

Access to Selected Records



A state-by-state survey of
obtaining government data

Spring 2003

Electronic access is critical to reporting

Reporters have a tool that allows them to report on entire populations and do original analysis on a subject for their stories, rather than relying solely on anecdotes. Computer-assisted reporting helps journalists do important stories that otherwise would not be covered.

In 1999, reporters for the *Miami Herald* used voter databases to show widespread fraud in the city's mayoral election. The series overturned the election results and won the staff the 1999 Pulitzer Prize for investigative reporting.

In 2002, *Washington Post* reporters used databases to show the District of Columbia's role in the neglect and death of 229 children in protective care. The series prompted an overhaul of the child welfare system there and earned the 2002 investigative Pulitzer.

But not all computer-assisted stories are done by large metropolitan newspapers that win Pulitzer prizes. Around the country small and medium-sized newsrooms use databases to track government corruption or systemic difficulties in a local or state agency.

But to use this tool, reporters need access to government databases. Access to electronic records often can be difficult for reporters, depending on how a particular state treats computerized information.

Prohibitive fees, privacy regulations, proprietary software and laws that don't necessarily address access to databases can be barriers to journalists acquiring electronic information.

When reporters at the *Detroit News* requested a database of driver records, they were told that it would cost about \$43 million. New legislation in Michigan allows for per-record charges on driver data. In many states, access to driver data was eliminated because of state responses to the federal Driver's Privacy Protection Act.

When the *San Jose Mercury News* wanted county assessment records, it was told that a local statute allows the assessor to charge \$40,000 for the database. When the *Mercury News* sought a copy of the database listing information on participants in the state's "Adopt-a-Highway" program, its request was denied because it ostensibly infringed on the participants' privacy — even though their names are already displayed on highway signs.

When a (*Harrisburg*) *Patriot-News* reporter tried to get records from Pennsylvania's Department of Education, the only information he could get was in PDF format on the agency's Web site. Because PDF files are difficult to put into databases, he requested another format. The agency denied the request, saying that the information was not in their possession, but rather in the hands of a vendor in Minnesota. Providing the data would take two months to prepare and cost about \$7,000.

Although state governments are becoming increasingly aware of — and responsive to — changes brought by the new technologies, conflicts over electronic records access remain common.

A 2001 survey by the National Archives and Records Administration of more than 150 federal agencies and departments concluded that most federal agencies are still baffled by electronic records. According to the survey, most create documents in electronic formats, but when preserving them as official records, print them on paper and put them into storage.

"Government employees do not know how to solve the problem of electronic records — whether the electronic information they create constitutes records and, if so, what to do with the records," NARA said in a report written with help from information technology firm SRA International Inc.

In some states, government agencies contract with private companies for data processing. In some cases, because private or quasi-governmental agencies have the agencies' data, the information has not been disclosed. In other states, courts have said that if the private organization is doing government business, then the information should be public.

Is electronic information public?

A growing number of states now include electronic data in their definitions of what constitutes a public record. As government increasingly conducts its business electronically, access to computerized records becomes essential. The public must have access to electronic records or lose any meaningful way to oversee government activity. Yet agencies often resist opening their computerized records to requesters.

According to a report from the National Association of Legislative Information Technology (NALIT): "All 50 states and the District of Columbia include computerized records in their definition of public records, either specifically in the statutory language or through judicial interpretation."

Since September 11, however, some states are rethinking how they make information available. Some have curtailed the amount of information they are putting online and, in some cases, agencies have removed information.

Can a requester choose the format?

Agencies and requesters often disagree over the particular physical format — paper, tape or diskette — for delivering public records.

The format in which data are released is often as critical as the disclosure itself. A printout of raw data may be as useless to journalists as a pile of unorganized documents. One New York City department refused to provide a copy of a computer tape to a publisher. Instead, the agency proposed that the requester pay for a printout that would take five or six weeks to print, exceed one million pages in length, and cost \$10,000 for paper alone.

In some cases, when raw data isn't available, news organizations must create a database from the paper documents. Because campaign finance information is not in a database in Missouri, the *St. Louis Post-Dispatch* entered the data into a computer.

How much will it cost?

The National League of Cities resolved in December 1993 that cities and towns should set higher fees for electronically stored public information to offset and recoup the costs of developing better computer systems. Since that time, many states have enacted laws or administrative regulations outlining fee structures for access to electronic records. Most states either charge "reasonable fees" or "actual costs." However, what fees agencies believe are reasonable and what may be considered an actual cost varies widely among the states.

Many officials try to recoup more than costs. These agencies try to use electronic records to generate revenue for the government's coffers. Members of the public point out that they already paid for electronic information systems through their taxes.

Is software a public record?

In most cases, reporters do not need agency software and can use just the underlying data. However, in some cases, customized software does not allow for easy data extractions. There have been disputes over whether requesters may obtain copies of specific software to read coded electronic records. Many states now address this issue in their statutes.

According to the NALIT report, state legislatures have amended their open records statutes to exempt agency-developed software. "Currently 20 states have statutes that exempt



software in some way, and the attorneys general of Michigan, Mississippi and Nevada have issued opinions exempting government software. Alaska, Florida and Kentucky specifically include software in the definition of public record."

Copyright issues arise when requesters seek some types of commercially produced software. Commercial software is privately produced and licensed to the government, and the producers believe that the government is just like any other licensee.

Some software may be prepared by a state agency or a state university. The state-created software is arguably not proprietary since it was created using state money. However, unlike the federal government, which does not copyright public information, some states claim that they may copyright items such as statutory compilations and computer programs.

In Nevada, a computer program was set up to randomly select recipients of the limited number of hunting permits issued by the state. Hunters complained that permits were not distributed fairly. But when citizens asked for a copy of the software to test how random the selections were, the Nevada attorney general advised that government-written software is not a public record.

But the Florida attorney general advised that copyrighted computer software that was licensed by a county from a private company and used for compiling county data was a public record. The opinion said the software must be made available to the public for examination and inspection only. Unauthorized reproduction of copies of the software was prohibited by federal copyright law. Since then, the Florida legislature has allowed state agencies to hold copyrights from software they develop and charge license fees for its use, so long as public access to records is not compromised.

Can government pump up the price for useful systems?

A growing number of state legislatures want to make money off of specialized computer systems called "geographic information systems." These systems manipulate large databases of information by overlaying the data on regional maps. Such GIS are tempting cash cows for municipalities because commercial organizations, such as mail order companies, are often willing to pay for access to these databases.

When reporters at *The Modesto Bee* tried to get electronic mapping files of voting precincts, the county elections office refused, offering paper or PDF files instead. The officials claimed that, because it took county workers many hours to create the files, the data should be protected work product. Unfortunately for them, California law covers this only if the government workers had created the programming language. In this case, the county used ArcView, a commercial mapping software. The reporters ended up getting the files, but got them too late to do the story for which they needed them.

Online information.

Many states provide frequently requested information on Web sites. And in some states, legal requirements mandate that some information be online.

California mandated in 1994 that all state statutes, the state constitution and current legislative information be made available on the Internet. In recent years, every state has placed varying amounts of information online. Some provide only a home page; others post statutes, case law, governmental information and agency reports online.

This guide addresses in more detail many of the issues raised earlier concerning electronic records access. In addition, the guide provides a state-by-state summary of key issues regarding electronic information.

The EFOIA gave promise

In 1996, the federal Freedom of Information Act was amended to specifically cover electronic information. The federal law only applies to records that are held in federal agencies, but states often imitate the federal law in passing new state legislation. The 1996 "Electronic Freedom of Information Act" also lengthened the time in which an agency must respond to FOI requests to 20 business days from 10 days. EFOIA created multiple tracks for processing requests and allows a requester to ask for "expedited processing" if a request "demonstrates a compelling need." In many cases, journalists can show that their requests demonstrate such a need.

The law, codified at 5 U.S.C. § 552, defines a record to include any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."

EFOIA also made it clear that computer searches to retrieve records did not constitute the creation of a new record, eliminating one common barrier to reporters seeking electronic records.

EFOIA required agencies to create "electronic reading rooms" and to have a FOI Act section on their Web sites. The legislation required agencies to post online copies and indices of frequently requested records, as well as administrative opinions, policy statements and staff manuals. The provision was to be met by Nov. 1, 1997, and the requirement applied only to records created on or after Nov. 1, 1996.

While EFOIA has made it clear that electronic records are covered by the federal records law, problems still exist with agencies' EFOIA compliance.

Journalists told a House subcommittee in 2000 that agencies continued to delay requests and some failed to post frequently requested information on their Web sites.

An August 2001 report by the General Accounting Office, based primarily on federal agencies' annual FOI Act reports, found that backlogs continue and agencies need to better provide online information.

The study found a growing backlog of unprocessed requests at most agencies, while the number of requests has held steady or declined for most agencies.

Although most agencies reported that they processed simple requests within the required 20 days, other agencies reported much higher processing times.

According to the GAO report, agencies are still inconsistent in how they report their annual FOI Act results from year to year, making it difficult to look at changes over time.

For the study, the GAO also interviewed FOI Act requesters and agency FOI Act staff to study the impact of September 11 on the

Access to Electronic Records

Executive Director: Lucy A. Daligh

Editors: Jennifer LaFleur and Gregg P. Leslie

Contributors: Jennifer LaFleur, Rebecca Daugherty,

Kathleen Dunphy, James Getz and Alicia Upadhy

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FOI Act: "Agency officials characterized the effects on FOIA implementation as relatively minor. . . . In contrast, members of the requester community expressed general concern about information dissemination and access to government in light of removal of information from government Web sites after Sept. 11."

The impact of September 11 on EFOIA, however, will become clearer when annual reports covering 2002 are released.

The report found that while agencies are making efforts to put information on their Web sites, improvements are still needed: "Agencies are not devoting sufficient attention to the on-line availability of materials and en-

suring that Web site content is adequately maintained, including accuracy and currency of the material and Web site links."

The Department of Justice, charged with FOI Act oversight, has made strides to implement earlier GAO recommendations outlined in a March 2001 report.

"FOIA makes government work better," said Sen. Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, who along with Rep. Stephen Horn (R-Calif.) requested the report.

"In times of heightened security, the tendency to close doors and conduct the government's business in secret is natural," Leahy said in a Sept. 25, 2002 statement. "Se-

crecy can become addictive, and that is a danger we have to guard against. The nation needs a robust FOIA in times of peace, but also in times of war. The Freedom of Information Act is the people's window on their government, showing where it is doing things right, but also where it can do better."

Horn headed the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform. Leahy and Horn were the chief authors of the EFOIA Amendments of 1996. GAO continues to examine the impact of these new FOI Act policies at Leahy's request.

May a requester choose to obtain electronic records?

A computer can search through millions of records in a relatively short period. The same task could take a reporter weeks or months of searching through paper records. So the format in which the information is produced is crucial. The requester's right to demand that information be provided in a computer printout, a computer tape, a CD-ROM or some other form varies by state — so the format can render data very useful or practically useless.

Agencies also may provide information in an electronic format that still renders it useless to a reporter. As states create searchable databases on their Web sites, reporters use them to look up individual cases, but if a reporter wants to do further analysis with the entire database, some agencies balk, saying the information is available online. In other cases, information may be available in formats such as PDF files that make analyzing them difficult.

The states deal with this issue in a variety of ways. When electronic records are sought, Oregon requires an agency to "provide copies of the public record in the form requested if available."

In California, government agencies used to be able to pick the format that they wanted to provide, but a 2001 amendment to the

public records act said that requesters could get electronic files if they requested them and the agency had them in that format.

Virginia gives the agency discretion to "convert" a record to another format to satisfy a request when the document does not already exist in the requested format. The statute requires that electronic records must be "reasonably accessible."

Some statutes that do not refer specifically to electronic records require agencies to adopt "reasonable" rules and regulations regarding access and copying. It may be possible to argue that such a provision applies to a request for release of information in a specific format.

Even when an agency has discretion over the format, some courts have allowed requesters to challenge very unreasonable agency action as an abuse of that discretion.

Other courts have decided that requesters have affirmative rights to obtain computer tapes or disks. In one of the earliest cases on the subject, the New Mexico Supreme Court said "the right to inspect public records should . . . carry with it the benefits arising from improved methods and techniques of recording and utilizing information contained in those records." The court ruled that political organizers had a right to a copy of a computer tape.

The Ohio Supreme Court ruled that an agency must allow copying of portions of computer tapes if the requester has presented a legitimate reason why a paper copy of the records would be insufficient or impractical.

The Georgia Court of Appeals implied that an agency cannot discriminate against future requesters when the agency provides computer tapes to one private entity. The court affirmed a deal struck by the county commissioners to supply computer tapes to a business, provided that the county did "not exclude any other individual or company from access to such records on an equal basis."

Utah agencies may not deny access because information is stored electronically. An agency must provide that information in a particular format if the agency can comply without "unreasonably interfering with the government entity's duties and responsibilities." Additional fees may be added for such a service.

The Kentucky Attorney General's Office said in an August 2002 opinion that a computer crash was no excuse for the Elsmere Police Department's decision to deny records and said that the police department's efforts to retrieve information requested under the state's Open Records Act were "inadequate." The inability of a requestor to obtain information reflects poor records management, the opinion said. "Electronic record-keeping is to enhance access, not to impede access."

Some states may permit requesters to copy electronic records with their own equipment if the agency cannot do so.

However, when a requester asked an agency to temporarily turn over original disks because the agency could not make a copy in the format requested, the Arkansas Supreme Court ruled in 1987 that the agency need provide only computer printouts. The court reasoned that a request for access to original disks was a request for equipment rather than information.



Ramifications of 9-11 Web takedowns still unclear

After Congress passed the 1996 amendments to the federal Freedom of Information Act, government agencies began putting more data and documents on their Web sites.

But after the events of September 11, 2001, several federal agencies moved to take down maps, databases and entire Web sites from the public domain, citing security reasons.

In particular, the door was shut to environmental data, transportation maps, dam locations and other databases frequently used by reporters, community groups and citizens.

Instead of the usual reports and information on Web sites, many users instead found messages saying that sites were down or information was unavailable.

The U.S. Army's Redstone Arsenal posted this message: "Due to the threat against our nation, our way of life, national security, and because I was told to do so, portions of the Team Redstone homepage have been temporarily blocked from public viewing."

Removal of information on Web sites does not, in all cases, mean that the same information will be denied a requester. Federal FOI officers can deny only information that falls within one of the nine exemptions, but agencies have been under some pressure to make information that hypothetically might be useful to terrorists less conveniently available.

One of the FOI Act's nine exemptions defers to other laws that require confidential treatment of information. In early 2003, Congress passed one law requiring the Department of Homeland Security to protect "critical infrastructure" information voluntarily submitted by businesses. It was considering additional legislation to protect information some members of Congress say would be useful to terrorists.

Since the first rush to take down federal Web sites, some of the information has been returned, but much continues to be unavailable and additional information is either being removed or not updated. In addition, proposed legislation and rulemaking could restrict information such as pipeline locations, chemical plant information and other data deemed "sensitive."

Where reporters could once get maps showing pipeline systems, the Office of Pipelines Safety Web site now has this message: "The Office of Pipeline Safety has discontinued providing open access to the National Pipeline Mapping System. Recent events have focused additional security concerns on critical infrastructure systems."

The agency went beyond just removing the information from its Web site. The information is now available only to pipeline operators and local, state and Federal government officials. Reinterpretation of FOI exemptions has allowed this to occur.

Tracking Closures

OMB Watch, a non-profit organization

in Washington, D.C., concerned with freedom of information issues, has tracked federal agencies' removal of information from their Web sites since Fall 2001.

