent that the FOI Commission would be employed at the expense of full judicial review, however, it is not likely to be attractive to requesters.

7. (A) Appeals to the Attorney General.

(1) [If the person seeking access to information requests a written statement of the grounds for such denial under section 6B of this chapter], a copy of the written [statement] denying inspection [or copying] shall be forwarded immediately by the agency to the attorney general of [the state and to the requester]. If requested by the person seeking inspection, the attorney general shall review the denial and issue within [7] [business] days... a written opinion of the agency concerned, stating whether the agency acted consistently with provisions of [this chapter]. A copy of the opinion shall also be sent by the attorney general to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the attorney general may request additional documentation from the agency for substantiation. The attorney general may also request a copy of the records involved, but they shall not be disclosed.³⁶⁸

This provision provides that only those who request written responses will receive them. All written responses will then be forwarded to the attorney general. Some responses will require no action by the attorney general, but the mere fact of having to file a response with the attorney general might lessen spurious responses on grounds of denial by custodians of records.

(2) In the event a person feels the intent of [this chapter] is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the attorney general and the complaint shall be subject to the same adjudicatory process as if the record had been denied.³⁶⁹

(3) If the Attorney General [agrees with the person seeking access to information] and orders the state agency to disclose the record, or if the Attorney General [agrees] in part and orders the state agency to disclose a portion of the record, the state agency shall comply with the order in full within seven days after issuance of the order, unless within the seven-day period it issues a notice of its intention to institute proceedings for injunctive or declaratory relief in the Circuit Court for [] County. Copies of the notice shall be sent to the Attorney General and by certified mail to the petitioner at the address shown on the petition. The state agency shall institute the proceedings within seven days after it issues its notice of intention to do so.³⁷⁰

In considering appeal mechanisms, it might be desirable to explore the feasibility of giving the requester a choice of paths to pursue.

Adler Letter, *supra* note 231, at 11-12.

³⁶⁸ KY. REV. STAT. ANN. § 61.880(2) (Michie/Bobbs-Merrill 1986) (substituting "statement" for "response," and "business" for "(excepting Saturdays, Sundays, and legal holidays)"). The time period of seven days comes from OR. REV. STAT. § 192.450(1) (1991). Kentucky calls for ten days. KY. REV. STAT. ANN. § 61.880(2) (Michie/Bobbs-Merrill 1986). Kentucky provides that all denials will receive a written response, and thus all denials will be forwarded to the attorney general. *Id.*

³⁶⁹ KY. REV. STAT. ANN. § 61.880(4).

³⁷⁰ OR. REV. STAT. § 192.450(2) (1991) (substituting "agrees with the person seeking access to information" for "grants the petition," and substituting "agrees" for "grants the petition"). In short, in Oregon a petition must be submitted and granted.

(4) If . . . the public agency continues to withhold the record notwithstanding the opinion of the attorney general, the [attorney general] may institute proceedings for injunctive or declaratory relief on behalf of the complainant in the [superior, district, circuit] court of the county where the record is maintained.³⁷¹

This model would not allow an individual to institute proceedings for relief on his or her own behalf. Other states such as Oregon and Kentucky do allow a person to institute proceedings on his or her own behalf.³⁷² Oregon even provides a sample petition form.³⁷³

(5) Any authority which or legal custodian . . . who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than \$1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall

³⁷¹ KY. REV. STAT. ANN. § 61.880(5) (Michie/Bobbs-Merrill 1986) (substituting "Attorney General," from R.I. GEN. LAWS § 38-2-8(b) (1991) for "the person seeking disclosure may institute such proceedings").

³⁷² KY. REV. STAT. ANN. § 61.880(5) (Michie/Bobbs-Merrill 1986) and OR. REV. STAT. § 192.450(2) (1991) both say, "the person seeking disclosure may institute such proceedings." OR. REV. STAT. § 192.450(1) says that "any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General . . ." (emphasis added). But Oregon says that for agencies which are not state agencies, the district attorney shall handle the petition:

[Section] 192.450 is equally applicable to the case of a person denied the right to inspect or receive a copy of any public record of a public body other than a state agency, except that in such case the district attorney of the county in which the public body is located, or if it is located in more than one county the district attorney of the county in which the administrative offices of the public body are located, shall carry out the functions of the Attorney General, and any suit filed shall be filed in the circuit court for such county . . .

§ 192.460.

³⁷³ I (we), _____ (name(s)), the undersigned, request the Attorney General (or District Attorney of _____ County) to order _____ (name of governmental body) and its employees to (make available for inspection) (produce a copy or copies of) the following records:

1.
(Name or description of record)
2.
(Name or description of record)

I (we) asked to inspect and/or copy these records on _____ (date) at _____ (address). The request was denied by the following person(s):

1.
(Name of public officer or employee;
title or position, if known)
2.
(Name of public officer or employee;
title or position, if known)

OR. REV. STAT. § 192.470.

award any forfeiture recovered together with reasonable costs to the county.³⁷⁴

(6) Nothing within this section shall prohibit any individual from retaining private counsel for the purpose of instituting proceedings for injunctive or declaratory relief....³⁷⁵ A person... need not exhaust the remedy under this section before filing suit.³⁷⁶

(7) Each agency shall notify the attorney general of any actions filed against that agency in [superior, district, circuit] court regarding the enforcement of [this chapter].³⁷⁷

Another option that could be included is to set up offices run by the Attorney General to provide information, guidelines, and advisory opinions to agencies. For example, Hawaii provides an Office of Information Practices³⁷⁸ within the Department of the Attorney General with the power to provide advisory opinions to a requester "regarding that person's rights and the functions and responsibilities of agencies under this chapter."³⁷⁹ In addition, some states allow appeals to the head of a public body or a chief administrative officer. In Illinois, appeals can be made to the head of the public body:

Any person denied access to inspect or copy any public record may appeal the denial by sending a written notice of appeal to the head of the public body. Upon receipt of such notice the head of the public body shall promptly review the public record, determine whether under the provisions of this Act such record is open to inspection and copying, and notify the person making the appeal of such determination within 7 working days after the notice of appeal.³⁸⁰

This procedure, however, adds an extra inter-agency layer, and it may not be productive because the person at the top of the agency may very well set the tenor for the rest of the agency's employees. Rhode Island, which allows appeals to the "chief administrative officer," permits the filing of a complaint to the Attorney General to contest an administrative decision denying access.³⁸¹

³⁷⁴ WIS. STAT. ANN. § 19.37(4) (West 1986).

³⁷⁵ R.I. GEN. LAWS § 38-2-8(b) (1990).

³⁷⁶ MD. CODE ANN., STATE GOV'T § 10-622(c) (1984) (deleting "or governmental unit"). Kentucky says:

In order for the circuit courts of this state to exercise their jurisdiction to enforce the purposes of [this chapter], it shall not be necessary to have forwarded any request for the documents to the attorney general... or for the attorney general to have acted in any manner upon a request for his opinion.

KY. REV. STAT. ANN. § 61.882(2) (Michie/Bobbs-Merrill 1986).

³⁷⁷ KY. REV. STAT. ANN. § 61.880(3) (Michie/Bobbs-Merrill 1986).

³⁷⁸ HAW. REV. STAT. § 92F-41(a) (1991).

³⁷⁹ § 92F-42(3) (1991). See also ALASKA STAT. § 09.25.123(e) (1992) (providing for a "Telecommunications Information Council" to establish administrative appeals procedures); N.Y. PUB. OFF. LAW § 6-89 (Consol. 1987) (establishing a "committee on open government" which "shall furnish to any agency advisory guidelines, opinions or other appropriate information...").

