

Technology Tests Transparency

States are using technology to keep pace with the increasing volume and sophistication of requests for public records.

BY PAM GREENBERG

Tim Clemans calls himself the guy who keeps public records staff awake at night.

Clemans has sought millions of records from Washington state agencies, the University of Washington and local governments. He's a programmer who has also made many of those requests via bots—requests automatically generated by a computer program or script.

Clemans is just one of many who make similar requests, and bots are just one of many new technologies that are changing the ways requests are made. These trends, however, are making it more difficult for governments to respond. Technology might be the only answer.

Challenging Requests

Records requests can be expansive, vague, voluminous, even frivolous; yet governments still must respond, unless the information requested is specifically exempted by law. Examples abound: In Washington, a person calling himself “Mr. Public Requester” asked for all the data from the public cellphones of all Snohomish County employees—including photos, audio, video and even apps and operating system data.

In Texas, a House committee in 2016 heard about a requester, described as someone who “distrusts government,” who emailed 22,887 public information requests to Angelina County officials in one year.

Also in Texas, a three-person department spent 200 hours reviewing and redacting files, producing more than 2,000 copies of documents for a requester who never returned for the information and was never heard from again.

More commonly, commercial information brokers, researchers and watchdog groups request large volumes of data that they can analyze, reorganize or repackage. Some of these organizations also use bots and make frequent requests.



Some requests are just vague, making it difficult to know how to respond. Examples of these include, “Please provide all records mentioned in the March 25 [name of newspaper] article about [agency name],” or “I am requesting all your department’s records related to [topic].”



Representative
Terry Nealey
Washington

Washington Representatives Terry Nealey (R) and Joan McBride (D) in 2017 cosponsored a bill to help agencies deal with vague or excessive requests. “In this digital age,” Nealey said, “there has been an explosion of electronic public records requests for free, including from ‘vexatious requestors’—people who have little or no legitimate interest in the records themselves, other than to force agencies to spend

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Mind Your Exemptions

Every state has a public records law (aka Sunshine Laws or Freedom of Information Acts), many of which were enacted in the 1950s and '60s. Most were established with a presumption of openness—that is, that government information is public and should be accessible unless specifically exempted for privacy or other compelling reasons.

Legislatures have carved out exemptions to protect personal information, critical infrastructure data and cybersecurity strategies, and trade secrets or other proprietary or research data. The more the exemptions, however, the greater the complexity when records are requested. Records custodians must be trained and knowledgeable about what the law requires and must redact confidential information.

To address concerns about proliferating exemptions, Vermont this year enacted legislation specifying that any public records exemption that is enacted or substantively amended starting in 2019 will be repealed after five years unless the Legislature re-enacts it.

Oregon also passed a law this year requiring a subcommittee of the legislature to review public records exemptions, and consider retention, amendment or repeal of the exemptions.

precious time and limited resources trying to fulfill the requests.”

The legislation passed. Now, nonspecific requests for all or most agency records may be considered invalid. Agencies may also deny multiple, automatically generated bot requests from the same source within a 24-hour period if it causes excessive interference with essential functions of the agency. Agencies may charge a nominal fee for requests, and local governments can apply for grants to help pay for training to improve the management of records.

At least a dozen states have similar laws that address frivolous, harassing,



Representative
Joan McBride
Washington

redundant or unduly burdensome records requests, by allowing for special fees, for example, or by allowing agencies to refuse to comply with requests under limited circumstances.

Digital Records Exploding

The number of emails, texts and social media records generated by government officials and employees is increasing exponentially. The sheer volume of these records can make it hard to review them to determine which are public and whether and for how long they should be retained.

Government information resides in formats that might not initially come to mind when thinking of public records. For example, the vast amount of video foot-

age from police body cameras—public in many states—often puts a strain on data storage and retrieval capabilities. Requests for footage require additional personnel to select and download the videos, and to review every minute for possible redactions to protect the privacy of uninvolved bystanders.

Apps and cloud technologies also create new challenges, especially where records of individual officials are concerned. The messaging apps Snapchat and Confide, for example, are designed to be transitory. On Snapchat, pictures and messages are accessible for only a short time. Confide destroys messages after they've been read by the intended recipient.

Similar capabilities are now available in email. In April, Google announced a “confidential mode” for Gmail users—a way to set expiration dates on email and revoke previously sent messages. The new feature has come under criticism from open-government groups. The National Freedom of Information Coalition is urging Google to take steps to ensure that the “self-destruct” feature is disabled on government Gmail accounts and on emails directed to a government entity.

The coalition's executive director, Daniel Bevarly, said Gmail's self-destruct option is just one on a growing list of concerns about the abundance of third-party software and apps used by state and local governments. According to Mal Leary, the coalition's board president, “Technology that allows the self-destruction of official, electronic public communications is not promoting transparency, and under most state open-government laws is illegal.”