"We saw a pretty dramatic shutdown," said Sean Moulton, senior policy analyst with OMB Watch. "We haven't seen much of a reversal of that. If it didn't reverse immediately . . . it became stuck amid the debates."

In December 2001, OMB Watch sent FOI requests to federal agencies asking them to list what information they had removed from the Web sites. The responses varied. The Federal Energy Regulatory Commission refused to comply with the request, saying that the mere disclosure of such a list would be problematic. Early removal of information from the agency's Web site was based on size, meaning that documents with large file sizes were removed from the electronic reading room.

"Literally tens of thousands of documents that were 'FOI-able' a year ago or that you could just go get are now exempt from FOIA with no change in FOIA and no change in court rulings," Moulton said.

Rather, the changes were based on how the exemptions are to be interpreted.

The Federal Aviation Administration responded to the OMB Watch request by saying that it had not taken anything down, Moulton said. Yet the Web site where FAA enforcement data was once available now has a message stating: "The Enforcement Information System (EIS) is not available at this time due in part to security considerations."

Moulton said that one of the most responsive agencies was the Environmental Protection Agency.

"They showed that stuff was taken down and then put back up," Moulton said.

According to Odelia Funke, chief of EPA's Policy and Program Management Branch, the agency did an inventory of databases and identified where there were security issues. In the end, much of the information was returned to the agency's site. However, access to some chemical information and direct-connect access to the agency's Envirofacts Data Warehouse remain unavailable. Direct-connect allowed users to query directly the Envirofacts database.

"Agencies that took down stuff wholesale are having difficulty deciding what to put back up," Funke said.

Moves to take down information were not isolated to federal agencies. Several states removed information from Web sites as well. Pennsylvania removed environmental data from its site. A memo to New York state agencies from James K. Kallstrom, director of the Office of Public Security, and James G. Natoli, director of the Office of State Operations, urged them to review sensitive information. New Jersey removed chemical information from its Web site.

States have made efforts to exempt terrorism meetings and homeland security

agencies from state public records acts.

In Illinois, a new law exempts geographic information systems from the state's freedom of information act. In Alabama, proposed legislation in 2002, submitted by the state Department of Emergency Management, attempted to make secret state agency e-mail and meeting records if they would jeopardize agency safety. It also would have exempted from disclosure vulnerability assessments and infrastructure information for many public and government buildings.

Lawmakers have been particularly concerned about disclosing vulnerabilities that they fear could be targeted by terrorists, but secrecy carries its own danger.

In June, Sen. Christopher "Kit" Bond (D-Mo.) introduced the "Community Protection from Chemical Terrorism Act," legislation that would restrict access to chemical plant's risk management plans. Environmental reporters and citizen groups have used that information to assess the risk of chemical plants in their areas. And although the information is no longer online, it is available in EPA reading rooms around the country.

But risk management plans do not provide overly detailed information about a plant, Moulton said. "It doesn't say where it [the chemical supply] is stored, nor indicate what it is stored in."

"There is a risk when industry is not under the watchful eye of the public," Moulton said. "When you get information you can create pressure to get something fixed or changed."

In July 2001, Ralph Haurwitz and Jeff Nesmith did a series of stories in the *Austin American-Statesman* looking at pipeline safety around the country.

As a result of the series, federal agencies with pipeline oversight have increased efforts to update regulatory activities and rulemaking, Haurwitz said. In addition, the Texas Railroad Commission levied its largest fine ever against a company responsible for an accident in Abilene, Texas.

Much of the data they used, including pipeline incidents and company financial information, is still available today. But other information concerning pipelines in environmentally sensitive areas is no longer available.

"Today, if a reporter wanted to do a particular analysis dealing with these areas, it would be difficult to do it because the information is no longer public," Haurwitz said.

The potential for closure of these and other types of "critical infrastructure information" worries journalism organizations.

"I think if the government gets its way it's going to be an awful lot harder to do what we've been doing," said James Bruggers, president of the Society of Environmental Journalists and environmental reporter for *The (Louisville) Courier-Journal*. "I'm not sure what the overall benefit is. The fact that a lot of this information has been made public has made communities safer."

Does an agency have to search for requesters' records?

When an agency wants to restrict access to information, the records custodian may say that manipulating database information is "creating" a new record, which usually is not required by law.

Others argue that "creating" a specialized record is the very essence of why databases are set up. Their primary function is to permit users to manipulate data and information.

Sometimes customized searches are required only because the agency neglected to plan its database system in a way that users could access information.

When reporters at the *St. Louis Post-Dispatch* wanted traffic ticket data from a local police agency, the police agency argued that because it had no way to separate cases, it was not required to disclose from other cases, they could not provide any of the information.

Often, statutes that regulate the practice do not require an agency to manipulate computer data for requesters, but neither do they prohibit an agency's compliance with such requests.

Some statutes appear to require agencies to make reasonable efforts to provide such data. Virginia allows an agency to "abstract or summarize information," but the agency is not required to do so.

In Minnesota, requesters can ask an agency to make a custom run of summary data, if the requester is willing to pay for it.

Idaho implies a limited right of access to "analysis, compilation and other manipulated forms of the original data produced by use of the program." Oregon permits an agency to collect fees for "summarizing,



compiling or tailoring" electronic records.

Computer-savvy reporters often will offer to write the program to save an agency the trouble. This may depend on which database management system the agency uses.

Courts have split on whether agencies must manipulate data for a requester. State courts sometimes look to federal law for guidance.

In 1982, the federal appeals court in Washington, D.C., held that "an agency is not required . . . to create a document that does not exist in order to satisfy a request." (*Yeager v. Drug Enforcement Administration*)

A U.S. District Court in San Francisco (9th Cir.) ruled that an agency was not required to manipulate exempt information on personal tax returns to provide a breakdown of non-exempt information. The court ruled that the request involved "editing so extensive as to amount to the creation of new records." (*Long v. IRS*)

However, more recent federal cases impose greater burdens on federal agencies to search

for specific information. A federal district court in San Francisco ruled in 1989 that an agency must search all data banks to find specific information sought. (*Mayock v. Immigration and Naturalization Service*)

The U.S. Court of Appeals in Washington, D.C., appears to have narrowed its earlier holding in *Yeager* when it found in 1994 that a publisher's FOI Act request for specialized address lists from the Health Care Financing Administration was reasonable, even though it would require a search through the agency's database.

However, the court ruled that the information, which was compiled from tax return information, was exempt from disclosure under the Revenue Code and the FOI Act's Exemption 3. (*Thompson Publishing Group, Inc. v. Health Care Financing Association*)

In an administrative decision, the U.S. Department of Energy's director of hearings and appeals decided that generating a list of documents by computer would not be creating a "new record," even though the list did not previously exist.

The federal Electronic FOI Act was enacted to guarantee that requesters would enjoy the same benefits from electronic record-keeping enjoyed by the agencies themselves. It is consistent with later developments in case law, imposing the requirement of "reasonableness" in determining whether an agency has made an adequate search through its records for requested information.

Although many states look to federal law for guidance, it remains to be seen whether the "reasonableness" standard will carry the day.

States move more records to the Internet

Increasingly, agencies are looking at ways to put government records online. All states now offer some type of information through the Internet.

In Maine, nearly all business records of the Secretary of State are available online, along with all state regulations, statutes and legislative information on the state's Web site.

California has made all state statutes, the constitution and current legislative information available in electronic form over the Internet. Many other states offer full-text legislative information through the Internet without usage fees.

In November 2002, the South Dakota Supreme Court began broadcasting live and archived arguments on the Web.

Tennessee's legislature gave a commit-

tee "exclusive authority" to approve "direct access" to the legislature's computer system, but only if "protection of any confidential information is ensured."

Florida allows any records custodian to permit "remote electronic access to public records" but permits an agency to charge special fees for access.

Many state agencies offer online access to information, although there is no specific statute that sets up the service. For example, Montana runs a legislative information service similar to California's. The main difference is that California's system is established by law. Montana's is not.

Increasingly, courts are putting information online as well. Of those that make information available electronically, some provide free Web-based services; others

have fee-based services.

U.S. Supreme Court cases are available online, as are those from a variety of other jurisdictions, although the amount of material varies. The federal PACER system allows subscribers to access docket information for a fee. In some jurisdictions, the courts, in concert with law schools or universities, make opinions, orders and rules available on the Internet.

From May 2001 and June 2002, an advisory panel created by the National Center for State Courts met to study access to electronic court records and develop model guidelines to be applied to state court systems.

The Reporters Committee for Freedom of the Press released a detailed analysis of the proposed model guidelines, which is available at www.rcfp.org/courtaccess.

Is an agency's software considered a public record?

In some cases, reporters' quests for data require that they also have access to specialized software developed by or for a government agency. This can lead to problems if software is not considered a public record in that state.

Of all the answers to electronic records questions, perhaps the least consistent are rulings addressing release of software. Nearly every state allows agencies to keep information confidential if it qualifies as a "trade secret." The definition of a trade secret, however, varies from state to state and does not necessarily apply to software.

Government agencies usually acquire software in one of three ways. First, the state may purchase software from a commercial vendor.

With newer, post-Y2K computers, many government agencies are using standard database systems such as SQL server or Oracle. Second, the state may develop the software itself. Third, the state may contract with an outside party to create specialized software. Police departments often purchase specialized software for crime analysis, for example.

Most states that have chosen to regulate access to software explicitly exempt it from their public records statutes, regardless of whether it is a commercial or an agency-written program.

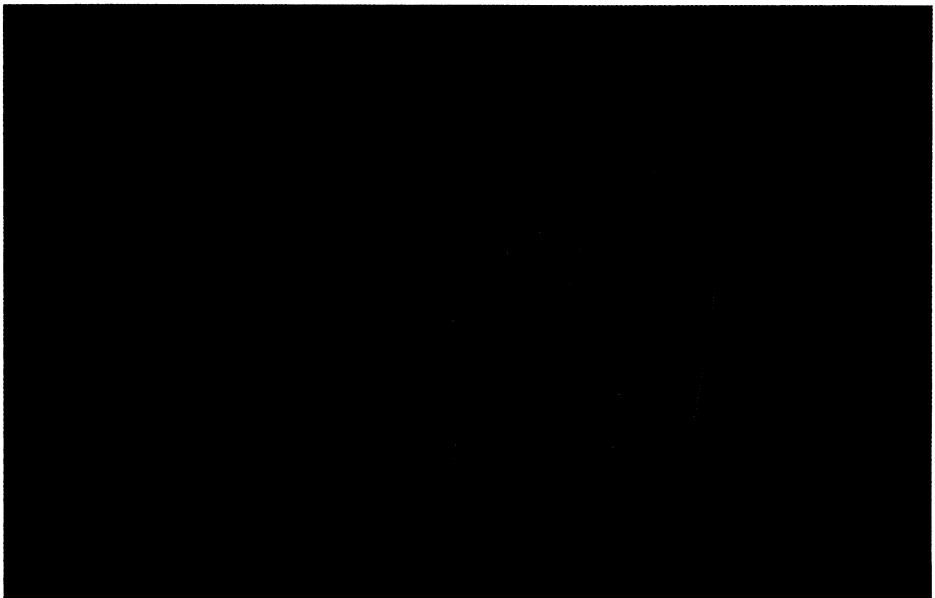
Minnesota permits an agency to copyright or patent a computer software program or components of a program created by that government agency to make it exempt as a trade secret.

A reporter for the Minneapolis *Star-Tribune* had to pay a \$200 programming fee for county payroll data. The reporter requested a copy of the program to see if the cost was justified. The county refused on the grounds that software is not a public record. Without the program there was no way for the reporter to know if the charge was fair.

North Dakota requires agencies to copyright or patent agency-created programs before withholding them.

A few states also exempt related material. In Illinois, an agency may withhold "operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals," and other information. This exemption creates a significant barrier for reporters for whom raw data is useless without the appropriate documentation.

Oregon and Idaho allow an agency to withhold computer programs, but not mathematical and statistical formulas that manipulate computer data. Such language allows public scrutiny of how the agency



conducted its search where accuracy and fairness of the program might be at issue.

Mississippi takes a unique tack. It places the burden on a software supplier to get a court order prohibiting release of a program. The agency is required to notify the supplier of a request, but if the software licensor does not respond after a waiting period, the government must release the software.

Trade secrets "developed by a college or university under contract," which may include software, are exempt from disclosure altogether.

A few states limit an agency's authority to withhold software. For example, Florida allows an agency to keep software confidential only if it was "obtained by an agency under a licensing agreement which prohibits its disclosure and which software is a trade secret." The statute also exempts "sensitive software" developed by an agency.

A few statutes allow collection of additional fees for the release of some software programs developed at government expense. These statutes mimic GIS concerns about private entities receiving public "subsidies."

Minnesota permits an agency that develops software "with a significant expen-

diture of public funds" to charge a fee that includes a share of the "actual development costs of the information" if the software is used to access data that has commercial value.

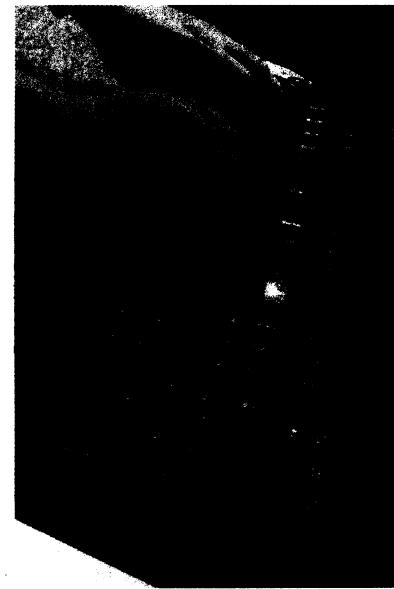
The Texas Attorney General suggested that agencies could withhold programs on a case-by-case basis if release would pose a security risk, the programs qualify as trade secrets, or the material would be exempt from discovery in a civil lawsuit.

The Nevada Attorney General adopted a broad exclusion for computer programs by finding that they do not qualify as public records.

The attorney general's office in Florida has issued several opinions that address software issues. It considers the purpose of the software when determining whether it is a public record. One computer program developed by an agency to perform financial functions was a public record.

Another program that processed voter registration data was exempt as "sensitive" data processing software. Electronic voting software obtained under a license agreement was exempt as a trade secret. And copyrighted software obtained from a private company was available for "examination and inspection purposes only."

Data processing software is now included under Florida's definition of a public record.



The 'ins and outs' of negotiating for electronic records

Just as with dealing with paper documents, getting electronic information from a government can be difficult. But following a few strategies and learning the "ins and outs" of data can help make it a little easier. Here are some things you should know when accessing electronic records:

Know the law. Know how your state treats (or doesn't treat) electronic information and what the exemptions to the open records act are.

Know what information you want. Don't ask an agency to provide you everything it has. Make sure your request is narrow and specific. Also, you don't always have to ask for the data first. Request a list of its databases. Then ask for record layouts for specific databases. Then ask for the data. One helpful tactic is to request the agency's Y2K compliance reports, which often list all databases affected. Some of that information may now be outdated, but it could be a good starting point.

Know how the information is kept. Try to find someone in the information systems department at an agency who knows how the information is kept. The public affairs officer that you usually deal with may not know the details of the databases.

Know what the appropriate cost should be. In most states, you should really have to pay only duplication costs. If they hit you with a high price, ask them to itemize the costs — frequently this request alone will decrease the fee.

Know who does the data entry. The best resource to any database are the data entry clerks.. They can tell you details about how the information is input and how often it is updated.

Know who administers the data. The persons in charge of the database can be much more helpful than the agencies' public relations persons. Sometimes they can be pretty excited to have someone take an interest in their database. Long before you ever need the data, tour the agency's data processing center — get to know the folks you need to meet. Go to software users groups — there are usually some data processing folks from government agencies there.