³⁸⁰ ILL. ANN. STAT. ch. 116, para. 210(a) (Smith-Hurd 1988).

³⁸¹ R.I. GEN. LAWS § 38-2-8 (1990).

If the chief administrative officer determines that the record is not subject to public inspection, the person seeking disclosure may file a complaint with the attorney general. The attorney general shall investigate the complaint and if the attorney general shall determine

(B) Injunctive or Declaratory Relief.

(1) Any citizen . . . who shall request the right of personal inspection of any state, county, or municipal record as provided in [this chapter], and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.³⁸²

(2) Jurisdiction. [Such petition shall be filed in] the [superior, district, county, circuit] court in the county in which the complainant resides, or has his personal place of business, or in which the public records are situated, or in the [superior, district, circuit] court of [the county where the state capital is located] . . .³⁸³

(3) Upon filing of the petition, the court shall . . . issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if any . . . why the petition should not be granted. A formal written response to the petition shall not be required . . . in the interest of expeditious hearings.³⁸⁴

(4) Proceedings arising under this section shall take precedence on the docket over all other matters and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. Such suits may be heard in termtime or in vacation.³⁸⁵

(5) Proceedings are De Novo. In any action considered by the court, the court shall consider the matter de novo.³⁸⁶

(6) *In Camera* Review. The court may direct that the records being sought be submitted under seal for [*in camera*] review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.³⁸⁷

that the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief on behalf of the complainant in the [superior, district, circuit] court of the county where the record is maintained.

Id.

³⁸² TENN. CODE ANN. § 10-7-505(a) (1992). This language is generally clearer to lay people than those statutes that use the language of "injunctive and declaratory relief." See, e.g., ILL. ANN. STAT. ch. 116, para. 211(a) (Smith-Hurd Supp. 1992) ("Any person denied access to inspect or copy any public record by the head of a public body may file suit for injunctive or declaratory relief."); MD. CODE ANN., STATE GOV'T §§ 10-623(c)(3)(i), (ii) (1984) ("The court may enjoin the State . . . from withholding the public record" or "pass an order for the production of the public record."); N.H. REV. STAT. ANN. § 91-a:8(III) (1990) ("In addition to any other relief award . . . the court may issue an order to enjoin future violations of this chapter.").

³⁸³ VT. STAT. ANN. tit. 1, § 319(a) (1986). "Such petition shall be filed in" comes from TENN. CODE ANN. § 10-7-505(b) (1992). Some states restrict jurisdiction to the county in which the public record is kept, making it more difficult to petition for release of the records. See, e.g., R.I. GEN. LAWS § 38-2-8(b) (1990); W. VA. CODE § 29B-1-5(1) (1986).

³⁸⁴ TENN. CODE ANN. § 10-7-505(b) (1992).

³⁸⁵ MISS. CODE ANN. § 25-61-13(3) (1991). For more moderate language, see Model Statute § 7(A)(4). In Rhode Island such actions "may be advanced on the calendar upon motion of the petitioner." R.I. GEN. LAWS § 38-2-9(c) (1990).

³⁸⁶ ILL. ANN. STAT. ch. 116, para. 211(f) (Smith-Hurd Supp. 1992).

³⁸⁷ TENN. CODE ANN. § 10-7-505(b) (1992). Many states do use the term *in camera*, but some states provide for *in camera* review without using that specific language. See, e.g., MISS. CODE ANN. § 25-61-13(2) (1991) ("the court . . . may privately view the public record").

(7) **Burden of Proof.** The burden [of proof] shall be on the public body to establish that its refusal to permit public inspection or copying [of public records] is in accordance with the provision of this [chapter].³⁸⁸

(8) **Court Ruling.** The court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records.³⁸⁹

(9) **Judgment in Favor of Petitioner.** Upon a judgment in favor of the petitioner, the court shall order that the records be made available to the petitioner unless:

(a) There is a timely filing of a notice of appeal; and

(b) The court certifies that there exists a substantial legal issue with respect to the disclosure of the documents which ought to be resolved by the appellate courts.³⁹⁰

(10) In the event of noncompliance with the order of the court, the [superior, district, circuit] court may punish for contempt the responsible employee or official.³⁹¹

(11) **Actual and Punitive Damages.** A defendant governmental unit is liable to the complainant for actual damages and any punitive damages that the court considers appropriate if the court finds that any defendant knowingly and willfully failed to disclose or fully to disclose a public record that the complainant was entitled to inspect [and copy].³⁹²

This section, as adopted, allows the court great leeway in assessing damages, and guarantees that damages, if assessed, will be paid to the complainant. Some states allow punitive damages.³⁹³ Some states forbid damage awards,³⁹⁴ while some place caps on actual and punitive damages.³⁹⁵ In Iowa the damages awarded are to be paid to the state or local government rather than to the complainant.³⁹⁶

³⁸⁸ ILL. ANN. STAT. ch. 116, para. 211(e) (Smith-Hurd Supp. 1992). Statutes placing the burden of proof on the public body are common. *See, e.g.*, HAW. REV. STAT. § 92F-15(c) (Supp. 1991); IND. CODE ANN. § 5-14-3-9(c) (Burns Supp. 1991). Tennessee also places the burden of proof on the public body, but the statute speaks only of disclosure, not of copying, as in the model. TENN. CODE ANN. § 10-7-505(c) (1992).

³⁸⁹ TENN. CODE ANN. § 10-7-505(d) (1992).

³⁹⁰ § 10-7-505(e).

³⁹¹ VT. STAT. ANN. tit. 1, § 320(b) (1985). For some other states using specific contempt of court language, see ARK. COD ANN. § 25-19-107(c) (Michie 1992); ILL. ANN. STAT. ch. 116, para. 211(g) (Smith-Hurd Supp. 1992); IOWA CODE ANN. § 22.10.3(a) (West 1989); MD. CODE ANN., STATE GOV'T § 10-623(c)(3)(iii) (1984); W. VA. CODE § 29B-1-5(2) (1986).

The Michigan Supreme Court applied MICH. COMP. LAWS § 15.240(1) (1981) to uphold a contempt order against a City Attorney for the city of Detroit when he refused to turn over records from an auction of publicly owned property. *Detroit News v. City of Detroit*, 430 N.W.2d 742 (1988). The attorney was jailed for five days. *Rob Zeiger, Pailen Freed After 5 Days in County Jail*, DET. NEWS, Oct. 29, 1988 at 1.

³⁹² MD. CODE ANN., STATE GOV'T. § 10-623(c)(3)(iii) (1984).

³⁹³ *See, e.g.*, WIS. STAT. ANN. § 19.37(3) (West 1986).

³⁹⁴ KAN. STAT. ANN. § 45-223 (1986).

³⁹⁵ MICH. COMP. LAWS § 15.240(5) (1981).

³⁹⁶ IOWA CODE ANN. § 22.10.3(b) (West 1989).

(12) Costs and Attorney Fees. The court [shall] assess against the public agency reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.³⁹⁷

At least twenty states allow recovery of attorney's fees by the complainant, although restrictions may apply.³⁹⁸ For example, New York only allows attorney's fees and litigation costs if "(i) the record involved was, in fact, of clearly significant interest to the general public; and (ii) the agency lacked a reasonable basis in law for withholding the record."³⁹⁹ The requirement of "clearly significant interest to the general public" seems vague and unfair to individuals who may have a significant personal interest in finding out information not of general interest.