In Missouri, however, the state attorney general investigated then-Governor Eric Greitens' use of Confide to communicate with his taxpayer-funded staff and concluded that use of the app did not violate the state's sunshine law, but that its use for public business was “not a best practice.” (Greitens later resigned while facing an unrelated felony charge and possible impeachment during an investigation of claims that he tried to elude the state's campaign disclosure laws and to blackmail a former lover.)

Since Confide automatically deletes mes-

sages after they're read, the Missouri opinion states, the app prevents public employees from exercising reasoned judgment about whether a communication must be retained. Moreover, "If a public employee were to receive such a communication via Confide, she would be unable to retain that communication as required by Missouri law." Missouri Representative Gina Mitten (D), assistant minority floor leader, sponsored a bill this year that would have made the use of Confide by state employees and officials illegal, but it never got a hearing.



Representative
Gina Mitten
Missouri

More Requests

Many state and local agencies report that records requests are increasing in number, though statistics are not readily available. A 2016 report by the Washington State Auditor's Office found that the number of state and local requests increased by 36 percent from 2011 to 2015, and that the cost of responding to the more than 285,000 requests in 2016 was more than \$60 million.

A Florida TaxWatch survey of the state's city and county managers found that about half said the volume of big data requests has increased in recent years. The organization also gave examples of what it called intentional misuse of public records laws. For example, one person in the small community of Cooper City, Fla., filed approximately 600 email requests in a one-year period, then sued the city for noncompliance when it had difficulty producing the records.

In Texas, the Open Records Division of the attorney general's office saw an average increase in records requests of more than 18 percent annually from 1989 to 2016, even when the average annual growth of the state's population was less than 2 percent.

Even states that do not receive many requests from residents have felt the impact from elsewhere. A recent study by the Pennsylvania Legislative Budget and Finance Committee found that a "relatively small number of agencies do receive a large number of requests, often for a

commercial purpose from outside of Pennsylvania, which could be exceedingly time consuming."

Unfortunately, records custodians sometimes see legitimate public records requests as frivolous or time consuming, especially agencies with limited staff and resources. The Pennsylvania report concluded that agencies consider some requests to be burdensome even when they require relatively little time to fulfill, especially if custodians have concerns about the type of request or who's making it.

As electronic records have proliferated, they've become more varied in format and more likely to reside outside of government servers. Some government offices and agencies contract with commercial services such as Gmail or Dropbox. Public officials are using personal devices, social media and personal cloud accounts for public business. This comingling of records can make it more difficult to track, find and retain records when requested.

In many states, it's the content of the record, not the format or where it's located, that determines whether it's public. In some states, laws expressly state that; in others, judges or attorneys general have issued opinions finding the same. That means public officials—or their legal staff—must review email correspondence to determine which are considered public record and to make sure confidential information is redacted before the emails are released.

New Systems Offer Solutions

A burgeoning industry is aimed at helping government respond to records requests more efficiently. New software applications, for example, can help organize and retain records according to specific schedules. Software can capture requests, route them to the appropriate staff, manage deadlines, redact certain words or phrases from documents automatically, keep track of fees, and more. There's also software that automatically archives and retains email for whatever period is required by law. Governments that can't afford these new tools, however, are left with manual methods and paper-based responses.

Endless information is available by typ-

ing a few words in a web search engine, and government records are going online, too. Open data portals and taxpayer transparency websites are available in every state. But a few state and local governments are taking an even more proactive and streamlined approach. They make full records requests and responses available online, or they allow requests to be searched and submitted online. For example, Utah's statewide Open Records Portal has an online form with guidelines about how to make a request. It also allows users to review their request and track its progress.

In California, agencies that post public records on the web can refer requesters to the website where the record is posted, instead of responding individually.

It might seem counterintuitive that a request for electronic records such as emails, for example, might be met with a stack of paper copies of messages. But some requests are still fulfilled only on paper. About half the states, however, now have laws that require information to be released in the same format in which the record is maintained. In other states, court decisions or attorneys general's opinions have interpreted statutes to mean the same. Iowa law goes further: It prohibits a government body from acquiring data processing systems for public records if the system would impede the ability to examine or copy a record.

On the Horizon

New consumer apps and innovations raise the public's expectations for near-instantaneous service when seeking information from government. And government is gaining ground by taking advantage of some of those very innovations and tools. On the horizon, artificial intelligence holds promise as a way to comb through and categorize records already online, and to create conveniences like automatic email alerts when new information becomes available.

Whether the records requests are coming from Tim Clemans and his bots or giant information brokers, state legislatures will play a pivotal role in ensuring that new technology is used to maintain transparency.

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