Get hard copy summary reports. Summary reports will help you to check your data and may give you hints about what data the agency keeps.

Know how many records or pieces of information are in the database. When you get the database, make sure you have the right number of records.

Increasingly, reporters face two major hurdles in gaining access to databases. Agencies will claim that release of data on named individuals intrudes upon their personal privacy. And agencies will try to sell public record data for profit.

It is increasingly difficult in many states to get any data on individual people — and there is little public support for access to such data. Be persistent at getting the data while it is still available and get together with other news organizations to fight impending closure of these databases.

Insist that you should only pay for reproduction costs. Neither government agencies nor outside companies who process their data should be profiting from the sale of public data. Wealthier news organizations may sometimes pay more than cost just to get the data more quickly, without challenging unfair costs. However, there is a danger that those sales set a precedent that hurts overall access to public information.

In some cases, the law does not clearly say whether you have a right to a particular database. That does not mean you should not try to get it. In fact, news organizations have done important stories with data that was not necessarily a public record. When a *Miami Herald* found voter fraud in the mayoral election, the records were not open records at that time.

The North Andover *Eagle-Tribune* in Massachusetts found public officials who were getting welfare checks by analyzing a welfare database that was leaked to them by a source.

In other cases, you may be able to argue that you are entitled to at least portions of the database. Find out whether a researcher or another government agency has ever gotten the records.

Argue that the public has an interest in the disclosure. Identify important important stories that have been done using the records you seek or similar records in other jurisdictions. Remind officials that they are accountable to the public. A politician interested in "cleaning up government" might release records. Find similar records that have been released.

Making your request

Determine whether an agency will be cooperative before using tactics that might be seen as confrontational. A records custodian may provide records you need without requiring a formal request.

If the agency makes electronic records

available to other agencies, it may produce them for a requester. Many agencies now make computer terminals available for public use.

Develop a good "paper trail." As you appeal an adverse decision, good documentation of your request and the agency response will be valuable.

Show how your request is reasonable by including information you learned earlier. If state statutes support your request, cite them. If any court decisions from your state support your request, cite those as well. Alternatively, cite other state or federal cases, especially those from jurisdictions that are nearby or have public records laws similar to yours.

Address fees. Because of the potential costs of computer access, it is important to discuss fees in your request letter. Ask that the agency incur no costs until it advises you, or state the maximum you are willing to pay. Ask for fee waivers where appropriate. Offer to discuss your request with agency officials to avoid delays.

Follow up any denial with oral negotiations. Ask a records custodian if you can narrow a request to satisfy the custodian's concerns or reduce fees. Try to negotiate lower fees if necessary.

Determine if an administrative appeal is available. Some states allow, or even require, review by another public official before an appeal to a court. Explain in detail why your request is, or ought to be, covered by the state open records law and why a denial is unlawful or unreasonable.

Pursue a judicial appeal if necessary. Your case may warrant an appeal to a court. Seeking legal representation is best, but if you cannot afford an attorney, you may be able to pursue your own appeal.

All evidence you have gathered will be important at this stage. You must also address cases that weaken your position. If a case is contrary, demonstrate how your situation is different from that considered in the earlier case.

Learn to talk like a nerd

Megabytes, density, ASCII. Mention these terms and many journalists turn pale. But knowing a few computer terms can help unlock the door to a wealth of information. Suppose you were interested in investigating federal contracts granted to companies in your area.

You could examine summary reports

created in an agency office, but you might want to look at the records themselves. Imagine sorting through thousands of documents. Making sense of such information would take a *very* long time. Looking at that same information on a computer makes it easier, if you know what you're doing.

The information in your computer is a bunch of little on and off switches that form different patterns to stand for different things. Each switch is called a "bit" — that stands for Binary Digit. It's how the computer stores information: 1 or 0, off or on, yes or no.

Information is just like your old secret decoder ring where a certain pattern would stand for a certain letter. For example, J51 might have stood for the letter A. Your computer does the same thing with different patterns of bits.

In order to have enough combinations for all the possible letters, numbers and symbols, your computer needs eight slots — that group of eight on/off switches is called a byte. That secret decoder language that your personal computer uses is called ASCII. So, for instance, the bits 01001000 make up a byte with the value of 72; the ASCII value of 72 is "H".

Another type of language is EBCDIC. That takes more work to translate, but if it is all you can get, take it.

And, for those of you who want to sound especially techno-savvy in your negotiations: ASCII stands for American Standard Code for Information Interchange and EBCDIC stands for Extended Binary Coded Decimal Interchange Code.

You also may have the opportunity to get data in a variety of formats including CD-ROM, DVD, tape cartridges, 9-track tapes and diskettes. You will need to make sure your computer can read some types of media such as 9-track tapes.

In addition to the data, you also will need some hard-copy information. You must have a record layout — that is the map to your data. You also need to know some format information about the data.

Once you have determined if your file is ASCII or EBCDIC (or is one of those rare files already in a database or spreadsheet), you need to know if the information is arranged in fixed or delimited fields.

A fixed length file has everything in columns; delimited files typically have commas separating each piece of data, so your database or spreadsheet program knows which piece to put into the first column, second column and so on.

With this information, you can import the information into a spreadsheet or database program and, using your record layout information, start compiling useful information from what started as a bunch of computerized bits.

Overcoming common excuses

The previous guidelines are all dandy, until you actually ask for the data. Many times you will run into excuses. Reporters may, more often than not, just accept the excuses agencies give them for keeping the data to themselves. But often sheer persistence will pay off.

Our database is too complicated

Knowing the lingo will pay off. If you understand databases and the officials can see that — you will have more success getting a database.

Our computer system can't output a file

It would be unusual for this statement to be true, but it does happen. If you can't find someone at the agency who can figure out how to export the data, find out what software they use. You might have to call a vendor directly to get information on exporting from its software.

Some reporters run into cases where an agency uses software with which they are familiar and can talk the agency through the exporting process.

The person who knows how to do that is on vacation for two weeks /doesn't work here anymore.

If you are not willing to wait, you may have to find another tactic. Does another agency keep the same data? Could the agency's software vendor help you? If they realize that you are not going to go away, they may be more willing to work with you.

It will cost you \$20,000

Know the law and how fees can be assessed in your state. Ask for an itemized estimate of charges. Find out what it really costs agencies to reproduce the data.

Offer to pay reasonable programming fees. In most states, you should only have to pay the programmers their hourly rate, not overhead.

If they do programming, ask for a copy of the program or at least have them put in writing that they will save the program in case you need the data again next year. See if there is a rate charged by state agencies to other agencies. Provide your own tapes, disks or CDs. Ask for a backup tape.

In some cases, this actually might be the price charged to that agency from a larger state data processing center. For example, in California many agencies are charged such fees from the Teale Data Center.

The database is not public record.

The burden is on the agency, not you, to show where in the open records law the information is exempt from disclosure. If only part of the information is exempt, most states require that they redact the confidential information, and give you the rest.

We don't like what you plan to do with it.

Most open records laws do not require that you disclose what you plan to do with the data. Some states ask reporters to complete data disclosure forms asking what the purpose of a request is. In these cases, be as vague as possible. You may not know everything you plan to do with the data.

We don't keep that on computer.

Make sure that is true. If you have a computer-generated report from the agency, the agency probably does keep the underlying data on its computer. However, you may actually run into cases where records are not computerized. In that case, you may want to have a data entry firm input the information or enter it yourself. Some journalists scan data, but scanning numbers can introduce errors into your data. For instance, it is very easy for a "2" to become a "7" in the scanning process.

That uses proprietary software.

You do not want the software, you want the data. If agencies do not know how to copy to a file or print to a file, find out who their vendor is.

We don't mind giving you a few records, we just don't want to give you the whole database.

When the *San Jose Mercury News* sued for a pet license database, the judge asked the agency's attorney: "You mean if they wanted ONE record from ONE person it would be okay?" The attorney answered: "Depends on the person." The *Mercury News* lost the suit on a finding that disclosure would invade pet owners' privacy. However, in most states, if one record is a public record, all of them should be.

Privacy laws block database access

Electronic records are subject to the same exemptions from disclosure under open records laws as paper records.

Some agencies maintain that there is a greater risk of invasion of privacy if personally identifiable information is easily retrieved from computers. Legislators are beginning to scrutinize traditionally public records, worried that their disclosure intrudes upon privacy.

The argument by these agencies that computerized records are somehow more intrusive on personal privacy than paper records is a dangerous one and has led to serious losses of important news stories.

Privacy advocates have convinced some legislators that personally identifying information in databases should be withheld. This can render the data useless because the reporter has no way of distinguishing one person from another.

For reporters who wish to match two databases – to learn, for instance, if teachers within a school system are convicted child molesters, or if ambulance drivers have been convicted of drunken driving – denials of identifying details can be devastating. Without personal identifiers such as name and date of birth such analyses are virtually impossible.

Driver records, voter records, hunting licenses and personnel records have all been vulnerable to privacy protection in recent years. Even databases as innocuous as pet licenses have been withheld on privacy grounds.

Concerns over personal privacy have caused some courts to resist releasing computerized information. These cases often involve commercial requesters who want names for mailing lists or sales prospects.

A California Court of Appeal cited concern for “extensive dissemination” of juror questionnaires “with the ubiquitous availability of integrated computer information circulating freely.” The court prohibited the distribution of the information for privacy reasons.

Even where the same computer information would later be published in a public directory, the Michigan Supreme Court wrote that providing a computer tape containing the names and addresses of students at a state university “was a more serious invasion of privacy than disclosure in a directory form” because “computer information is readily accessible and easily manipulated.”

The 3-3 deadlock among justices in that case let stand a lower court decision denying public access to the tape.

A dissenting justice in that case wrote that “we cannot accept the conclusion that the Legislature intended to allow a public body to exempt otherwise public records by the simple expedient of converting the public record from one form to another.”

Other courts have overruled similar privacy arguments. The New Mexico Supreme Court

held that release of computer tapes does not create special privacy concerns.

Minnesota and Illinois courts have also repudiated privacy arguments in cases seeking lists of doctors who performed state-funded abortions.

If some material in a record is confidential, a principle accepted by the federal government and most states requires agencies to delete that material and provide the remainder to any requester.

This process traditionally involved a records custodian drawing a black line through an entry in a paper document. But some software is not designed to automatically redact confidential information from electronic records.

Several states have recognized the need to separate confidential and public information at the time the data are entered into the computer systems, not down the road when a member of the public requests the record.

The Ohio Supreme Court ruled that a public officer has a duty to maintain files in a way that allows confidential material to be deleted and the remainder provided to the public “within a reasonable time.”

When privacy concerns required a school district to delete names and other identifying information and then “scramble” the alphabetized record to further protect identities, the Illinois Supreme Court said such manipulation would not be “overly burdensome.”

On the federal level, Justice Anthony Kennedy, while serving as a judge on the U.S. Court of Appeals in San Francisco (9th Cir.), wrote in *Long v. U.S. Internal Revenue Service* that deleting names and addresses from tax files would not be overly burdensome. 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

That order, he found, would not violate the court-imposed rule that an agency is not required to create a “new record” in response to an FOI Act request.

Reporters need to argue strenuously against the categorical application of privacy exemptions in open records laws.

Passage of censorial privacy protection laws must be curtailed. Congress passed the Driver’s Privacy Protection Act in 1994 to protect personal information in driver records. Rep. Barbara Boxer (D-Calif.) hoped to prevent stalking when she introduced the measure, but it has stopped reporting that relied on driver records in all 50 states and the District of Columbia.

Medical privacy regulations developed by the Department of Health and Human Services in response to a congressional mandate similarly will bar news stories that need to be told. The regulations go into effect in April 2003. And yearly, state and federal legislatures suggest new ways to bar use of information in overzealous attempts to address exaggerated privacy concerns. ♦

Agencies move data processing to private firms

Across the country, government agencies contract with private organizations to carry out tasks that would normally be governmental functions. But because those organizations are private, they are not always bound by state public records laws. Depending upon the state, open records laws may apply if the organization is supported by public money or performs a public function.

The Press-Enterprise in Riverside, Calif., sued late in 2001 to obtain an employee roster and salary data from a corporation formed in a joint venture by a hospital district to run the district’s facilities. But the superior court ruled that the language of the state open meetings act applied only to “non-profit” boards in this situation. In 2002, the public records law in California was amended to include nonprofit or for-profit corporations whose boards are subject to the open meeting law.

A Texas appeals court in Waco ruled in 1998 that the Brazos Higher Education Authority, Inc., a nonprofit corporation that issues revenue bonds to purchase student loans, is not a governmental body under the public records act.

In 1996, the New Mexico Foundation for Open Government sued Corrections Corporation of America for access to inmate records at the Sante Fe Juvenile Detention Center, which the company operates. An eventual settlement determined that the records are subject to New Mexico’s Public Records Act, Arrest Records Information Act, Children’s Code and other state open-access laws. It also said the company served as a “custodian of public records” as defined in the Public Records Act.

When a reporter for the *Lexington Herald-Leader* requested property data from several counties, they were told that the counties contract with a private vendor that would charge \$500 per county and an additional \$500 per town within the counties. The newspaper regularly acquires similar data from the city of Lexington for about \$20.

A Kentucky appellate court ruled in 1996 that the control of a private entity by a government official does not necessarily convert the entity’s records into public records.

Quasi-governmental agencies

In California, much of the data processing done for state agencies is done by the Teale Data Center. When agencies attempt to provide data that is at Teale, they are charged processing costs, which they pass on to requesters.

In St. Louis, the Regional Justice Infor-

mation Service was created through a joint agreement between St. Louis and St. Louis County to provide data processing for law enforcement and court information. When the *St. Louis Post-Dispatch* requested data housed at REJIS, reporters were told that the organization was not bound by the open records law, but they did offer to do a special data run for the newspaper for a significant fee.

In Missouri, quasi-public government bodies do not include urban redevelopment corporations, which are privately owned, operated for profit, and do not expend public funds. Such urban redevelopment corporations are not subject to the Sunshine Law.

A Florida appellate court in Daytona Beach ruled in 1999 that a local chapter of the humane society was subject to the state's open records laws because of its status as a quasi-public agency.

Statutes

State law varies in how it treats these organizations. In Alaska, records that are "developed or received . . . by a public contractor for

a public agency" are "public records" available for inspection and copying.

The Tennessee Supreme Court ruled in 2001 that private companies now performing functions once done by the state must open their books to the public. This ruling came after *The (Memphis) Commercial Appeal* sought the records of a private company that provided state day-care services.

The Arkansas Freedom of Information Act applies to meetings of the governing bodies of private organizations "supported wholly or in part by public funds or expending public funds." But in 1990, a court ruled that the mere receipt of public funds is not sufficient to bring a private entity within the FOIA; rather, the question is whether the private

group carries on "public business" or is otherwise intertwined with the activities of government.

Many states follow the same rules as Arkansas and require that an organization receive public funds or carry out a government function to be bound by the public records law. In Kentucky, public officials must constitute the majority of the members of a private organization for it to be covered by the state's open records law.

State courts have ruled in often divergent ways on this issue, but most states back access, according to a 2000 study by the *Florida State University Law Review* and more recent court decisions. Of the 34 states that have dealt with this issue either judicially or legislatively, more than 20 have opted for an approach that favors access to records held by private companies while 11 have adopted a more restrictive attitude.

North Carolina, Oregon, Kansas and Florida have used "functional equivalency" approaches similar to Tennessee's.

In an Ohio decision, the state's supreme court said a private consulting company hired by the city of Cincinnati to choose a safety director had to release the names of job candidates. Even though the company declared the list a trade secret, the court held that, if a company carries out a public function, its records are subject to release.