(13) Criminal Sanctions. [In addition to any civil liabilities for which he or she is liable,] any custodian of any public records who shall willfully violate the provision of this [chapter] shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than \$100 nor more than \$500, or be imprisoned in the county jail for not more than ten days, or, in the discretion of the court, by both such fine and imprisonment.⁴⁰⁰

(14) Civil Fines. The court [shall] impose a civil fine not exceeding \$1,000 against a public body found to have committed a willful violation of this chapter.⁴⁰¹

³⁹⁷ VT. STAT. ANN. tit. 1, § 319(d) (1985) (substituting "shall" for "may").

³⁹⁸ ARK. CODE ANN. § 25-19-107(d) (Michie 1992); ARIZ. REV. STAT. ANN. § 39-121.02(B) (1985); FLA. STAT. ANN. § 119-12(1), 12(2) (West 1982 & Supp. 1992); HAW. REV. STAT. § 92F-15(d) (Supp. 1991); ILL. ANN. STAT. ch. 116, para. 211(i) (Smith-Hurd Supp. 1992); IND. CODE ANN. § 5-14-3-9(h) (Burns Supp. 1992); IOWA CODE ANN. § 22.10.3(c) (West 1989); KAN. STAT. ANN. § 45-222(c), (d) (Supp. 1991); KY. REV. STAT. ANN. § 61-882(5) (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 44:35(E)(2) (West Supp. 1992); MD. CODE ANN., STATE GOV'T § 10-623(f) (1984); MICH. COMP. LAWS § 15.240(4) (1981); NEB. REV. STAT. § 84-712.07 (1987); N.H. REV. STAT. ANN. § 91-A:8(I) (1990); N.J. REV. STAT. § 47-1A-4 (1989); N.Y. PUB. OFF. LAW § 6-89(4)(c) (Consol. 1987); OR. REV. STAT. § 192.490(3) (1991); TENN. CODE ANN. § 10-7-505(a) (1992); WIS. STAT. ANN. § 19.37(2)(a) (West Supp. 1992); WASH. REV. CODE ANN. § 42.17.340(3) (West 1991).

³⁹⁹ N.Y. PUB. OFF. LAW § 6-89(4)(c) (Consol. 1987). *See also* KAN. STAT. ANN. §§ 45-222(c), (d) (Supp. 1991) (awarding attorney fees not only to winning complainants, but also to winning defendants if an action was brought "not in good faith"); N.J. REV. STAT. § 47-1A-4 (1989) (limiting the recovery of attorney fees to \$500).

⁴⁰⁰ W. VA. CODE § 29B-1-6 (1986). Many states may levy criminal sanctions, but there is a wide variation in punishment from state to state. *See, e.g.*, LA. REV. STAT. ANN. § 44:37 (West 1982) (\$100 to \$1000 fine and/or one to six months in jail for first conviction, \$250 to \$2,000 fine and/or two to six months in jail for additional convictions); OKLA. STAT. ANN. tit. 51, § 24A.17.A (West 1988) (up to a \$500 fine and/or one year in jail); WYO. STAT. § 16-4-205 (1990) (\$100 fine). Several states also provide for removal from office for one or more violation. *See, e.g.*, IOWA CODE ANN. § 22.10.3(d) (West 1989); NEB. REV. STAT. § 84-712.09 (1987).

⁴⁰¹ R.I. GEN. LAWS § 38-2-9(d) (1990) (substituting "shall" for "may"). Civil fines vary even more in amounts and implementation than criminal fines. For example, Florida and Missouri cap damages at \$500 and \$300, respectively. FLA. STAT. ANN. § 119.10(1) (West Supp. 1992). MO. ANN. STAT. § 610.027.3 (Vernon Supp. 1992). Kentucky and Washington both impose fines of \$25 for each day access is denied. KY. REV. STAT. ANN. § 61.882(5) (Michie/Bobbs-Merrill 1986). WASH. REV. CODE ANN. § 42.17.340(3) (West 1991). Mississippi provides for \$100 plus "reasonable expenses." MISS. CODE ANN. § 25-61-15 (1991). Virginia imposes fines ranging from \$25 to \$1000, payable to the State Literary Fund, not to the complainant. VA. CODE ANN. § 2.1-346.1 (Michie Supp. 1992).

(15) Ignorance Is No Defense; Custodian May Seek Help. Ignorance of the legal requirements of this chapter is not a defense to an enforcement proceeding brought under this section. A lawful custodian or its designee in doubt about the legality of allowing the examination or copying or refusing to allow the examination or copying of a government record is authorized to bring suit at the expense of that government body in the district court of the county of the lawful custodian's principal place of business, or to seek an opinion of the attorney general or the attorney for the lawful custodian, to ascertain the legality of any such action.⁴⁰²

(16) Protection for Custodians Releasing Information. Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records nor shall a public official required to release records in [his] custody or under [his] control be found responsible for any damages caused, directly or indirectly, by the release of such information.⁴⁰³

(C) Writ of Mandamus.

(1) Grounds for Mandamus. If a person allegedly is aggrieved by the failure of a governmental unit to promptly prepare a public record and to make it available to him [or her] for inspection . . . or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a person responsible for it to make a copy available to him [or her] . . . the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the governmental unit or the person responsible for the public record to comply with [the provisions of this chapter].⁴⁰⁴ [This action is in lieu of any other court action for denial of access to a public record.]

(2) Jurisdiction.

(3) All procedural safeguards applicable under this chapter for injunctive or declaratory relief shall apply equally in mandamus actions, including docket precedence, de novo review, in camera review, and burden of proof falling on the defendant.⁴⁰⁵

Mandamus provides another alternative for a requester seeking access to information from a custodian who has withheld the information. If a state's constitution provides for original jurisdiction in appellate courts, mandamus then offers an advantage over mandatory or prohibitory injunctive relief. The following mandamus provision was enacted recently in Ohio:

The mandamus action may be commenced in the court of common pleas of the county in which [the open records law] was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio

⁴⁰² IOWA CODE ANN. § 22.10.4 (West 1989).

⁴⁰³ TENN. CODE ANN. § 10-7-505(f) (1992).

⁴⁰⁴ OHIO REV CODE ANN. § 149.43(C) (Anderson Supp. 1991). Texas also allows the Attorney General to seek a writ of mandamus. TEX. REV. CIV. STAT. ANN. art. 6252-17(a) § 8(a) (West Supp. 1992). In Wisconsin, individuals may request that the Attorney General or District Attorney of the county in which the records are located bring the mandamus action. WIS. STAT. ANN. § 19.37(1)(b) (West 1986).

⁴⁰⁵ NEB. REV. STAT. § 84-712.03 (1988) enumerates all of these procedural safeguards.

Constitution, or in the court of appeals for the appellate district [the open records law] allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.⁴⁰⁶

Apparently, injunctive relief by itself was not considered adequate in Ohio. The Senate Bill which enacted this mandamus provision stated that it was an emergency measure enacted to supersede *State ex rel. Fostoria Daily Review Co. v. Fostoria Hospital Ass'n*:⁴⁰⁷

[Unless] . . . a civil action for a writ of mandamus available in all courts with original jurisdiction [is] reestablished as the remedy to enforce the Public Records Law, members of the general public could be denied access to public records in violation of the Public Records Law, and have *no recourse other than to pursue an inadequate, statutorily prescribed remedy in the court of common pleas of injunctive relief, a forfeiture of \$1,000, and a reasonable attorney's fees award*. Therefore, this act shall go into immediate effect.⁴⁰⁸

To be a viable alternative, the mandamus action must include the procedural safeguards available in actions for injunctive or declaratory relief.

(4) If the citizen prevails in the mandamus action, the district court shall award court costs, damages, and attorneys fees.⁴⁰⁹

Office of Information Technology

If custodians are to manage the creation, storage, and retrieval of records most efficiently in this complex, rapidly changing computer era, then expert help is necessary. States must provide custodians with needed guidance from a state board or office whose duty is to provide expertise in information technology. Having such a board or agency to aid custodians is a clear trend among states. California offers statutes that give both the rationale and detail for creating an office of technology.

8.(A) Legislative Findings. The Legislature finds that information technology is an indispensable tool of modern government for the rapid and efficient handling of data, records, communication, and transactions, and for assisting decisionmakers in carrying out their tasks and responsibilities at all levels of government. The Legislature finds that advances in information technology, such as automated office systems, personal computers, electronic mail, and others, have the potential to increase the productivity, efficiency, and responsiveness of the state's operations. The Legislature finds that a need exists to consolidate and integrate the state's policy and planning functions with regard to information technology to ensure coordination of the state's information technology needs. Therefore, the Legislature intends that the bodies in the executive branch currently responsible for planning and overseeing

⁴⁰⁶ OHIO REV. CODE ANN. § 149.43(C) (Anderson 1991).

⁴⁰⁷ 512 N.E.2d 1176 (Ohio 1987).

⁴⁰⁸ 1987 Ohio Legis. Serv. S. 275 § 5 (Baldwin).

⁴⁰⁹ N.M. STAT. ANN. § 14-2-3 (Michie 1988).

the acquisition of information technology be replaced by an Office of Information Technology, whose purpose would be to identify new applications for information technology, to improve productivity and service to clients and to assist agencies in designing and implementing the use of information technology.

(B) Legislative Intent. It is the intent of the Legislature:

(1) That there be specific objectives and definitive policies to guide the development of information technology systems, procedures, and techniques within the governmental sector.

(2) That policies and plans developed within state government recognize fully the interrelationships and impact of state activities on local governments and on agencies of the federal government, and that these policies and plans represent the best interests of all of California's citizens.

(3) That there be plans for enhancing the use of information technology within state government, encompassing both short-term and long-range needs, and that these plans be continually updated.

(4) That the plans provide for optimum utilization of information technology equipment; maximum practical integration of information technology systems; the establishment of service centers, as required, to provide data processing services to units of state government as needed; adherence to standards ensuring appropriate compatibility of systems and interchange of data and information; and proper management controls to ensure the most efficient, effective, and economical use of the state's resources for information technology.

(5) That appropriate criteria be developed for cost sharing and evaluation of effectiveness for the utilization of information technology systems.

(6) That such goals as one-time collection of data, minimum duplication of records, and maximum availability of information at lowest overall cost will not jeopardize or compromise the confidentiality of information as provided by statute or the protection of the right of individual privacy as established by law.

(7) That state government participate with private industry, and federal, state, and local governments in demonstrating or developing advanced information technologies which offer the potential of improving the efficiency and reducing the cost of state operation.

(C) Definitions.

(1) "Information technology" means all computerized and auxiliary automated information handling, including systems design and analysis, conversion of data, computer programming, information storage and retrieval, voice, video, and data communications, requisite system controls, simulation, and all related interactions between people and machines.

(2) "Office" means the Office of Information Technology.

(3) "Director" means the director of the office.

(D) Creation of Office of Information Technology; Appointment of Director. There is in the Department of Finance an Office of Informa-

tion Technology, whose director shall be appointed by the Governor, who shall report directly to the Director of Finance, and who shall serve at the pleasure of the Governor.

(E) Promotion of Innovative Information Technologies. The director shall develop plans and policies to support and promote the use of innovative information technologies within state government as a means of saving money, increasing worker productivity, improving state services to the public, and demonstrating effective management tools. The director shall recommend to the Governor, Legislature, Department of General Services, and Department of Finance changes needed in state policies to accomplish the purposes of this section.

(F) Development of Plans and Policies. The director shall continue to develop plans and policies in a coordinated fashion regarding all of the following:

(1) The state data centers, including the optimum size and degree of centralization of the data centers.

(2) Information management personnel, including the training and qualifications of such personnel.

(3) Office automation, including the use of personal computing and electronic mail.

(G) Formation and Composition of committees. The director shall form a user committee or committees which shall consist of representatives of departments engaged in the use of information technology. All departments shall appoint a representative to the user committee or committees who shall be a person knowledgeable about the application of information technology in that department. The director shall publish a plan for forming the committee, including a plan for yearly rotational assignments to the committee, such that each department is represented at least once every three years and no department is represented more than three years in a row.

(H) Appointment of Representatives. The representatives appointed to the user committee or committees shall be non-technical managers who are accountable for program results. The director may provide for the appointment of the data-processing personnel who are advisory ex officio members, but such members shall have no voice in matters considered before the committee.

(I) Purposes of Committees; Report to Legislature.

(1) The purpose of the user committee or committees shall be to provide guidance and input to the director and other state officials, to identify barriers preventing the optimum use of information technology and management techniques, and to recommend changes in policy, both legislative and administrative, necessary to remove those barriers.

(2) The director, after consultation with the user committee, shall submit to the Legislature by [date] a report concerning provisions of

public access to non-confidential indexes and data banks through the medium of telecommunications and remote computer terminals.

(3) The user committee shall make recommendations to the director on what data should be accessible, and what provisions should be made for security of confidential state data. The user committee shall make recommendations on how to recover the costs of making provision for public access. The user committee shall make recommendations on studying the potential cost savings to state government from public access provisions.

(J) Chairperson; Meetings. The user committee or committees shall be chaired by the director and shall meet at his or her discretion, but in any event not less than four times per year.

(K) Submission of Implementation Plan to Legislature. The office shall submit to the Legislature by [date] an implementation plan which does all of the following:

(1) Addresses findings and recommendations contained in the Legislative Analyst's report entitled "The Utilization and Management of Information Processing Technology in California State Government."

(2) Provides for an effective planning, budgeting, and management control system for coordinated development and utilization of information technology in state government.

(3) Summarizes the specific plans and policies adopted by the office for each of the areas of functional responsibility

(L) Director as Advocate. It is the intent of the Legislature that the director shall be the state's advocate in the exploitation of information technology to increase the effectiveness and efficiency of government electronic data-processing services in program and support areas. The office shall adopt procedures to carry out its advocacy role and shall publish and maintain them in the State Administrative Manual.

(M) Budgeting and Control of Expenditures. It is the intent of the Legislature that the director shall adopt policies and guidance to carry out electronic data-processing budgeting and control of expenditure responsibilities and shall publish and maintain them in the State Administrative Manual. The office shall approve proposed expenditures for electronic data processing only if these policies and procedures have been met and followed.

(N) Equipment Management Revolving Fund. There is in the State Treasury the Equipment Management Revolving Fund, hereafter referred to as the "EMR Fund."