Courts in other states, such as Pennsylvania and New Jersey, have held that private companies need to reveal their records only if they were formed under a state statute or in some way determined by the state to be subject to open access laws. ♦

Is a government official's e-mail a public record?

growing number of decisions and statutes directly address whether electronic mail qualifies as a public record. In a few cases, e-mail communication is also an issue with regard to state open meetings laws because business is conducted via e-mail.

In Florida, e-mail messages made or received by a state agency in connection with the transaction of official business are public records. The same holds true in Arizona, Arkansas, Colorado, Maryland and Ohio. Arguments also may be raised that many states' expanded definitions of public records now contain e-mail within their scope.

However, in Michigan, the lack of a specific statute has allowed two agencies to develop radically different e-mail practices. The University of Michigan has made e-mail private to the "fullest extent permitted by law." Washtenaw County, where the university's Ann Arbor campus is located, adopted a resolution to make county government e-mail open to public scrutiny.

The conflicting policies in Michigan illustrate the tensions between open records laws and privacy concerns. Open records advocates argue that e-mail is a natural prod-

uct of the move toward "paperless" offices. Others argue that government employees use e-mail believing that the messages are private.

In December 2002, a circuit judge in Fredericksburg, Va., ruled that a group of officials violated the state's open meetings law when they e-mailed each other regarding city business.

The Connecticut Freedom of Information Commission has proposed restrictions on use of e-mail. If the new rules are adopted, a majority of a board's members would not be allowed to discuss the same subject using e-mail, because it would constitute an illegal meeting and thus exclude the public. The commission intended to reach a decision by Spring 2003.

The Florida Attorney General found that "the use of an electronic bulletin board by water management district basic board members to discuss matters that may foreseeably come before the basin board over an extended period of days or weeks, which does not permit the public to participate online, is a violation" of the state's open meetings law. But the attorney general also has said that "a school board may use electronic media technology in order

for a physically absent member to attend a public meeting of the board if a quorum of the members is physically present."

It is not clear in all states whether open records laws apply to e-mail such as intra-office memos, letters from citizen-taxpayers, and government employee correspondence from an outside bulletin board.

On the federal level, the U.S. Court of Appeals in Washington, D.C., held that substantive e-mail communications are records under the Federal Records Act. The Federal Records Act covers the preservation of the transaction records produced by federal agencies. In *Armstrong v. Executive Office of the President*, the court ordered periodic review of electronic record-keeping practices at the National Security Council.

A federal district court in Tennessee ruled that a media plaintiff had no First Amendment right to city government employees' Web browser history and "cookie" files, which store information about Web sites the user has visited. The court noted that it did not address whether the files would be available under the state Public Records Act. (*The Putnam Pit, Inc. v City of Cookeville*)

Fees assessed in varying ways from state to state

The size of fees an agency charges for access to electronic data are critical to many requesters. Arbitrary and prohibitively high fees can undercut a requester's ability to utilize freedom of information laws. There are nearly as many approaches to fees as there are states. Fees for computer time, programming time, printouts, supplies, labor and overhead may be assessed against the requester.

Many states have just started to address fee schedules for electronic records access. Texas was one of the first states to outline charges for databases. The Texas General Service Commission established suggested charges for diskettes and fees for access time on various types of computers.

Many statutes state that an agency may not charge more than "actual cost." Connecticut requires that fees for a "printout of transcription . . . shall not exceed the cost thereof to the public agency."

Some states allow additional fees for computer records. For instance, Indiana law permits an agency to charge "the standard cost, if any, for selling the same information in the form of a publication." When accessing the Indiana legislative services agency, a requester may be charged "a reasonable percentage of the agency's direct cost of

maintaining the system in which the information is stored."

Some statutes prohibit agencies from charging for the time to search electronically stored documents. Others say agencies may assess a fee for that service. States also split on whether agencies may or must grant fee waivers to reporters or other requesters when disclosure is in the public interest.

The market value of disclosed electronic government records should have no bearing on their cost to the public, which has already paid for gathering and storing requested information. Fiscally strapped agencies may see the sale of government information as a means of generating revenue.

In a few states, journalists are running into agencies that want to charge them "commercial" fees. Commercial requesters are treated differently in some states.

Reporters for *The Daily Oklahoman* ran into this problem when they asked the county assessor for copies of his property assessment and sales data and plat maps. The assessor argued that because the newspaper also does database marketing and direct mail marketing for paying clients, he could charge the full commercial rate for the data unless they only asked for specific data planned for use in a specific story. He also argued that keeping the data after the

specific story ran would make it a commercial use.

But Oklahoma's records law makes a distinction between "commercial" requests for records and "public good" requests: "Publication in a newspaper or by broadcast news media for news purposes shall not constitute a resale or use of data for trade or commercial purpose and charges for a news purpose shall not exceed the direct cost of making the copy."

Because agencies sometimes assess inflated costs for computer time, requesters may want to question high charges. The National Institute for Computer-Assisted Reporting, based at the University of Missouri, suggests that a requester who is charged by the minute should multiply the per-minute charge claimed by the agency by the 525,600 minutes in a year and compare the result to the actual yearly expense the agency pays for operating the computer services. Also, if an agency is charging for programming time, find out what the salary for the programmer is to see if it is charging a fair fee.

Requesters should refer to the statutes, official regulations and informal policies of each office if they have questions about fees agencies charge.

To sign or not to sign: Use caution with predisclosure forms

Many reporters trying to get data are faced with requirements from agencies that they fill out a predisclosure agreement stating why they want access to the data. This is a common practice with health and science data. Some agencies have such forms on their Web sites. Before data can be downloaded, reporters must complete the form.

In the Winter 2003 issue of *News Media and the Law*, published by The Reporters Committee for Freedom of the Press, three media attorneys addressed the issue of predisclosure forms. The following are excerpts from the attorneys' responses on this issue.

David B. Smallman, Steinhart & Falconer LLP, New York, N.Y. The extent to which reporters should explain the basis for document or data requests and their intended use of the materials depends upon the applicable law and the factual circumstances. Practical considerations may affect technical rights under access laws. And reporters may be asked to consent to limitations of their rights, for example through terms of use agreements on government Web sites.

The devil is in the details.

As a general matter, the federal free-

dom of information law and many similar state laws do not require disclosure of the purpose for the request. However, access laws typically create practical incentives for reporters to disclose their status, which can result in expedited consideration of their requests and result in fees that are reduced or waived. Representatives of the news media and others can seek a fee waiver under the federal FOI law. Doing so, however, may require disclosures about why the information is of public interest, the name of the news organization, information about expected publication, and whether the release of information will "contribute significantly to public understanding of government operations and activities." Similarly, expedited review requests may require detailed disclosures about the public's "urgent need" for information in a specific context.

While access usually is available to "any person" who "reasonably describes" the information sought, some states, such as Pennsylvania, restrict the right to inspect and copy records to citizens of the state. For sensitive undercover or investigative stories, keep in mind that your requests may create a paper or electronic trail.

Another important consideration arises if access to information is conditioned

upon a voluntary agreement by the reporter that effectively waives certain First Amendment or other rights. Reporters' agreements have been held by courts to be subject to *promissory estoppel* law, which essentially imposes an obligation on those making promises to keep them. While this issue often arises in connection with agreements between reporters and confidential sources, it also can apply to situations in which reporters agree to "security review" when covering military, police or intelligence-related stories.

Because consent to certain conditions before gaining access to government data may impose restrictions inconsistent with constitutional, statutory or common law rights, carefully review terms of use agreements on Web sites before agreeing or clicking through. Consider whether the conditions imposed may later come back to haunt you and ask yourself if there is some other way to get the data. Consult media counsel for specific language if the option of modifying the terms of use is presented. Subsequent challenges to improper terms of use agreements, while possible, can be expensive and the results uncertain.

Recent passage of the E-Government Act of 2002 suggests that a proliferation

of online regulations (and end-user agreements) affecting security, privacy and confidentiality may be on the way, so increased vigilance by journalists is warranted.

Tom Clyde, Dow, Lohnes & Albertson, Atlanta, Ga. At both the state and federal level, it is becoming common for government agencies to ask that public records requests be submitted in writing, often on a preprinted form that requests an explanation of what you plan to do with the information. The general rule under both federal and state freedom of information laws is that your purpose for requesting information is irrelevant to an agency's duty to provide it.

So, is this just improper snooping? Frequently it is, and the agency's request for an explanation can be ignored. But there are exceptions to this rule. Sometimes an agency is legally entitled to enough information to determine whether you fall into a certain category of record requesters, such as commercial requesters, who may be entitled to less information or who may be required to pay a higher fee.

In the area of health care information, federal privacy regulations now impose a duty on agencies to identify requesters and their purpose in order to determine if identifiable patient information may be disclosed.

In making a record request, the first question to consider is whether you submit a written record at all. As a practical matter, it often is to your advantage to do so. At federal agencies, until a record request is submitted in writing, the Freedom of Information Act does not apply. So a federal agency may provide records in response to an informal verbal request, but it is not legally required to do so.

At the state level, state freedom of information laws vary on the issue of whether a records request must be in writing to trigger the state's disclosure requirements. For example, Maryland, Michigan and New York require written requests; Colorado, Florida and Georgia permit verbal requests.

Even if not legally required, however, having a written record of the request is frequently critical in the event the agency resists or delays disclosure, and you have to try to compel compliance through an administrative review or court action. But keep in mind that government officials may more easily review written records requests in attempting to anticipate and blunt future investigative stories.

In competitive markets, where more than one news organization is chasing the same story, reporters sometimes review an agency's records request log to see what their competition is up to.

Given these concerns, it is generally advisable to keep any explanation of your intended purpose for requesting information to a minimum. As mentioned above, under the federal Freedom of Information

Act and most state freedom of information laws, the purpose for which information is sought generally is irrelevant, so providing even a general explanation is not legally required.

There are some exceptions to this rule, however. Many state records laws prevent or limit access to certain information, particularly personally identifiable information, if it is sought for a commercial purpose.

Particularly in the area of health care information, the government does have a reason for asking who you are and generally what you plan to do with information. Under federal privacy regulations scheduled to go into effect in April 2003, agencies are under an affirmative duty to monitor their disclosure of any information containing individually identifiable patient information. Under the regulations, agencies can release individually identifiable information to certain relatives and organizations such as hospitals and law enforcement agencies, but must otherwise "de-identify" the data prior to release. Accordingly, if your request includes patient identifying information, a brief disclosure that you are seeking information for news reporting on health care matters should assist the agency in determining the appropriate level of disclosure and undertaking the "de-identification" process.

James Chadwick, Gray Carey, Palo Alto, Calif. Whether you should complete a form that requires you to say why you want information depends on the open records law you are using. For the federal government, the Freedom of Information Act generally applies. Each state has its own laws, which typically apply to both state and local governments, and some cities and counties have their own special laws. Individual government agencies often have their own specialized regulations.

Under the federal FOIA, the purpose for which a request is made is generally irrelevant to whether you are entitled to the information you are requesting. However, you may need to confirm that you are a journalist in order to avoid having to pay for the costs of document search and review.

In addition, under the FOIA you may need to provide information about the federal government activity you are investigating and why you have an urgent need to report on it to the public if you want to get expedited processing of your request. Be careful. Such requests frequently are denied, even when they have merit.

Many state open records laws are the same. For example, California's Public Records Act expressly states that limitations on access are not allowed based on the purpose for which a record is being requested.

That being said, in at least two situations you may need to provide at least some

description of your purpose for seeking the records.

First, some statutes expressly limit the release of information to those who are going to use it for certain purposes, typically "scholarly or journalistic" purposes. If the information you are requesting is governed by such a statute, you may have to explain that you are a journalist and that you are seeking the information for purposes of news reporting.

In regards to information that is for release to "researchers," I think a reporter can make such a claim, if it is done in a way that is not misleading. The reporter should make it clear that they are a journalist and not a scientist, but can legitimately say that the media frequently engages in sophisticated analysis of data for the purposes of reporting to the public, and is seeking the information for that purpose.

Second, the information you are requesting may be exempt from disclosure. Agencies sometimes provide access to exempt information even though they are not expressly required to do so. In this situation, the agency can pretty much define the terms upon which it releases information, and you may have to complete a form or answer questions about your purpose.

Finally, the basic rule for what you say about your purpose is: the less the better. Say only as much as you need to in order to get access. Start with a generic description, such as: "For purposes of news reporting."

This may be sufficient in some circumstances, particularly if the statute permits disclosure for journalistic purposes. If the agency tells you that you have to provide more information, and the records are important, you can elaborate.

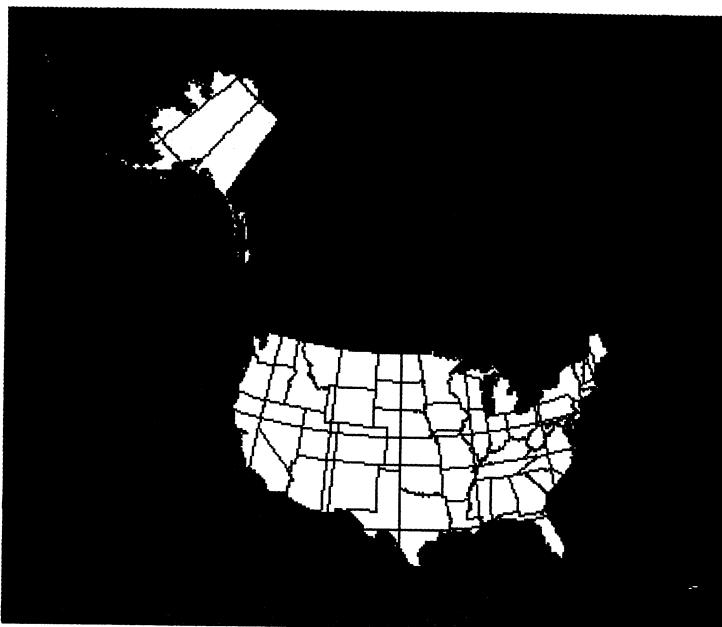
Keep three things in mind if you complete a form to get records.

First, you probably are signing an agreement. Could you have problems if you violate it? Make sure you read what the form says about the information you are providing. For example, does it require you to sign under penalty of perjury? What limitations, if any, does it impose on what you can do with the records you get? Are there consequences for violating the agreement, such as criminal prosecution?

Second, be careful about signing a form that imposes limitations on your access to or use of information that are not justified by the law. Agencies may try to get you to sign such forms, even though you are entitled to the records without having to do so.

Third, you may later want to invoke the reporter's privilege if someone tries to make you testify about your sources or unpublished information you obtained during your investigation. You may not be protected with respect to information you have provided to the government, if it comes out.

Some states plot access to maps



Around the United States, police departments, county planning agencies and other government agencies are developing extensive systems to apply their data to maps. Computer systems called geographic information systems, or GIS, give agencies the power to do complex mapping.

The Chicago Police Department uses GIS to track neighborhood crime. St. Louis uses mapping to study redevelopment and plot census data. Some of these agencies make maps available online. Some government agencies charge large sums of money for actual copies of GIS data because they are valuable to real estate companies, developers and marketing firms.

The substantive conflicts over GIS access involve fees and the desire of governmental bodies to turn these systems into cash cows.

Agencies argue they have created an "added value" to these systems that justifies the greater access fees, by creating the maps themselves, such as the boundaries of voting precincts or city council wards.

The Ohio Attorney General opined that if "the Department of Natural Resources stores, produces, organizes, or compiles public records in such a manner that enhances the value of data or information included therein, it may charge for copies an amount that includes the additional costs of copying the information in such enhanced or 'value-added' format."