(O) Allocation of Funds. It is the intent of the Legislature that the director shall actively promote maximum efficiency in the use of state funds for information technology and information systems. The director may allocate funds from the EMR Fund . . . as a loan for the purchase of leased information technology equipment and necessary ancillary

operating equipment when it has been clearly demonstrated, in the opinion of the director, that cost benefits to the state will be realized. These allocations shall be made only in those instances in which no other funds are reasonably available for those purposes, and not sooner than 30 days after notification in writing of the necessity therefore has been given to the chairperson of the committee of each house which considers appropriations, and the chairperson of the Joint Legislative Budget Committee, or sooner than such shorter time as the chairperson of the Joint Legislative Budget Committee, or his or her designee, may in each instance determine. The EMR Fund shall be repaid by the state agency to which funds have been allocated, upon terms and conditions as may be prescribed by the office.

(P) Duties of Director. The director shall do all of the following:

(1) Establish and maintain criteria for determining which data center is to provide which data-processing service to each state agency.

(2) Establish policies for the development, operation, maintenance and performance management of data-processing information systems, including, but not limited to, equipment, software, and data communications.

(3) Establish and maintain criteria to be followed by state government in participating with private industry, and federal, state, and local government in demonstrating or developing advanced information technologies.

(4) Establish and maintain the criteria to be followed by data-processing in each state agency in providing confidentiality and security of data, and the security of data-processing facilities and equipment.

(5) Establish policies and guidelines for the exchange of data between data centers by intercoupling or telecommunications to ensure that exchanges do not jeopardize data security and confidentiality.

(6) Establish procedures to allow the Legislative Analyst to make an analysis of programs and budgets and the Auditor General to conduct audits utilizing data in the state data processing information systems or as products of state data-processing information systems. Information shall not be provided to the Legislative Analyst or the Auditor General if specifically prohibited by federal law. These policies and criteria shall be published and maintained in the State Administrative Manual.

(Q) Transfer of Funds; Submission of Budget. It is the intent of the Legislature:

(1) That on the effective date of this article, all resources budgeted for the Department of Finance for support of the State Office of Information Technology shall be transferred to the office.

(2) That resources currently budgeted to any state agencies and departments may be transferred to the office pursuant to agreement between the director and the relevant agency or department head.

(3) That the office prepare and submit to the Legislature, through the Department of Finance, a budget for consideration during the hearings on the [year] fiscal year budget, to provide funding for the [year] fiscal year sufficient to enable the office to adequately perform its responsibilities in accordance with this chapter.

(R) Duties of Office of Information Technology.

(1) The Office of Information Technology shall do all of the following:

(a) Develop the policies and standards to be followed in providing for the confidentiality of information.

(b) Develop policies necessary to ensure the security of the state's informational and physical assets.

(c) Develop policies to provide for the preservation of the state's information processing capability.

(d) Coordinate research and identify solutions to problems affecting information security.

(e) Review and approve personal services contracts for information security consulting services.

(f) Represent the state to the federal government, other agencies of state government, local government entities, and private industry on issues that have statewide impact on information security.

(g) [Review and advise the state archivist on developing policies and monitoring] state agencies to ensure that agency business operations will continue to function in the event of a disaster. [Bracketed language substitutes for "Develop policies and monitor."']

(h) Review and advise on security plans concerning the location and construction of information processing facilities for state agencies.

(i) Prepare policies and procedures for inclusion in the State Administrative Manual for use by state agencies regarding the applicable law relating to confidentiality and privacy of, and public access to, information.

(2) State agencies shall notify the office of all incidents involving the unauthorized intentional damage to, or modification or destruction of, electronic information, and the damage to, or destruction or theft of, data processing equipment, or the intentional damage to, or destruction of, information processing facilities. The office shall investigate any incident it deems necessary.

(S) Information Security Officer. The chief executive officer of each state agency which uses, receives, or provides data-processing services shall designate an information security officer who shall be responsible for implementing state policies and standards regarding the confidentiality and security of information pertaining to his respective agency. Such policies and standards shall include, but are not limited to, strict controls to prevent unauthorized access to data maintained in computer files, program documentation, data-processing systems, data files, and data-processing equipment physically located in such agency.

(T) Contracts. Any contract entered into by any state agency which includes provisions for data-processing systems design, programming, documentation, conversion, equipment maintenance, and similar aspects of data-processing services shall contain a provision requiring the contractor and all of his staff working under such contract to maintain all confidential information obtained as a result of such contract as confidential and to not divulge such information to any other person or entity.

(U) Exceptions. The provisions of this chapter shall not apply to the [State] University, agencies provided for by... the [State] Constitution, or the [State] Legislature.⁴¹⁰

Exceptions will have to be created for universities and their constitutionally incorporated bodies.⁴¹¹

Florida is an example of a state with an established center to provide technological expertise. In Florida, under the Department of General Services,

the Division of Information Services is responsible for the management and operation of the Administrative Management Information Center (AMIC). The center operates as an Information System Utility to provide effective and efficient computer services to state agencies. The director is responsible for administering and directing the division, which consists of four bureaus....⁴¹²

The Division's Bureau of Computer Services "provides computer operations services by maintaining three computer platforms and peripheral devices for use by the agencies. A full range of production control and associated data entry services are also provided to agencies."⁴¹³ The Bureau of Technical Services "provides system and data communication software support required to maintain AMIC's multi-vendor computer configurations and communication network. User agency systems personnel are also provided support services for UNISYS, IBM, and Digital software."⁴¹⁴ The Bureau of Systems Development "provides application support services in the areas of feasibility studies, analysis, design, development, implementation and maintenance on existing and new applications for state agencies utilizing the bureau's services."⁴¹⁵ The Bureau of Client Services "provides client relations and consulting services to assure maximum service to state agencies. The bureau provides a full range of use assistance activities which include a help desk, a technical library, training, office automation assistance, personal computer assistance and communication support."⁴¹⁶ Other examples of efforts to centralize technological information include Virginia's Innovative Technology Authority

⁴¹⁰ CAL. GOV'T CODE §§ 11700-11791 (West 1992).

⁴¹¹ See, e.g., Board of Regents v. Exon, 256 N.W.2d 330 (Neb. 1977) (Nebraska statute, establishing a central data-processing division, held not applicable to Board of Regents, which cannot delegate its constitutional powers and duties to other officers or agencies).

⁴¹² FLA. ADMIN. CODE ANN. r. 13-1.005 (1992).

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

Act,⁴¹⁷ Kentucky's Information Systems Commission⁴¹⁸ as well as its Communications Advisory Council,⁴¹⁹ and Nebraska's Central Data Processing Division.⁴²⁰

Preservation and Destruction of Records

9. (A) Any person who shall willfully mutilate, destroy, transfer, remove, damage, or otherwise dispose of [public] records or any part of such records, except as provided by law, and any person who shall retain and continue to hold the possession of any such records, or parts thereof, belonging to the state government or to any local political subdivision, and shall refuse to deliver up such records, or parts thereof, to the proper official under whose authority such records belong, upon demand being made by such officer or, in cases of a defunct office, to the succeeding agency or to the state archives...shall be guilty of a...misdemeanor.⁴²¹

(B) The State Records Administrator, or any official under whose authority such records belong, shall report to the proper county attorney any supposed violation of 9(A) that in its judgment warrants prosecution. It shall be the duty of the several county attorneys to investigate supposed violations of such section and to prosecute violations of such section.⁴²²

This section makes clear to the official ultimately responsible for preserving records that he or she has a duty to report willful destruction or removal of records that the official considers worthy of prosecution. And the section also makes clear to the prosecutor that if the official has decided that the willful action warrants prosecution, then the prosecutor must, at a minimum, investigate "supposed" violations. If the prosecutor finds there is a violation, the prosecutor then has the duty to prosecute. By using the language of this section, government is clearly stating that it values its records and that those who intentionally damage or displace this valuable—and often irreplaceable—resource can suffer criminal prosecution.

⁴¹⁷ VA. CODE ANN. §§ 9-250 to 9-252 (Michie 1984) (addressing need to expand knowledge pertaining to scientific and technological research and development among public and private entities, including, but not limited to, knowledge in the areas of information technology).

⁴¹⁸ KY. REV. STAT. ANN. §§ 61.945 to 61.950 (Michie/Bobbs-Merrill 1986). The Commission's duties include "[r]ecommending procedures and legislation to improve the accessibility of machine readable public records" and "[r]ecommending procedures and legislation to insure the privacy of individuals, with particular emphasis on the potential for invasion of individual privacy." Also, "[t]he commission shall have a permanent staff to assist it in the formulation of the statewide electronic data processing plan and to provide necessary support for its research activities." § 61.950(b)-(d).

⁴¹⁹ § 61.955 ("for the development and coordination of statewide communications plans for the effective and efficient use of communications technology within state government").

⁴²⁰ NEB. REV. STAT. § 81-1116.02 (1991) (providing centralized, coordinated, and efficient data processing services to all state agencies and to prevent the proliferation and duplication of data processing equipment and applications in state government).

⁴²¹ NEB. REV. STAT. § 84-1213 (1991) (substituting "public" records for "such" records where "such" refers to "[a]ll records made or received by or under the authority of, or coming into the custody, control, or possession of agencies").

⁴²² NEB. REV. STAT. § 84-1213.01 (1991).

Alternative [or Addition] to 9⁴²³

9. (A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the [state archivist].⁴²⁴ Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

(B) Any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A) of this section, or by threat of such removal, destruction, mutilation, transfer, or other damage to or disposition of such a record, may commence either or both of the following in the court of common pleas of the county in which division (A) of this section allegedly was violated or is threatened to be violated:

(1) A civil action for injunctive relief to compel compliance with division (A) of this section, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action;

(2) A civil action to recover a forfeiture in the amount of \$1,000 for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action.⁴²⁵

(C) Essential Records.

(1) Designation of Essential Records. In order to provide for the continuity and preservation of civil government, each elected and appointed officer of the state shall designate those public documents which are essential records of his [or her] office and needed in an emergency and for the reestablishment of normal operations after any such emergency. A list of such records shall be forwarded to the state archivist on forms prescribed by the state archivist. This list shall be

⁴²³ Many states have criminal statutes which cover tampering with computer data. If criminal statutes seem adequate to cover all records, the following alternative alone could be used. If not, add (B) to 9 above.

⁴²⁴ The precise title of this official, board, or agency will depend upon state structure.

⁴²⁵ OHIO REV. CODE ANN. § 149.351 (Anderson 1991). For an indication of the varying scope of punishments in different states, see, CONN. GEN. STAT. ANN. § 1-21k(a) (West 1992) (willful destruction or mutilation is a class A misdemeanor and each such occurrence a separate offense); GA. CODE ANN. § 50-18-102(c) (1992) ("The alienation, alteration, theft, or destruction of records by any person or persons in a manner not authorized by an applicable retention schedule is a misdemeanor."); MASS. GEN. LAWS ANN. ch. 66, § 15 (West 1992) (establishes a fine of \$10 to \$500, imprisonment of up to a year, or both); N.J. STAT. ANN. § 47:3-29 (West 1992) (makes malicious removal, alteration or destruction a "high misdemeanor"); N.C. GEN. STAT. § 132-3 (1991) ("Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00)."); R.I. GEN. LAWS § 38-1-2 (1991) (anyone who has public records and who refuses to return them within ten days "shall" be fined up to \$500 and imprisoned up to five years); S.C. CODE ANN. § 30-1-30 (Law. Co-op. 1991) (unlawful removal or mutilation is a misdemeanor with \$50-\$500 fine); S.D. CODIFIED LAWS ANN. § 1-27-10 (1992) (says files "may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of," but adds no penalties (no teeth)); TEX. REV. CIV. STAT. ANN. art. 6252-17a(12) (West 1992) (for anyone who "wilfully destroys, mutilates, removes without permission... or alters public records," punishment is \$25-\$4,000 in fines, three days to three months in jail, or both).

reviewed at least annually by the elected or appointed officer to insure its completeness. Any changes or revisions following this review shall be forwarded to the state archivist. Each such elected and appointed officer of state government shall insure that the security of essential records of his office is by the most economical means commensurate with adequate protection. Protection of essential records may be by vaulting, planned or natural dispersal of copies, or any other method approved by the state archivist [in consultation with the Director of the Office of Information Technology]. Reproductions of essential records may be by photo copy, magnetic tape, microfilm or other method approved by the state archivist [in consultation with the Director of the Office of Information Technology]. Local government offices may coordinate the protection of their essential records with the state archivist as necessary to provide continuity of local government under emergency conditions.⁴²⁶

Several examples will indicate how widely states vary on how much they centralize or decentralize decision making. Many states have instituted boards or agencies to provide expertise in record management matters such as protection, reproduction, or destruction of records. For instance, in North Carolina, selection and preservation of essential records will be under the guidance of the Department of Cultural Resources.⁴²⁷ Montana, on the other hand, requires that "Each elected and appointed officer of state government shall insure that the security of essential records is accomplished by the most economical means possible."⁴²⁸ Minnesota makes record preservation at the local level optional: "Every county, municipality, or other subdivision may institute a program," which must receive approval from the commissioner of administration.⁴²⁹ How much a state would want to centralize or decentralize its boards or offices which provide expertise depends on an interplay of a variety of factors, including sheer geographical size of the state, density of the population, and volume of records generated. Existing state governmental structure may make such a board or office work better as a free-standing entity or as a division within another department, such as the department of education or department of state.

While a variety of organizational structures could work to accomplish the ends of appropriate protection, reproduction, and destruction of records, adequate guidelines within which the boards or offices work are imperative. A conservative approach—conserving records when in doubt—clearly is the least risky course. Once records are destroyed, whether through neglect or purposeful activity, they are lost forever, of course. Keeping records which later prove valueless results in some clutter, but destroying records which later prove valuable destroys a resource to which our posterity has a right. Given the irreplaceable nature of records, legislators may well want to establish a minimum number of years for which various documents must be kept. Legislators may also want to establish minimum conditions under which records must be kept.⁴³⁰ The argument against establishing minimums is that the legislature is substituting its judgment for that of the

⁴²⁶ WASH. REV. CODE ANN. § 40.10.020 (West 1992).

⁴²⁷ N.C. GEN. STAT. § 132-8.2 (1991).

⁴²⁸ MONT. CODE ANN. §§ 2-6-206 (1), (2) (1991).

⁴²⁹ MINN. STAT. ANN. § 138.17 (West 1992) (explicitly mentioning "nuclear" as well as "natural disaster" as reasons for its program to preserve essential records).

⁴³⁰ One surefire means of protecting records is the use of fireproof vaults. *See, e.g.*, FLA. STAT. ch. 119.031 (1991); MASS. ANN. LAWS ch. 66, §§ 11, 12 (Law. Co-op. 1992); N.H. REV. STAT. ANN. § 41:59 (1991); N.C. GEN. STAT. § 132-7 (1991); R.I. GEN. LAWS §§ 38-1-3, 4 (1991).

experts it hires. The argument for establishing minimums, however, is that conserving such a precious public resource is a duty so solemn that elected legislators dare not delegate the duty.