Another barrier to GIS information came after September 11, when many agencies decided that making mapping data public could leave them vulnerable to terrorist attacks. On the federal front, maps showing pipeline locations, water supplies and nuclear

power plants were no longer available to the public because of national security concerns.

States also are looking at legislation that could limit access to GIS data. In Illinois, a senate bill exempting computer geographic system information from the state's freedom of information act became law in July 2002.

A majority of states have GIS laws on the books. The statutes appear in scattered sections of each state's code.

Some GIS laws, such as Arizona's, are codified in the public lands code. Alaska's GIS law is included in the code containing the civil procedure rules.

Florida's law is included in the section on communications and data processing. California includes rules governing disclosure of mapping records in its open records law.

Maryland's GIS law tries to strike a balance between the financial interests of government and the desire of the public for open access. The systems, which are developed with public funds, "should not be unreasonably withheld from private commercial users." However, GIS "should not provide a public subsidy to private commercial users."

A Maryland agency may sell a GIS database "for a fee that reasonably reflects the cost of creating, developing and reproducing the product."

The agency may reduce or waive fees for products and services used for a "public purpose."

The Supervisor of Public Records in Massachusetts addressed this issue of GIS and money-making in a 1996 opinion: "The temptation for public officials to increase revenue by sale of valuable information, such as that contained in a GIS database, is understandable.

However, the premise behind the Public Records Law, and other open government laws on the federal and state level, is that the public has an absolute right to access public information held by the government. The public should not be required to pay a premium for access to information which it has already paid to create and maintain through taxes."

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Electronic access, state by state

ALABAMA

Although the state's public records law does not specifically cover electronic records, several attorney general opinions and court cases have recognized computerized information as public record.

Like some other states, Alabama law governing what fees can be assessed for public records is somewhat vague. Some reporters say that the definition of what is a "reasonable" cost varies greatly from agency to agency.

The law. The Alabama Public Records Law provides access to "public writings," without more definition, but recent statutes, case law and attorney general opinions have recognized that the term includes electronic records. Alabama Code § 22-9A-21(f).

Cases & opinions. A circuit court judge ruled that state law required the Alabama Department of Public Safety to release electronic information about driving records to a newspaper from the department's databases. The court held that computer tapes are "public writings." *Birmingham News Co. v. Peevy*, 21 Media L. Rep. 2125 (Ala. Cir. Ct. 1993). In light of the Driver's Privacy Protection Act, however, access to drivers license data may be interpreted differently.

Computer records maintained in the office of the tax assessor constitute public records that may be supplied to citizens under reasonable conditions. 209 Ala. Op. Atty Gen. 29 (Nov. 4, 1987).

Probate judges may enter into an agreement with a vendor to make records maintained in their offices available via computer from remote locations so long as they allow similar access to anyone requesting it on the same terms. Ala. Op. Atty. Gen. 2000-076 (Feb. 2, 2000).

One Alabama Attorney General opinion has declared, however, that in response to a request for a diskette of personnel data, the requested data need not be provided in the particular format: "It is not [a public agency's] responsibility or duty to provide the information to [the requester] in a particular form nor must [the agency] necessarily compile or assimilate the information for the public. Your responsibility is to provide reasonable access to the information and for the information to be a reasonable form (e.g. legible copies if possible or in regular language rather than a code form a person outside the office would not be familiar with)." Op. Atty Gen. No. 88-00079 (Dec. 16, 1987)

In 1991, the Alabama Legislature established the Alabama Criminal Justice Information Center ("ACJIC") and mandated that a number of categories of information be sent to the Center by state and local law enforcement agencies for storage in the Center's computer database. Most of the categories of information are public records at the originating agencies, but the ACJIC Act bars public access to its computerized information except on a "need to know" and "right to know" basis. Arguably, the legislature deems the compilation of that data in computer form to be more invasive of privacy rights than the ungathered data. See Alabama Code §§ 41-9-620 et seq. (1991). See also Alabama Code § 41-9-594 (Supp. 1996) (ACJIC commission shall appoint a privacy and security committee); Alabama Code § 41-9-136 (1991) ("Provision of information [by ACJIC] shall be limited by . . . the right of privacy . . ."); Alabama Code § 41-

9-642 (1991) (ACJIC legislation gives no authority to "invade the privacy of any citizen").

Rule 33 of the Alabama Rules of Judicial Administration provides the following criteria for evaluating requests for computer-based information that is maintained by the Administrative Office of Courts ("AOC") regarding court cases in Alabama: (1) Availability of data; (2) Specificity of request; (3) Potential for infringement of personal privacy created by release of the information requested; (4) Potential for abuse or misinterpretation of the information requested as it related to its intended use; and (5) Potential disruption to the internal, ongoing business of the courts.

Fees. The state may charge the "actual, reasonable cost" required to create a new computer program to comply with an open records request. Where a newspaper wanted copies of computer tapes of driving records, it still had to pay \$5.75 for every driving record identified by a named driver that is generated electronically. *Birmingham News Co. v. Peevy*, 21 Media L. Rep. 2125 (Ala. Cir. Ct. 1993). Statutes allow a record custodian to charge "legal fees" for certified copies. Ala. Code § 36-12-41 (1991). However, the statute does not address charges for noncertified copies, nor does it set limits on cost.

There is no uniform fee schedule or formula for the assessment of fees for copies of electronic records. In *Birmingham News Co. v. Peevy*, 21 Media L. Rep. (BNA) 2125 (Cir. Ct. of Montgomery County, Ala., July 22, 1993), the trial court ordered the requester to pay (a) "the actual, reasonable cost incurred by the Department [of Public Safety] to create any new computer program required to comply with [the Plaintiff's request for motor vehicle records]" and (b) the statutorily mandated fee of \$5.75 "for each and every individual driving record identified by named driver in any such copy of the Department's databases delivered to the Plaintiff," *id.* at 2125, presumably on the ground that the MVR fee statute makes no distinction for the form in which the MVR records are produced. Alabama Code § 32-7-4 (1999) (as of Sept. 13, 1997, access to MVRs has been governed by 18 U.S.C. § 2721).

Rule 33 of the Alabama Rules of Judicial Administration provides that the Administrative Director of Courts ("ADC") will promulgate policies and procedures — including a schedule of costs — for handling applications for computer-based information that is maintained by the Administrative Office of Courts ("AOC"). No such cost schedule has been established, but AOC computer-based information is available through two on-line services, ALALINC and Remote Access. ALALINC has an annual user fee of \$100 and provides access to current appellate decisions of the Alabama Supreme Court, Alabama Court of Civil Appeals, Alabama Court of Criminal Appeals, U.S. Circuit Court of Appeals for the Eleventh Circuit, and U.S. Supreme Court, in addition to general information about Alabama's criminal justice system, directories of judicial officers, and related educational information. Remote Access has a one-time user fee of \$100, a base fee of \$35 per month, and a usage fee of \$35 per minute; it provides access to case action summaries of pending civil and criminal actions in all Alabama trial courts, with search capacity.

Much more typically, there will be no statutorily mandated fee, and the fee for records in

electronic format should be subject to the same reasonable-cost-of-production requirement that governs records requests in any other form.

Profit-making. The Alabama Code provides for the sale of information from the Alabama Criminal Justice Information Center (ACJIC) at a fee not to exceed \$25, with all fees collected going to the State's General Fund. Alabama Code § 41-9-644 (Supp. 1996). There is as yet no other provision for generating revenue by the sale of public records in electronic form.

Online. "If the county appraisal, mapping, and assessment data qualifies as a compilation of facts protectible under copyright law, a copyright would protect from the reproduction of the facts in the exact same format. The facts themselves, however, would not be protected." Att'y Gen. Op. No. 1998-1588 (June 8, 1998).

Resources. Alabama Press Association public records guide: www.alabamapress.org/Legals/legal_pom.html; Alabama Attorney General Opinion Search: www.ago.state.al.us/opinion_search.cfm

ALASKA



Reporters in Alaska say that they usually can get electronic information — if it exists that way in the first place. Some agencies still do not have their records on computer. "We don't ask for a lot of electronic information here, but when we do, we usually get it. The process is very slow and painful, often dealing with agency officials or techies who aren't familiar with the great access laws we have," said Anchorage Daily News reporter Richard Mauer.

The law. The Alaska Public Records Act gives the public a right to inspect and copy "public records," defined as "books, papers, files, accounts, writings . . . regardless of format or physical characteristics." Alaska Stat. §§ 09.25.120, 09.25.220(3).

The statute also specifies that "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." Alaska Stat. § 40.25.110(l).

If an electronic file or database contains both nondisclosable and disclosable records, a public agency must either delete or mask the nondisclosable information before releasing the requested record, or write a program to extract the requested disclosable public records from the electronic file or database. Masking or deleting nondisclosable information does not constitute providing an electronic service or product. Alaska Admin. Code tit. 6, § 96.330(b)(c).

The law encourages public agencies to "make information available in usable electronic formats to the greatest extent feasible" and to provide equal access to electronic products and services. Alaska Stat. § 09.25.115(a), (h).

Certain agencies have attempted at times to provide electronically stored information only in a less usable paper printout format, but ultimately provided information on disk in response to objections from media organizations. The public records law specifically provides that agencies are entitled to exercise their discretion about whether to provide duplication of public records in an alternative format not used by a public agency, and to charge an enhanced

fee if they choose to do so. Alaska Stat. § 40.25.220(1)(A).

As a general rule, public records laws do not require agencies to create records that do not exist. Pursuant to, or consistent with this principle, the Alaska Legislature in 1990 added § 40.25.115, dealing with requests for "electronic services and products." This provision was designed to balance the interests of citizens seeking access to information more usefully tailored to their specific needs and the interests of agencies being asked to provide this. It also was designed to encourage agencies to help those requesting information. Among these electronic services and products, as defined by § 29.25.220(1)(A)-(G), are electronic manipulation of 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.

Cases & opinions.. In at least one context, after 10 years has elapsed a defendant's expectation of privacy in regards to computerized criminal justice information is greater than the public's interest in the disclosure of the information. Although much of the information contained in a criminal history record, such as arrests and convictions, is public information, this information enjoys "practical obscurity," the Attorney General held, because it is not easily available. Att'y Gen. File No. 663-93-0039 (Nov. 25, 1994).

The Criminal Justice Information Systems Security and Privacy Act by its own terms restricts only access to criminal justice information contained in systems funded by the federal Law Enforcement Assistance Administration (LEAA). Alaska Statute § 12.62.070(3). Although the state's initial computerized database of individuals' criminal histories — the Alaska Justice Information System (AJIS) — was funded by LEAA, the system in current use — the Alaska Public Safety Information Network (APSIN) — is not. Inf. Op. Att'y Gen. (Dec. 10, 1986; 663-86-0479) at 1-3. Thus, although the statutory restrictions apply to systems that are still funded at least in part by LEAA (which include the Prosecutor's Management Information System and the Offender-Based State Correctional Information System), the Act's restrictions on disseminating criminal history records from AJIS are not directly applicable to criminal history records contained in APSIN. Nonetheless, the restrictions were developed to protect individuals' rights of privacy. They accordingly may serve as useful guidelines for the dissemination of APSIN information. Att'y Gen. File No. 663-93-0039 (Nov. 25, 1994).

The Workers' Compensation Division may not release its electronic database in its entirety, but may release the information contained in the database if the Social Security numbers are deleted.

The release of public information in usable electronic formats, when feasible, is encouraged under Alaska Stat. § 09.25.115. However, state law exempts from public inspection records that are required to be kept confidential under federal law or regulations. Att'y Gen. File No. 663-93-0171 (Nov. 13, 1992).

The Child Support Enforcement Division may not disclose Social Security numbers in its files or computer database unless the disclosure is necessary for the purpose of establishing or collecting child support obligations or locating persons who owe child support. A Social Security number may be disclosed for other purposes if it was not obtained from a federal tax return, the Social Security Administration, or the Bureau of Vital Statistics. Att'y Gen. Op.

663-99-0160 (April 8, 1999).

Fees. The fee for electronic services and products "must be based on the actual incremental costs" of providing them, plus a "reasonable portion of the costs associated with building and maintaining the information system" of the agency. Alaska Stat. § 09.25.115(b). The fee may be reduced or waived if the information is used for a public purpose, such as journalism or academic research. Alaska Stat. § 09.25.115(b).

State administrative regulations allow agencies to charge the media for excess searching and copying time only if the requests are unreasonable, in bad faith, or require extraordinary expenditures of state resources, or if the news organization has failed to pay for previous requests. Alaska Admin. Code tit. 6, § 95.130(c).

Unreasonably high fees for electronic services and products also may be canceled by the state's Telecommunications Information Council. Alaska Stat. § 09.25.115(g).

"Electronic services and products" include the electronic manipulation of data to fill a search request, duplicating public records in an alternative format not used by the agency, providing online access to an electronic file or database, providing information that cannot be retrieved or generated by an agency's existing computer programs, providing electronic access to the agency's information system and providing software developed by the agency and generating maps from an electronic geographic information system. Alaska Stat. § 09.25.220.

Additional fees may be incurred for electronic public records searches. Furthermore, when a public agency offers online access to an electronic file or database, the agency must provide at least one public terminal to access such information free of charge. Alaska Stat. § 09.25.115(f). Agencies are allowed to charge an enhanced fee for electronic services and products, including customized searches of computer databases tailored to the requesters' needs. Specifically, the fee for electronic services and products must be based on recovery of the actual incremental costs of providing them, but may also include a "reasonable portion of the cost associated with building and maintaining the information system of the public agency." These may be reduced or waived if the electronic services and products are to be used for a public purpose, including journalism, so long as fee reductions and waivers are uniformly applied. Alaska Stat. § 40.25.115(b).

The fee for duplicating a public record in the electronic form kept by a public agency may not exceed the actual incremental costs of the public agency. Alaska Stat. § 40.25.120(c). In other words, as a general rule, the only charge for providing records in electronic format should be the cost of a disk, if the disk is provided by the agency rather than the requester. This provision must be read together with the more general section governing charges for public records by agencies, which provides that a fee for copying public records may not exceed the standard unit cost of duplication established by the public agency, and that no charge may be made for personnel costs required to complete the search and copying tasks unless they exceed five "person-hours" per calendar month for any one requester. Alaska Stat. § 40.25.110(b), (c).

Software. The law specifically excludes "proprietary software programs." Alaska Stat. § 09.25.220(3).

ARIZONA

 Access to electronic records in Arizona is not specifically outlined but the public records law, but reporters have been able to obtain databases from government agencies. The law still leaves room for problems. For example, the law does not make clear whether or not an agency must provide actual data or whether a computer printout satisfies a request. That can be a problem for reporters who need an actual database, rather than a printout. Databases commonly used by reporters in other states, such as birth and death records, are exempt from disclosure in Arizona.

The law. The Arizona Public Records Law applies to "public records and other matters." Ariz. Rev. Stat. § 39-121. The statute strongly implies a right of access to electronic records, requiring a custodian of records to provide access to "copies, printouts, or photographs" and "access . . . for the purpose of making copies, printouts, or photographs of a public record which a person has a right to inspect." Ariz. Rev. Stat. § 39-121.01(D).

Although "public record" is not defined by statute, the Arizona Supreme Court has defined public records as "all records required to be kept under Ariz. Rev. Stat. § 39-121.01(B)." In another case the court said that a public record "is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." Otherwise stated, the court has observed that few, if any, records in the possession or control of a public officer will not be deemed to be public records. Also, this term has been expansively interpreted by the Office of the Attorney General in its published opinions. Records include books, papers, maps, photographs, or other documentary materials regardless of physical form, including electronic information, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business. Ariz. Rev. Stat. § 41-1350.

Cases & opinions. Public employees are deemed to be unlikely to have a legitimate expectation of privacy in personal documents that they have chosen to place in public computer files. Thus, e-mail, unless otherwise exempted, may be subject to state access provisions. *Star Publishing Co. v. Pima County Attorney's Office*, 891 P.2d 899 (Ariz. Ct. App. 1994).

The governor's office prohibited furnishing a labor organization with copies, printouts or photographs of a list of names, addresses and phone numbers of people employed by a film company, believing that the list was requested for a commercial purpose and that disclosure would violate the privacy of people on the list. Exec. Order No. 92-12 (April 16, 1992). When Arizona law does not directly address a records disclosure issue, the courts will look to the federal Freedom of Information Act for guidance. *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 937 P.2d 689 (App. Div. 1 1997). Although Arizona generally supports an "open access" policy, such access is not unqualified. *Phoenix Newspapers Inc. v. Purcell*, 927 P.2d 340 (Ariz. Ct. App. 1996).

The Arizona Attorney General's Office has concluded that "at least the product of electronic databases is a public record, although the disks, software, database, or raw information itself

probably need not be made accessible to the public." Also, the Arizona Court of Appeals has ordered release of computer backup tapes of a public agency including e-mail communications of employees. *Star Publishing v. Pima County Attorney's Office*, 891 P.2d 899 (Ariz. Ct. App. 1994).

Fees. The statutes provide that a custodian of records "may charge a fee" for copies. Ariz. Rev. Stat. § 39-121.01(D)(1). Reasonable fees may include "cost of time, equipment and personnel" to produce copies, but not the cost of searching for records. Ariz. Att'y Gen. Op. 186-090 (Aug. 25, 1986). When the request is for a "commercial purpose," the law allows recovery of search, copying and other costs." Ariz. Rev. Stat. Ann. § 39-121.03(A). Agencies generally have agreed that journalism is not a commercial purpose.

ARKANSAS

The Arkansas Freedom of Information Act was updated in 2001 to address access to electronic information.

The law now includes data in the definition of a public record. Agencies must now redact confidential information rather than just deny a database. The new law requires that government computer systems now be designed to make public access easier. The law did exempt agency software from public disclosure and said that agencies are not required to "create" a new record. Journalists in Arkansas report that they still experience problems with delays and high fees when agencies say they have to "compile" data.

The law. The Arkansas Freedom of Information Act defines public records to include "tapes, or data compilations in any medium," meaning "the physical form or material on which records may be stored or represented." Ark. Code Ann. § 25-19-103(5)(A). "Public information" includes any information stored, gathered or generated in electronic or magnetic form by the state or its agencies and instrumentalities that is deemed to be public under the Arkansas Freedom of Information Act. Ark. Code Ann. § 25-27-102(5). The legislature also created the Information Network of Arkansas, which will provide electronic access to "public information" through the Internet, maintain state Internet sites and supply database hosting services. § 25-27-102.

Computer "software acquired by purchase, lease or license" was excluded from the definition of public records, "to protect proprietary data and ensure that government agencies and other entities subject to the FOIA can easily obtain software necessary to carry out their functions."

"Custodian" of records is now defined as "the person having administrative control of that record." FOIA requests now "may be made in person, by telephone, by mail, by facsimile, electronic mail or by other electronic means provided by the custodian," such as the Internet. This change under the new law has posed problems for some reporters who have encountered agency clerks who claim they cannot release records because they are not the "official" custodian of the records.

Information does not have to be compiled or a new record created by a custodian of records. However, they can "summarize, compile or tailor electronic data in response to FOIA requests and to "provide data in an electronic format to which it is not readily convertible." If that takes more than two hours, a verifiable fee can be assessed for employee time.

Citizens have the right to "inspect, copy or

receive copies of public records." Prior to the 2001 amendments, it was not clear whether the law required copies of records to be made and provided.

Records requests can't be denied because some of the information contained within records is considered unreleasable. That information must be redacted.

State agencies, boards and commissions (not including city and county governments, and school districts) must provide organizational descriptions, office locations, methods to access information, e-mail and Internet addresses, a list and general description of its records including databases, regulations, rules and formally proposed changes.

No more than "actual costs of reproduction, including the cost of the medium of production, supplies, equipment, and maintenance, but not including agency personnel time associated with searching for, retrieving, reviewing, or copying the records" may be charged. The cost of mailing or transmitting records may be charged, and a breakdown of all fees must be provided.

Security information related to computer systems, such as passwords, is now specifically exempt from FOIA.

Any computer hardware or software acquired by an entity subject to § 25-19-103(5)(A) after July 1, 2001, shall be in full compliance with the requirements of this section and shall not impede public access to records in electronic form readily convertible with the custodian's existing software.

A citizen "may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian's existing software." § 25-19-105(d)(2)(B).

The custodian "may agree to summarize, compile, or tailor electronic data in a particular manner or medium and may agree to provide the data in an electronic format to which it is not readily convertible." § 25-19-109(a)(1). Custodians are encouraged to do so when "the cost and time involved in complying with the requests are relatively minimal." § 25-19-109(a)(2).

Each state agency, board and commission shall prepare and make available a list and general description of its records, including computer databases.

Cases & opinions. Information maintained in computer storage is a public record subject to disclosure. However, the state supreme court refused to order a county to turn over a "data module" so a requester could make his own copy when a county contractor was unable to make such a copy on its own equipment. The court ruled that a paper printout provides adequate access to the public record in such a case. *Blaylock v. Staley*, 732 S.W.2d 152 (Ark. 1987). The law does not obligate agencies to compile or collect information in a particular format sought by a requester. Ark. Op. Att'y Gen. 87-211 (June 23, 1987). Because it is a "data compilation," e-mail is subject to state disclosure provisions. Ark. Op. Att'y Gen. 96-258 (Aug. 1996).

The form of the record may affect the application of an exemption. For example, in *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992), the supreme court recognized that an individual's privacy interest in a tape recording is greater than his or her privacy interest in a transcript of that recording.

The FOIA places the burden on the state agency to make arrangements for reasonable access to public records, notwithstanding the agency's contention that the records are not in

its actual or constructive possession or control. *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995); *University of Arkansas*, 255 Ark. 108, 499 S.W.2d 56 (1973).

In determining whether personnel records are exempt from disclosure under Ark. Code Ann. § 25-19-105(b)(10), the court will weigh the public interest in the requested records against the affected individuals' privacy interest in withholding them. *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992). Revealing "intimate details" of a person's life gives rise to a substantial privacy interest. *Id.* In considering the "public interest" prong of the balancing test, the court will examine the degree to which release of the information would serve the purpose of the FOIA, i.e., to keep the citizens advised of the performance of their public officials. *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998).

Personal identifiers such as unlisted addresses and telephone numbers, personal histories, religious affiliation, citizenship, information about family life, welfare payments, legitimacy of children, alcohol use, marital status, payroll deductions, Social Security numbers, credit union statements and other financial records, insurance coverage and medical records are protected by the "unwarranted invasion of privacy" exemption. Att'y Gen. Op. No. 93-076 (March 25, 1993).

A private entity is subject to the FOIA when it receives public funds and carries on public business or is otherwise intertwined with the activities of a public entity. See *Waterworks v. Kristen Invest. Prop.*, 72 Ark. App. 37, 32 S.W.3d 60 (2000); *North Central Association of Colleges & Schools v. Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977) and *Rehab Hosp. Services Corp. v. Delta Hills Health Systems Agency*, 285 Ark. 397, 687 S.W.2d 840 (1985). The inquiry should focus on whether there is a symbiotic relationship between the private entity and the state or local government, such as when the private entity receives public funds for the general support of activities that are closely aligned with those of government. J. Watkins, *The Arkansas Freedom of Information Act* (3rd ed. 1998). When the activities of a private organization and the government become intertwined, the private organization may well render itself part of the government for FOIA purposes. See Att'y Gen. Op. Nos. 89-082 (nonprofit organization assisting local law enforcement in emergency situations); 95-273 (private nonprofit agency on aging providing services under a federal grant program); 2000-039 (private, nonprofit corporation licensed by the state as a community service provider).

FOIA applies to a private entity that is paid from public funds for services rendered to a government agency in some instances. The question seems to be whether the private entity is the "functional equivalent" of government employees. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); Att'y Gen. Op. Nos. 2001-172, 96-185. The FOIA applies to records [and meetings] relevant to the task performed on behalf of the public agency in that instance. Att'y Gen. Op. No. 95-121 (June 27, 1995).

A governmental agency is not required to compile or create a record to satisfy an FOIA request if no such record currently exists. Att'y Gen. Op. Nos. 87-211 and 91-208. However, new Section 25-19-109 permits and encourages custodians to compile and reformat electronic data. The custodian may charge for personnel time exceeding two hours.

Personnel information that is covered by

ACCESS TO ELECTRONIC RECORDS

FOIA includes salary, work history, educational background, training and certification, as well as terms of a settlement releasing an employee from his or her contract. Att'y Gen. Op. Nos. 93-114; 88-078 (May 28, 1993; March 23, 1988).

Fees. The FOIA's limitations on fees apply regardless of medium. Unless a specific statutory provision authorizes a higher fee, "any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records." Ark. Code Ann. § 25-19-105(d)(3)(A)(i). The custodian of the records must provide "an itemized breakdown of charges." § 25-19-105(d)(3)(B).

A custodian who agrees to "summarize, compile, or tailor electronic data in a particular manner or medium" or to "provide the data in an electronic format to which it is not readily convertible" may charge "the actual, verifiable costs of personnel time exceeding two hours associated with the tasks," plus any copying charges authorized by the FOIA. Ark. Code Ann. § 25-19-109(a)(1) & (b)(1). The charge for personnel time may not exceed "the salary of the lowest paid employee or contractor who, in the discretion of the custodian, has the necessary skill and training to respond to the request." § 25-19-109(b)(2). An itemized breakdown of all charges is required. § 25-19-109(c).

The state supreme court is authorized to establish a "reasonable fee" for access to its electronic records, Ark. Code Ann. § 21-6-401(d), but makes them available online at no charge. The board of directors of the Information Network of Arkansas, created by the General Assembly in 1995, is authorized to "develop and implement an electronic gateway system to provide electronic access . . . to public information" and to "establish charges for [its] services." § 25-27-104(a)(1) & (3). The INA board has selected a private firm to provide Internet access to public records. There is no charge for access to these records, although the firm is allowed to charge for records that are by statute available only for a fee and for special "value added" services.

Profit-making. The practice of selling *public* databases for revenue-raising purposes has not been widespread in Arkansas. Only extracts from corporate and Uniform Commercial Code records in the Secretary of State's Office have been sold in recent years, and the revenue was insubstantial. By contrast, providing electronic access to certain information that is *not* open to the public — traffic violation records of individual drivers — generates approximately \$8 million annually, most of which is used to fund operations of the state police. By statute, these records are available only to courts, government agencies, insurance companies that cover the driver or have received an application for insurance, and, if the driver consents in writing, to employers and other persons. Ark. Code Ann. § 27-50-906. Authorized persons may obtain this information on-line via the Information Network of Arkansas (INA) for an additional fee. This revenue supports INA's public access activities. See Item H, *infra*.

GIS. In 1995, the General Assembly created the State Land Information Board and charged it with implementing a modernized land-records system. Ark. Code Ann. §§ 15-21-501 *et seq.* The board was directed to establish a "shareable, statewide digital land basemap" and to "analyze and propose legislation to address issues enabling cost recovery in respect to free-

dom of information policy." The board considered but rejected the imposition of fees for GIS data. In 2001, the legislature deleted the provision regarding cost recovery. See Act 1250 of 2001. This task will presumably be undertaken by the newly created Chief Information Officer. See Act 1042 of 2001. As of this writing, some state GIS information is available online with no subscription fee. See www.cast.ark.edu/cast/geostor/. Some local governments also have GIS data available online at no charge. See, e.g., www.faygis.org/ (City of Fayetteville).

Online. Act 1653 of 2001 added a new section to the FOIA requiring all state agencies, boards, and commissions (but not local governments) to make available via the Internet, at no charge, certain records created after July 1, 2003. Ark. Code Ann. § 25-19-108(b)(1). These records include: a description of its organization, including its central and field offices and the nature of its operations; the methods by which the public may access public records and the locations at which those records are available, including street, mailing, e-mail and Internet addresses; a list and general description of its records, including computer databases; its regulations, rules of procedure, any formally proposed changes in those regulations and rules, and all other written statements of policy or interpretations formulated, adopted, or used in the discharge of its functions; documents comprising an administrative adjudication decision in a contested matter, except those parts that are confidential under state or federal law; and copies of records released under Section 25-19-105 which the agency, board or commission believes likely to be the subject of frequent FOIA requests. § 25-19-108(a)(1)-(5).

If a record requested by a citizen pursuant to Section 25-19-105 of the FOIA is posted on the Internet, the custodian may respond to that request by stating that "they are available on the Internet at a specified location." This response is sufficient "unless the requester specifies another medium or format." § 25-19-108(b)(2). At the local level, school districts are required by statute to publish certain information on their Web sites, including minutes of meetings, the district's budget, a breakdown of monthly expenses, employee salaries, and the district's annual audit. § 6-13-620(14). If a district does not have a Web site, then on or before July 1, 2003, the district's educational cooperative will develop one or enter into an agreement with a city or county to post the district's information on the Web site of that entity. § 6-13-620(15).

E-mail. Because a public record is defined to include "electronic or computer-based information," Ark. Code Ann. § 25-19-103(5)(A), the FOIA reaches electronic mail. This was also the case prior to the 2001 amendment revising the definition to include this information, because the act reached "data compilations in any form." See Ark. Att'y Gen. Op. No. 99-018 (electronically stored e-mail is public record).

Resources. FOI Arkansas: www.foiarkansas.com/news4.shtml

CALIFORNIA

For years, reporters seeking databases in California have run into problems with agencies providing computer printouts over electronic data. In 2001, the law was altered to require agencies to make electronic information available to requesters. Other barriers to accessing databases in California have been

and continue to be high costs for acquiring data and the state's strict privacy laws that make getting information on individuals difficult.

The law. The California Public Records Act applies to any "writing containing information relating to the conduct of the public's business . . . regardless of physical form or characteristics." It defines writing to include "magnetic or paper tapes, . . . magnetic or punched cards, discs, drums and other documents." Cal. Gov't Code § 6252. The fact that public records may be stored in a computer does not effect their status as public records. Cal. Gov't Code § 6254.9(d). Section 6253.9, which became effective Jan. 1, 2001, requires public agencies that have information which constitutes an identifiable public record from disclosure that is in an electronic format to make that information available in an electronic format when requested unless it is otherwise exempt from disclosure. This statute supersedes portions of an earlier statute (Section 6253(b)) that allowed public agencies to determine the form in which computer data would be made available.

The requester can choose the format if it is one that has been used by the agency to create copies for its own use or for provision to other agencies. Cal. Gov't Code § 6253.9(a)(2). Otherwise, the agency shall make the information available in any electronic format in which it holds the information. Cal. Gov't Code § 6253.9(a)(1). However, § 6253.9 does not require release of records in electronic format where "release would jeopardize or compromise the security of integrity of the original record or any proprietary software in which it is maintained." Cal. Gov't Code § 6253.9(f).

While the requester can try to persuade the public agency to do a customized search, there is no provision requiring the agency to provide electronic information other than in a format in which it normally keeps the information or in a format that has been used by the agency to create copies for its own use or for use by other agencies. Cal. Gov't Code § 6253.9(a). Moreover, an agency is not required to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format. Cal. Gov't Code § 6253.9(c). However, an agency arguably cannot deny access to public information because the request would require it to "compile data, write programming language or a computer program, or to construct a computer report to extract data." These are legitimate reasons for allowing the agency to extend the time necessary to comply with a Public Records Act request, but not for denying access altogether. See Cal. Gov't Code § 6253(c)(4).