A survey of state laws reveal that states are cognizant of the need for a deliberate policy and have designated policy makers in the area of record preservation, reproduction, and destruction.⁴³¹

⁴³¹ ALA. CODE § 41-13-20 (1992) provides for both a "state records commission" and a single "local government records commission" to determine what records will be "preserved or destroyed." Section 41-13-22 provides that the Department of Archives and History may give advice and assistance to custodians of public records. ALASKA STAT. §§ 40.21.010, .020 (1991) establish within the Department of Education, the Alaska State Archives to manage both state and local public records. CONN. GEN. STAT. ANN. § 1-16 (West 1992) says:

Any officer of the state or any political subdivision thereof, any judge of probate, and any person, corporation or association required to keep records, papers or documents may cause any or all such records, paper or documents to be photographed, microphotographed or reproduced on film. . . . The original records, papers or documents so reproduced may be disposed of in such manner as may meet the approval of the head of the political subdivision in charge thereof, or the probate court administrator in the case of probate records, with the approval of the public records administrator. All other original records, papers or documents so reproduced may be disposed of at the option of the keeper thereof.

DEL. CODE ANN. tit 29, §§ 522, 523 (1991) provide for both a "state records commission," and a single "local records commission." FLA. STAT. ANN. § 119.09 (West 1992) says:

The Division of Library and Information Services, records and information management program, of the Department of State shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, creating, filing, and making available to the public records in their custody. Public officials shall assist the division by preparing an inclusive inventory of categories of public records in their custody.

Furthermore, the division shall establish a time period for the retention or disposal of each series of records. § 119.01(2). And "[a]ll agencies" will follow the divisions' retention schedules. § 119.041. GA. CODE ANN. § 50-18-92 (1992) establishes a State Records Committee which has the "duty . . . to review, approve, disapprove, amend, or modify retention schedules submitted by agency heads, school boards, county governments, and municipal governments through the department for the disposition of records based on administrative, legal, fiscal, or historical values." See also IND. CODE ANN. § 5-15-1-1 (West 1992) (state commission on public records and commission on public records for each county); KAN. STAT. ANN. §§ 45-404(a), (b) (1990) ("state records board" to "[a]pprove or modify retention and disposition schedules and records manuals" for the state and counties); KAN. STAT. ANN. § 75-4701 (1990) ("division of information systems and communications," part of the department of administration); LA. REV. STAT. ANN. § 44:40 (West 1992) (formal records retention schedules—other than conveyance, probate, mortgage, or other permanent records required by existing law to be kept for all time—shall be developed and approved by the state archivist and director of the division of archives, records management, and history of the Department of State); MONT. CODE ANN. § 2-6-204 (1991) ("state records committee" to decide upon retention schedules); NEV. REV. STAT. ANN. § 239.080 (Michie 1991) ("state board of examiners" approves disposition schedules); N.J. REV. STAT. ANN. § 47:3-26 (West 1992) (Bureau of Archives and History in the Department of Education, with approval of State Records Committee establishes standards for "preservation, examination, and use" and "destruction or other disposition" of all public records); N.M. STAT. ANN. § 14-3-3 (Michie 1992) (state commission of public records); OHIO REV. CODE ANN. § 149.33 (Anderson 1991) (state records administration); R.I. GEN. LAWS §§ 38-3-1, 11 (1991) (Public Records Administration has right to examine condition of public records and shall give advice and assistance to public officials in solution of problems of preserving, creating, filing, and making available public records in their custody); S.C. CODE ANN. § 30-1-80 (Law Co-op. 1991) (records management program for application of efficient and economical management methods and creation, utilization, maintenance, retention, preservation, and disposal of public records administered by the Archives); S.D. CODIFIED LAWS ANN. § 1-27-11 (1992) (state board "will apply efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of state records"); TENN. CODE ANN. § 10-7-301 (1992) (Public Records Commission for management of state records); WASH. REV. CODE § 40.14.050 (1991) (records committee "shall . . . approve, modify, or disapprove the recommendations on retention schedules of all files of public records and to act upon requests to destroy any public record: *Provided*, that any modification of a request

(2) Reproduction of Essential Records by State Archivist. The state archivist is authorized to reproduce those documents designated as essential records by the several elected and appointed officials of the state and local government by [electro-magnetic means or by] microfilm or other miniature photographic process and to assist and cooperate in the storage and safeguarding of such reproductions in such place as is recommended by the state archivist with the advice of the [Director of the Office of Information Technology]. The state archivist shall coordinate the essential records protection program and shall carry out the provisions of the state emergency plan as they relate to the preservation of essential records. The state archivist is authorized to charge the several departments of the state and local government the actual cost incurred in reproducing, storing and safeguarding such documents: *Provided, That nothing herein shall authorize the destruction of the originals of such documents after reproduction thereof.*⁴³²

Statutes on destruction of records vary widely. For instance, Alabama allows the Department of Revenue to store data on electronic media and computer output microfilm and, after validation of accuracy, to destroy the original documents.⁴³³ Utah, however, says, "No public records shall be destroyed or otherwise disposed of by any state agency unless it is determined by the archivist and the records committee that the record has no further administrative, legal, fiscal, research, or historical value."⁴³⁴ In an interesting twist, Tennessee, which requires that public records have an index, allows use of a computer index, but not hardcopy printouts.⁴³⁵ A computer index is acceptable, but a "security copy" must be made and two paper copies must be made at least weekly, and one of the paper copies has to be stored somewhere other than in the register's office.⁴³⁶ Showing faith in computerized records, South Dakota law says: "To the extent an office is computerized, the office need not keep a hard, paper copy."⁴³⁷

Given the irreplaceable nature of records, liberal destruction seems foolhardy and adequate back-up seems sensible. Records are a natural resource for our progeny. Decisions that records are worthless and that they should be destroyed, when made by one generation, necessarily bind all succeeding generations—generations which might not agree. Destruction must not be entered into lightly, and faith in computerized records must be

or recommendation must be approved by the head of the agency originating the request or recommendation") (emphasis added).

⁴³² WASH. REV. CODE § 40.10.020 (1991) (substituting "Director of the Office of Information Technology" for "director of community development") (emphasis added).

⁴³³ ALA. CODE § 40-2-12 (1992).

⁴³⁴ UTAH CODE ANN. § 63-2-73 (1989).

⁴³⁵ TENN. CODE ANN. § 10-7-202(b) (1992).

⁴³⁶ § 10-7-202(b). See also ARIZ. REV. STAT. ANN. § 11-479 (1991) (The county recorder may destroy any or all of the filed papers or record books created by handwriting, by typing on printed forms, by typewriting or by photostatic or photographic methods in the recorder's official custody, except federal tax lien notices when certain conditions are met.); IOWA CODE § 602.8103.3 (1991) (allowing destruction of original court records—with court approval—and marriage and dissolution books if the information is stored in computers); NEV. REV. STAT. ANN. § 239.051.1 (Michie 1991) (allowing destruction of virtually any originals if records are on microphotographic film or if the information has been entered into a computer system); WIS. STAT. ANN. § 59.715(12)(16) (West 1989-1990) (allowing "obsolete county records" to be destroyed "whenever necessary to gain needed vault and filing space," so long as specific records have been kept for a designated number of years; e.g., dog-license records could be destroyed after three years, tax receipts after 15).