Cases & opinions. Judicial records are not subject to the Public Records Act, but a computerized list of prospective jurors and their addresses is public. However, confidential questionnaires completed by prospective jurors and used by the court to compile a master list are not public for privacy reasons. "Confidential" information, such as occupation, former felonies and former jury service, had to be deleted before providing the data in printed form or on computer tape. *Pantos v. San Francisco*, 198 Cal. Rptr. 489 (Cal. Ct. App. 1984).

The "Gang Reporting, Evaluation and Tracking" (GREAT) system contains intelligence information and security procedures incorporated into the gang reporting, evaluation, and tracking system by law enforcement agencies. The records are not subject to public disclosure under the Public Records Act. (Att'y Gen. Op. No.

95-607, Sept. 13, 1996)

Fees. The act allows fees only for "direct costs" of copying a record unless another statute specifically allows search fees or higher copying fees. Cal. Gov't Code § 6257. No fee or other charge may be imposed as a condition of accessing information available by way of the computer network over the Internet. Cal. Gov't Code § 10248. In a case involving a commercial requester, a statutory fee was upheld as reasonable even though the agency made a profit from copying computer tapes. *Shippen v. Dept. of Motor Vehicles*, 208 Cal. Rptr. 13 (Ct. App. 1984).

A public agency may charge a fee for a copy of a public record in an amount that is either (1) based upon and limited to the "direct costs of duplication" or (2) authorized and determined under some other statute. *North County Parents Organization v. Department of Education*, 23 Cal.App.4th 144, 147-148 (1994).

When the electronic record is in a format that has been used by an agency to create copies for its own use or for provision to other agencies, an agency may charge only the direct cost of duplication, which is the direct cost of producing the record in the electronic format. Cal. Gov't Code § 6253.9(a)(2). When, however, the record is one that is produced only at otherwise regularly scheduled intervals or when the request would require data compilation, extraction, or programming, an agency may charge for the cost of producing a copy of the record, including the cost of constructing the record and the cost of programming and computer services necessary to produce a copy of the record. Cal. Gov't Code § 6253.9(b).

A county board of supervisors may charge fees for copying public records in excess of the amount mandated by the California Public Records Act. An opinion by the state's attorney general contrasts the fee mandate in the CPRA, which allows only for direct cost of duplication, with a competing government code, § 54985, which states that a "county board of supervisors shall have the authority to increase or decrease the fee or charge, that is otherwise authorized to be levied by another provision of law." The fee must be an amount "reasonably necessary to recover the costs" of the copy.

"In charging a fee to cover its costs," the opinion said, "a county board of supervisors could conceivably benefit those being charged since 'an inability to charge fees in a sufficient amount to cover costs would likely produce inadequate staffing.'" Fees that largely exceed the direct cost of copying are not unusual in California, said Tom Newton of the California Newspaper Publishers Association, noting that in some areas people are charged as much as \$20 for a police report. Calif. Atty. Gen. Op. 01-605, Nov. 1, 2002.

Software. A statute exempts from disclosure computer software developed by a state or local agency. Software includes "computer mapping systems, computer programs, and computer graphics systems." The statute says information is not software merely because it is stored in a computer. State agencies may sell, lease, or license the software for commercial or noncommercial uses. Computer software, defined as "computer mapping systems, computer programs and computer graphics systems," developed by a state or local agency is not itself a public record under the CPRA. Cal. Gov't Code § 6254.9.

Online. All state statutes, the constitution and current legislative information are available

in electronic form through the Internet. Cal. Gov't Code § 10248.

The department of real estate is required to disclose information on its licensees, including real estate brokers, on the Internet. Cal. Gov't Code § 11018.5. Lobbying and political contribution reports required by the Political Reform Act of 1974 may now be filed electronically. Cal. Gov't Code § 84602.

Additionally, the Legislative Counsel is required to make available via the Internet its calendar, hearing schedules, a list of matters pending on the floor of both houses, a list of legislative committees and their members, as well as all bill information for the current legislative session, including the text of all versions of any bill, the bill's history and status, analysis of legislative committees, all vote information, and any veto message. Cal. Gov't Code § 10248. No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual. Cal. Gov't Code § 6254.21.

Special cases. Voter records — media exemption under the election code, section 2194. Voter registration card information: "Shall be confidential and shall not appear on any computer terminal, list, affidavit, duplicate affidavit, or other medium routinely available to the public at the county elections official's office. (2) Shall be provided with respect to any voter, subject to the provisions of Section 2188, to any candidate for federal, state, or local office, to any committee for or against any initiative or referendum measure for which legal publication is made, and to any person for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State."

Vital Records. On Sept. 25, 2002, Gov. Gray Davis signed a bill limiting access to indices of vital records such as births, deaths and marriages. He said the move will protect the public from "identity theft," but an open-records advocate calls the measure "a terrible precedent." As a result, the state limited access to vital records data such as births, deaths and marriages and created a tiered system for who can access which level of detail. The indices are exempt from disclosure under the CPRA. Under the new law, members of the public and media may "view" an edited version of the records, but only after certifying under penalty of perjury that they will not to use the information viewed to commit a crime. Vital records would still be available to government and law enforcement agencies, but these agencies would be prohibited from selling or releasing these indices, except as authorized by law. Cal. Health and Safety Code § 102230-102232.

Home Addresses in DMV, voter registration, gun license, public housing, local agency utility and public employee records are exempt, as are addresses of certain crime victims. (§§ 6254(f), (u), 6254.1, 6254.3, 6254.4, 6254.16, 6254.21)

Police Incident Reports, Rap Sheets and Arrest Records are exempt (Penal Code §§ 11075, 11105, 11105.1), but information in the "police blotter" (time and circumstances of calls to police; name and details of arrests, warrants, charges, hearing dates; etc.) must be disclosed unless disclosure would endanger an investigation or the life of an investigator.

Resources. California First Amendment Coalition: www.cfac.org; California Newspaper Publishers Association: www.cnpa.com

COLORADO

Reporters in Colorado say that one area of frustration is access to court records. The state court administrator has denied requests for court record databases. Instead, they've contracted with a private company to provide the information online, searchable one record at a time, for a fee. That obviously makes it difficult to match other data against court data. Another difficulty relates to confidential information in databases. Unlike some states, an agency in Colorado isn't required to redact the information and provide the rest of the information. The statute allows the agency discretion to deny a record that contains confidential information.

The law. The Colorado Open Records Act covers "all writings made, maintained or kept by the state, any agency, institution or political subdivision of the state." Colo. Rev. Stat. § 24-72-202(6). The Open Records Act defines writing to include "all . . . cards, tapes, recordings or other documentary materials, regardless of physical form or characteristics but does not include computer software." § 24-72-202(7). A separate section regulates criminal justice records, which include "all books, paper, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics." § 24-72-302(4). A requester may seek either "copies" or "printouts." § 24-72-205(1) (public records), § 24-72-306 (criminal justice records).

Custodians of miniaturized or digital records are to assist the public in locating documents and to ensure access "without unreasonable delay or unreasonable cost." § 24-72-203(b). State agencies, institutions and political subdivisions were ordered to adopt a written policy regarding any monitoring of e-mail and the circumstances under which it may be conducted. § 24-72-204.5.

E-mail. E-mail is now considered a public record unless it falls into one of the exemptions, such as work product. Colo. Rev. Stat. § 24-72-202 (1997). On or before July 1, 1997, the state or any agency, institution, or political subdivision thereof that operates or maintains an electronic mail communications system adopted a written policy on any monitoring of electronic mail communications and the circumstances under which it will be conducted. The policy includes a statement that correspondence of the employee in the form of electronic mail may be a public record under the public records law and may be subject to public inspection under the Open Records Act. Colo. Rev. Stat. § 24-72-204.5. E-mail messages that are public records must be maintained in either paper or electronic format. E-mail messages that are not public records should be deleted.

Although e-mail is considered a public record, that did not stop one agency from charging high fees for getting the information. When the Denver *Rocky Mountain News* requested the e-mail messages of Jefferson County Sheriff John Stone to find out how he responded to the shootings at Columbine High School, it didn't get the records. Instead, county officials sent a \$1 million bill to the newspaper. That fee would not necessarily guarantee the records would even be released. Officials defended the fee, saying it would merely recoup the cost of determining whether the e-mail messages were covered by the state's open records law. In contrast, in 1996, then-Colorado Gov. Roy

Romer voluntarily gave up two weeks of his e-mail messages to a student, who had requested them under the state open records act.

Cases & opinions. Regulations prohibiting the public from personally using the state treasury department's computer terminals did not unlawfully deny access to electronic records. Requiring a company to request information from the treasury department staff regulated only the manner of access and did not violate the open records act. *Tax Data Corp. v. Hutt*, 826 P.2d 353 (Colo. Ct. App. 1991). Although public requesters may not specify the form of access they receive, they are to be guaranteed reasonable accessibility that does not alter the contents of the information.

In *Tax Data Corp. v. Hutt*, 826 P.2d 353 (Colo. App. 1991) the Colorado Court of Appeals held the Open Records Act does not permit the public to dictate the format in which information will be transmitted; it guarantees only the public's right to access information that is a matter of public record "in a form which is reasonably accessible and which does not alter the contents of the information." Applying this standard, the court upheld regulations denying public access to government-owned computer terminals or magnetic computer tapes, but requiring that the information on those computers be transmitted to the requester in another "reasonably accessible" format (either orally, on microfiche, or computer printout). These regulations, the court ruled, do not deny access to the electronically stored information but merely regulate the *manner* of access to that information.

In 2001, the attorney general issued an opinion covering commonly asked questions about public records. (Att'y Gen. Formal Op. No. 01-1:Colorado Open Records Act, Nineteen Frequently Asked Questions (Alpha No. LW AG AGBAM, issued July 5, 2001) Here are some of the key points of interest to users of electronic records:

Confidential Information: Some public records contain a mixture of information that is public and information that is confidential, and not subject to inspection under the Open Records Act. In general, the government is not required to black out, or "redact," confidential portions of a record. It can lawfully refuse to let you see that record because of its partial confidential content.

If the record you want contains anything confidential, the custodian will decide whether it is appropriate to keep the document confidential, or to black out the confidential part and give you the document. How will the custodian make this decision? He or she will consider the following questions. How difficult is it to block out the confidential information? Is there so much confidential information that blacking it out is impractical because it will make the rest of the document meaningless? Does he or she risk accidentally disclosing something confidential? The easier it is to take it out the confidential part, the more likely it is the custodian will let you have a copy.

Social Security numbers: The Open Records Act does not specifically say whether your Social Security number is confidential. It authorizes a records custodian to deny a request for a Social Security number if it would be contrary to federal law. Under federal law, if you gave your Social Security number to the state because of a law enacted after October 1, 1990, the state must treat your Social Security number as confidential.

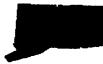
Electronic Records: Computers are widely

used in Colorado government to hold public information. Many of the computer records kept by governments in Colorado are open for inspection under this law. For example, electronic mail is widely used, and is an open record unless it is otherwise exempt from public inspection. The same is true of records kept in government databases.

Fees. The statute requires "reasonable" fees for copies or printouts, not to exceed \$1.25 a page unless "actual costs exceed that amount" or a higher fee is set by statute. If the custodian does not have facilities for making copies or printouts, the requester must pay the cost of providing those facilities. Colo. Rev. Stat. Ann. § 24-72-205(1)-(2) (public records), § 24-72-306 (criminal justice records). If an agency needs to manipulate data to generate a record in a form not used by the agency, a reasonable fee not exceeding actual cost may be charged. If the public record is not generated by word processing, the fee for a copy, printout or photograph may be based on recovery of the "actual incremental costs of providing the electronic services and products together with a reasonable portion of the costs associated with building and maintaining the information system." Fees may be reduced for journalism and other public purposes. § 24-72-205(3)-(4).

Special Cases. *DMV records.* In 2000, the governor signed a bill that altered the public records act to require a notice of the right to request confidentiality to be posted wherever applications or renewals for drivers licenses, I.D. cards, motor vehicle titles, and motor vehicle registration are accepted. The law also deleted an existing exception allowing the disclosure of confidential records for "the lawful use by the press and news media in gathering news information." § 42-2-121

CONNECTICUT

 Although many reporters have acquired databases for stories in Connecticut, one issue that journalists there have confronted for years is high fees for records. When a reporter for the *Hartford Courant* made a request under Connecticut's Freedom of Information Act to the Department of Public Safety for an electronic copy of information in the state's criminal history records, the department denied the request, claiming that it lacked the technology to gather the information electronically and would have to write a new computer program to be able to generate it. Alternatively, the department explained, it could charge the newspaper \$25 per record to have its employees search each one of the 815,000 records in its database. The only good news for reporters seeking data is that any new computer systems purchased by agencies are supposed to be designed to promote public access to the information.

The law. The Freedom of Information Act defines a public record as "any recorded data or information relating to the conduct of the public's business, prepared, owned, used, received or retained by a public agency, whether . . . typed, tape-recorded, . . . or recorded by any other method." Conn. Gen. Stat. § 1-18a(d) (1997). The law requires an agency that maintains its records in a computer storage system to provide printouts of any data properly identified. Agencies must provide public information in the format requested, including computer tape or diskettes. § 1-211

Any public agency that maintains public

records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, if the agency can reasonably make such copy or have such copy made. § 1-211

After July 1, 1992, before any public agency acquires any computer system, equipment or software to store or retrieve nonexempt public records, it must consider whether such proposed system, equipment or software adequately provides for the rights of the public under the Freedom of Information Act at the least cost possible to the agency.

Cases & opinions. In Connecticut, the state's Freedom of Information Commission administers and enforces the provisions of the Connecticut Freedom of Information Act. The commission issues opinions on public records and public meetings issues.

A state agency must provide electronic copies of public information in its criminal conviction records and may not charge a prohibitively high fee to do so, Connecticut's highest court has ruled. In the *Courant* case, the newspaper filed a complaint with the state Freedom of Information Commission, which ruled that it could not obtain the records unless it paid the fee. A state trial court upheld the decision. The *Courant* appealed, and the Connecticut Supreme Court reversed. *Hartford Courant Co. v. Freedom of Information Commission*, 801 A.2d 759 Conn., 2002 (July 23, 2003)

Where a newspaper wanted copies of computer tapes and was willing to pay for software to excise confidential information, the Freedom of Information Commission has authority to order an agency to prepare excised tapes, the state supreme court ruled. However, the court found that the commission had failed to show that release in that case would not invade personal privacy. *Maher v. FOIC*, 472 A.2d 321 (Conn. 1984).

A trial court ruled that the commission could order an agency to copy diskettes for a requester if it needed no additional software to make the duplicates. The court said the FOIC could order the release of software to access data on the diskettes. Although the act requires agencies to provide printouts of computer records, it does not limit release of electronic records to that format. *Comm'n on Hospitals and Health Care v. FOIC*, No. CV88-346502-S (Hartford/New Britain Super. Ct., Jan. 29, 1990).

An amendment to the Freedom of Information Act invalidated a state appellate court ruling that a government agency did not have to release information in the format requested, but had to provide only paper copies. *Chapin v. Freedom of Information Commission*, 580 A.2d 56 (Conn. App. Ct. 1990).