⁴³⁷ S.D. CODIFIED LAWS ANN. § 6-1-11 (1992).

tempered by the fact that lack of expertise by one individual could result in the inadvertent destruction and loss of significant records.⁴³⁸

(3) Reproduction Standards. Whenever any officer of the state...any political subdivision, municipal corporation, or public corporation is required or authorized by law to record, copy, file, recopy, or replace any document, plat, paper, voucher, receipt, or book on file or of record in his office he [or she] may do so by photostatic, microphotographic, microfilm, or other mechanical process which produces a clear, accurate, and permanent copy or reproduction of the original in accordance with the standards not less than those approved for permanent records by the national bureau of standards or the American National Standards Association.⁴³⁹

(4) Signatures on records need not be placed on the computer storage devices.⁴⁴⁰

This statute recognizes the practical difficulty of trying to place signatures on records stored in computers. Signatures can be placed on computerized records through use of optical scanners; however, requiring use of such scanners could be burdensome in terms of time and money.

(5) A recording officer adopting a system which includes the photographic process or the microphotographic process shall thereafter cause all records made by either of said processes to be inspected at least once in every three years, correct any fading or otherwise faulty records and make report of such inspection and correction to the supervisor of records.⁴⁴¹

(6) The [superior, district, circuit] court shall have jurisdiction in mandamus, on petition of the supervisor of records...to order compliance with the provisions of this section.⁴⁴²

(7) No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record...until after the request is granted or until at least 60 days after the date that the request is denied. If a [court] action is commenced [challenging the denial], the requested record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for

⁴³⁸ See Howe *supra* note 101 on the IRS inadvertently wiping out 10,000 tax records.

⁴³⁹ S.D. CODIFIED LAWS ANN. § 1-27-4 (1992). See also CONN. GEN. STAT. ANN. § 1-9 (1990) (specifies "American national standards for permanent paper"); LA. REV. STAT. ANN. § 44:415 (West 1992) (microphotographic or electronic digitizing processes must comply with standards established by the division of archives, records management, and history of the Department of State); N.M. STAT. ANN. § 14-8-7 (Michie 1992) ("shall be the duty of county clerks in this state to use either a good grade of nonfadeable permanent black ink or a good grade of black record typewritten ribbon in recording all instruments of writing which by law they are required to record"); NEV. REV. STAT. ANN. § 239.051(2) (Michie 1991) (microphotographs must be made on film approved by the American National Standards Institute); PA. STAT. ANN. tit. 65, §§ 63.1, 65.1 (1990) (specifies "microcopy or reproduction" meeting standards of the National Bureau of Standards); UTAH CODE ANN. §§ 63-2-70, 71 (1989) (specifies the standards of the American National Standards Association and adds the Association for Information and Image Management).

⁴⁴⁰ ARIZ. REV. STAT. ANN. § 28-110(E) (1991).

⁴⁴¹ MASS. GEN. LAWS ANN. ch. 66, § 3 (West 1988).

⁴⁴² § 4.

appealing that order has passed, or, if appeal, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the requested record may not be destroyed until after the request for inspection or copying is granted.⁴⁴³

(8) A copy of a record destroyed under the provisions of this chapter shall be receivable in evidence in any court or proceeding and shall have the same force and effect as the original record.

IV. CONCLUSION

As computer technology hurtles forward, it is important that laws not lag too far behind. For society to realize fully the benefits of technological advancement for access to public information, progressive laws are a necessity. Laws must be designed in light of technology. Otherwise, Francis Bacon's equation—"knowledge is power"—appears only as a mockery from the past. "Knowledge is power" only works in the realm of computer technology if laws give computers and their operators freedom to work. But too often computer technology and laws on access are out of harmony. The two need to work together to enhance our open society.

Legislators must not look to the courts to create harmony where technology and the law of access lack synchrony. As courts work to interpret inadequate statutes, they sometimes look favorably on persons wanting access to computer tapes, sometimes not. If courts start with comprehensive statutes when considering access to computerized information, requesters stand a better chance of quick, favorable outcomes. Or better yet, persons requesting computerized information will not have to go to court at all because the statutes so clearly authorize access. Ideally, for requesters of computerized information, the information will be produced quickly, cheaply, and in the form the requester wishes. The ultimate in ease, of course, is on-line access, and it is a growing trend.

But pitted against a dream of information utopia is the growing reality of privatization of government information and of increased privacy concerns. Governments' increasing practice of turning over information to private organizations and thus forcing individuals to gain access to public records by paying these private organizations could erect a financial barrier to access. Growing concerns over privacy could lead to greater erosion of information designated as public. Individuals who are concerned about access to information must be vigilant about the posting of the signs of denial—Warning: Privately owned or Warning: Private, period.

This is not to say that *all* information collected by government should be public. Certainly the government does collect information, such as medical information, that must remain off-limits to public perusal. And, in guarding rightful privacy interests, government must guard against collecting information for one purpose and then thoughtlessly turning it over to others to be used for vastly different purposes. But government should avoid posting "Keep Out!" signs unless excluded information clearly warrants such restriction.

If legislators are to take seriously their duty to open up government as much as possible within the rightful limits of privacy protection, then they must clean out the cobwebs of the Gutenberg era. Legislative housekeeping in the area of access demands a focused perusal of statutes that are anachronisms in this post-Gutenberg era of information technology. Tightening a phrase here, loosening one there, wholesale tossing

⁴⁴³ WIS. STAT. ANN. § 19.35(5) (West 1986).

out of the old legislative trappings that only made sense in a paper world—whatever it takes—legislators need to rise to the challenge of the age of computerized information. The alternative is senseless frustration and hardship in an information era that should facilitate easy record creation, storage, and retrieval.

This paper has presented a dozen elements legislation must contain to allow easy access to computerized information—a definition of “public record” that is broad enough to include computerized records, not just paper ones; a background presumption that information is indeed open to the public; redaction, so that mixed information (private and public) can be separated and the requester can gain access to the public information; access to all, without regard to purpose but with regard to instruction, if necessary; cost-effective access; tailored access; functional availability of all information stored within computers; timely access; a board or agency to provide expertise to the guardians of records; regulations on storage of our precious legacy of records; regulations on the destruction of records no longer deemed a necessary part of that legacy; and sanctions—teeth—to ensure that the guardians share the rich resource of records with individuals making rightful requests.

As always, in a nation as large as the United States, comprised of fifty states of vastly differing size and population density, with fifty different variations on the theme of government structure, some organizational features must vary. For instance, information technology decisions that require great expertise might be made by a free-standing board in one state and by a division in a governmental department in another. The precise organizational niche where the work originates is not important so long as the work is done—so long as the national treasure of records is gathered, stored, and shared in an increasingly optimal fashion.

The goal of easy access to public records was never nearly so attainable in the world of paper and file drawers and endless searches by hand as it is now. Technology has created the door to easy access. Now laws must let requesters pass through that door and out of the confines of the Gutenberg age. “Sunshine law” is an apt metaphor for laws on access to information, especially in the computer era. As legislators work to increase the sunshine in the law, they might well recall the words of Walt Whitman, “I think heroic deeds were all conceiv’d in the open air. . . .”⁴⁴⁴

⁴⁴⁴ 1 WALT WHITMAN, THE COMPLETE WRITINGS OF WALT WHITMAN 180 (1902).