The Secretary of State's Office may charge the full cost of maintaining a voter roll to someone requesting only part of the file. "It is found that pursuant to §1-212(b)(4), G.S., the respondent may charge the complainants the full amount of \$1,700, which is the lesser cost of providing the names of registered voters to the complainants. (FIC 2001-053, Oct. 24, 2001)

The Town of Greenwich must provide a requester with copies of GIS backup tapes and SQL server databases relating to the GIS data. The city may redact medical information from the files. FIC 2001-546 (Nov. 13, 2002)

A requester sought land records on diskette

ACCESS TO ELECTRONIC RECORDS

from the town of New Milford. The city alleged that they were required to provide only a computer printout of the information. But according to FIC findings, the city must comply with the request according to Conn. Gen. Stat. § §§1-15 and 1-19(a). FIC 87-192 (Dec. 9, 1987)

Fees. Charges for copies "shall not exceed the cost . . . to the public agency." Conn. Gen. Stat. § 1-15(b). The fee for a copy other than a printout may include compensation for agency employees who must format or program computers to provide the copy as requested. The fee may include the cost to the agency of hiring an outside electronic copying service, and the "actual cost of storage devices or media." The fee may not include search or retrieval costs, unless the agency incurs computer-time charges in providing the requested record. §§ 1-15(b), 1-19.

E-mail. The Electronic and Voice-mail Management and Retention Guide For State and Municipal Government Employees issued by the Office of the Public Records Administrator and State Archives states that e-mail messages and voice mail messages sent or received in the conduct of public business are public records.

DELAWARE



In general, reporters call the Delaware law "decent" when it comes to access electronic records. The biggest problem is that reporters find they have to wrangle with agencies over what constitutes a "reasonable" fee.

A recent access win for reporters came in October 2002 when a superior court judge ruled that *The (Wilmington) News Journal* was entitled to information that would enable it to recognize repeat offenders within raw data maintained by the Delaware Justice Information System. State officials maintained the newspaper could deduce offenders' identities if given the information, raising privacy concerns. The judge disagreed and ruled that the newspaper should be given the information. But the judge also ruled that the newspaper is not entitled to computerized records on cases that don't end in convictions, records involving minors, records on the location of an arrest or those that identify police, parole or probation officers.

The law. The statute does not specifically address electronic information. Rather, the Freedom of Information Act defines a public record as "information of any kind . . . regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." Del. Code Ann. tit. 29, § 10002(d).

It applies to any agency or political subdivision created by the legislature that disburses or receives state funds, or that makes recommendations to the legislature. The Administrative Procedure Act allows access to "any documents, papers and other materials considered by the agency in taking agency action." It sets procedures for state agencies that make regulations, adjudicate cases or issue licenses. A requester may proceed under either law, but the FOI Act creates more affirmative rights for a requester than the APA. Del. Code Ann. tit. 29, § 10112(a)(2).

Under Delaware corporate law, the department of state will charge for photocopies, microfiche or electronic image copies of corporation records unless Delaware's Freedom of Information Act or statute provide otherwise. Del. Code Ann. tit. 8, § 391(c).

Cases & opinions. The Delaware Attorney General has addressed two potential problems with public access to electronic records. First, public access to computer databases that contain exempt information (such as criminal records or information the disclosure of which would violate the individuals privacy) will not be granted. The Attorney General has recommended to one department that when designing such computer systems, the database should be segregable to permit public access to those parts not exempted by the Act or otherwise. See Del. Op. Att'y Gen., No. 91-I013 (Apr. 17, 1991). Second, a request for access to a database may present an administrative burden to redact exempt material. The request may be denied as a result.

Fees. Under the FOI Act, "reasonable expense" for copying may be charged. Del. Code Ann. tit. 29, § 10003(a). Each public body must "establish rules and regulations regarding access to public records as well as fees charged for copying of such records." § 10003(b). The secretary of state may issue photocopies and electronic image copies of corporate records filed with the state for a fee of \$5 for the first page and \$1 for each additional page. Del. Code Ann. tit. 8 § 391(c). Additional fees may be collected for "express" completion of a request for corporate records. § 391(h).

To obtain from the Secretary of State electronic image copies of instruments on file, or instruments, documents or other papers not on file, one must pay a fee of \$5 for the first page and \$1 for each additional page. 8 Del. Code Ann. tit 8, § 391(c). Certification of such documents costs an additional \$20. If the electronic image copies of such records are requested to be completed within two hours on the same day of the request, there is an additional fee of up to \$500. If the electronic image copies of such records are requested to be completed with the same day as the day of the request, there is an additional fee of up to \$200. If the electronic image copies of such records are requested to be completed within a 24-hour period from the time of the request, there is an additional fee of up to \$100. 8 Del. C. § 391(h). However, as of March 2003, such electronic image copies were not yet available online from the office of the secretary.

DISTRICT OF COLUMBIA

The District of Columbia public records law was changed in 2001 to specifically cover electronic records. In addition, records created after November 2001 are to be posted on the agency's Web site. Despite the new law, journalists still report problems with agencies saying a request will require hours of expensive programming to fill.

The law. The D.C. Freedom of Information Act affords the public a right to inspect and copy public records of the D.C. government, including the Office of the Mayor and all District agencies.

The term "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body. Public records include information stored in an electronic format." D.C. Code Ann. § 2-502(18).

A public body must make "reasonable" efforts to search for records in electronic form or format,

except when the efforts would significantly interfere with the operation of the public body's automated information system. D.C. Code Ann. § 2-532(a-2)). "Reasonable efforts" means that a public body should not be required to expend more than eight hours of personnel time to reprogram or reformat records. § 2-532(f)(1)).

For all public records created on or after November 1, 2001 that are subject to disclosure "each public body must make these records available on the Internet or, if a Web site has not been established by the public body, by other electronic means." D.C. Code Ann. § § 2-206(b).

Cases & opinions. None found.

Fees. Search fees are limited to \$10 for each request. A request is "a single demand for any number of documents." Copying fees are limited to "actual cost." Fees may be waived or reduced if waiver is "in the public interest."§ 2-531

A public body making electronic records available must provide the records in any form or format requested, provided that the person requesting the records pays the costs of reproducing the record in that form or format. D.C. Code Ann. § 2-532(a-1)).

FLORIDA

Long held in awe by reporters using databases as one of the most open states, Florida has seen erosion in recent years in access to public records. Although reporters there are frustrated with additional limitations on records access, Florida remains one of the better states for electronic access. After September 11, many exemptions were proposed to the already length list of records that may be withheld in Florida. Fortunately, most of them did not make it into law.

On the plus side, the standard for creation of new exemptions to the Sunshine Act was amended in November 2002 to require a two-thirds vote of the legislature for passage of any exemption to the public records law or sunshine law.

A legislative study group recently made 13 recommendations regarding access to electronic court records. "No new exemptions were proposed, but there was a recommendation that the court may want to take a careful look at the information it collects to determine whether new, additional exemptions are needed," First Amendment Foundation Executive Director Barbara Petersen said in a Feb. 14, 2003 statement.

The law. The standard for creation of new exemptions was amended in November 2002 to require a two-thirds vote of the legislature for passage of any exemption to the public records law or sunshine law. Provisions relating to electronic access were reenacted as Fla. Stat. § 119.084 in 2002.

Under 1993 amendments to the Sunshine Law, public records and meetings of the legislative, executive, and judicial branches and each agency or department are open unless exempted by statute. Fla. Const. of 1885, art. I, § 24. Exemptions must be narrowly drafted and justified by public necessity. § 24(c). Under the Sunshine Law (Fla. Stat. Chapter 119), every person who has custody of a public record must allow the record to be inspected and examined by any person desiring to, under reasonable conditions. The custodian must furnish a copy of the record upon payment of the cost

of duplication or of the fee prescribed by law.

The state Sunshine Law defines public records as "all documents, . . . tapes, data processing software. . . or other material, regardless of physical form or characteristics." Fla. Stat. § 119.011(1).

Each agency that maintains a public record in an electronic record-keeping system shall provide to any person a copy of any public record in that system which is not exempted by law from public disclosure. § 119.084(5). An agency that maintains a public record in an electronic record-keeping system must provide a copy of the record in the medium requested by the person making a Ch. 119 demand, if the agency maintains the record in that medium, and the agency may charge a fee which shall be in accordance with Ch. 119. *Id.*

Thus, a custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript would not satisfy the requirements of § 119.07(1). See Fla. Op. Att'y Gen. 91-61.

The definition of "public records" specifically includes "data processing software" and establishes that a record made or received in connection with official business is a public record, regardless of physical form, characteristics, "or means of transmission." See § 119.011(1).

As a matter of public policy, "providing access to public records is a duty of each agency and . . . automation of public records must not erode the right of access to those records." § 119.01(3). "As each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained."

Section 119.085 authorizes but does not require agencies to provide remote electronic access to public records. *And see* § 119.01(2), stating: "The Legislature finds that, given advancements in technology, providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible"; and, that agencies providing remote access should do so "in the most cost-effective and efficient manner available to the agency . . ." *Cf., Rea v. Sansbury*, 504 So. 2d 1315, 1317-1318 (Fla. 4th DCA 1987), *review denied*, 513 So. 2d 1063 (Fla. 1987) (while § 119.085 authorizes the county to facilitate inspection of public records by electronic means, the statute "does not mean that every means adopted by the county to facilitate the work of county employees *ipso facto* requires that the public be allowed to participate therein").

Unless otherwise required by law, the custodian may charge a fee for remote electronic access, granted under a contractual arrangement with a user, which may include the direct and indirect costs of providing such access. However, fees for remote electronic access provided to the general public must be in accordance with the provisions of § 119.07(1).

Cases & opinions. Public officials do not have to provide copies in the format requested when the government's software will not provide such a format. But officials may allow a requester to pay for or supply a program in order to obtain information in the desired format. A court may order an agency to cooperate when new programs must be written to excise confidential information or to access information that existing government programs do not reach, when "the form in which the information is professed does not fairly and meaningfully represent

the records," or when "other exceptional circumstances exist." *Seigle v. Barry*, 422 So. 2d 63 (Fla. Dist. Ct. App. 1982), *pet. for rev. denied*, 431 So. 2d 988 (Fla. 1983).

Intermediate files that enable the computer to assemble data for final output, but are not otherwise intelligible, are not public records because they are not intended to "perpetuate or formalize knowledge" and are not in themselves final evidence of the knowledge to be recorded. Fla. Op. Att'y Gen. 85-87 (Oct. 25, 1985).

A citizen who wanted to look at the legal fees records of a public hospital board was entitled to examine the actual records rather than extracts from the hospital's computer. *Davis v. Sarasota County Public Hospital Board*, 480 So. 2d 203 (Fla. Dist. Ct. App. 1985), *rev. denied*, 488 So. 2d 829 (1986).

The Department of Revenue's tangible personal property assessment rolls, recorded on computer tapes, are subject to inspection and copying under the Public Records Act. Fla. Op. Att'y Gen. 87-11 (Jan. 26, 1987).

If county commissioners use a computer network to conduct official business, all computer-stored information is subject to the Public Records Act. Any meetings conducted by computer network are subject to the open meetings law. Fla. Op. Att'y Gen. 89-39 (June 26, 1989).

A custodian of public records stored on a computer data software disk must provide a "like copy" in its original format. A typed transcript of the computerized public record does not satisfy the requirements of the public records act. Fla. Op. Att'y Gen. 91-61 (Aug. 23, 1991).

A statewide computerized violent crime database contains information that is exempt from the public records law. The system contains crime information and material derived from both active and inactive criminal case reports. The system is exempt to the extent that it involves active criminal intelligence information, which if disclosed, could impede criminal investigations and the apprehension of criminals. Fla. Op. Att'y Gen. 94-48 (May 24, 1994).

However, Florida criminal history records are available for a fee and the state maintains a sexual predator database that is accessible thorough the Internet. E-mail messages made or received by a state agency in connection with the transaction of official business are public records. Fla. Op. Att'y Gen. 96-34 (May 15, 1996).

As public records, these e-mail messages are subject to state statutory restrictions on destruction, which require agencies to adopt schedules for the destruction of records that are no longer needed. Fla. Op. Att'y Gen. 96-34 (May 15, 1996).

A database that lists holders of permits from the Florida Game and Fresh Water Fish Commission and subscribers to the commission's magazine are public record. "It has long been the opinion of this office that, in the absence of a statute to the contrary, public information must be open to the public without charge." Fla. Op. Att'y Gen. 85-03.

A Florida court rejected the argument that information requested would have to be "created" because the information is not indexed in the form requested. "The task is more onerous because it must be done manually, but it can be done," the court said. *Newman v. Amente*, 634 So. 2d 305 (Fla. 5th DCA 1994).

"The e-mail communication of factual background information from one city council member to other council members is a public record and should be maintained by the records cus-

todian for public inspection and copying. However, such communication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Government in the Sunshine Law." Fla. Op. Att'y Gen. 2001-20.

"The use of an electronic bulletin board by water management district basic board members to discuss matters that may foreseeably come before the basin board over an extended period of days or weeks, which does not permit the public to participate online, is a violation of section 286.011 Fla Statutes, and should be discontinued." Fla. Op. Att'y Gen. 2002-32.

"A school board may use electronic media technology in order for a physically absent member to attend a public meeting of the board if a quorum of the members is physically present." Fla. Op. Att'y Gen. 98-28.

The U.S. Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976), foreclosed the possibility that a federal constitutional privacy interest exists in relation to state dissemination of nonconviction arrest data.

Florida's public records law applies to criminal history information compiled and maintained by the Florida Dept. Of Criminal Law Enforcement. Fla. Op. Att'y Gen. 77-125.

Physically disabled members of the City of Miami Beach Barrier-free Environment Committee may participate and vote on board matters by electronic means if they are unable to attend a public meeting so long as a quorum of the members of the board is physically present at the meeting site. Fla. Op. Att'y Gen. 2002-82, Dec. 11, 2002.

Fees. "In the absence of a statute prescribing a fee which may be charged for furnishing copies of the growth management books, the City of Fort Myers is limited to charging only the actual cost of duplication when selling copies." Fla. Op. Att'y Gen. 89-93.

Unless the specific request for copies requires extensive clerical or supervisory assistance or extensive use of information technology resources, or both, the Division of Elections may charge only the actual cost of duplication for copies of voter registration records as provided in Fla. Stat. § 119.07(1)(a). Fla. Op. Att'y Gen. 99-41.

Sales tax does not apply to fees charged for providing copies of public records. Fla. Op. Att'y Gen. 86-83.

Fees are limited to the actual cost of copying, including "materials and supplies" but excluding "labor cost or overhead cost," unless other statutes specifically allow recovery of such costs. Fla. Stat. § 119.07(l)(a). Generally, a fee may not be imposed for inspecting records. *Florida ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905); Fla. Op. Att'y Gen. 85-3 (Jan. 8, 1985).

Fees for remote electronic access may include the direct and indirect costs of providing such access. § 119.085. A public body does not have to provide electronic records in a format other than that routinely used, but if it elects to provide the records in a different, requested format, it may charge the requester the costs of conversion. Fla. Op. Att'y Gen. 97-39 (June 30, 1997). If a custodian provides a copy of government software to a requester, the fee may not include costs of developing the software. Fla. Op. Att'y Gen. 87-1 (Jan. 2, 1987). Where a request involves "extensive use of information technology resources or extensive clerical or supervisory assistance . . . the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall

be reasonable and shall be based on the cost incurred." Fla. Stat. § 119.07(b).

"Information technology resources" include data processing hardware, software and services. § 282.303(13). An agency may impose such fees only when they are reasonable and only for extensive use of information technology or supervisory assistance. Fla. Op. Att'y Gen. 84-3 (Jan. 19, 1984); Fla. Op. Att'y Gen. 85-3 (Jan. 8, 1985). "Extensive" can mean "more than 15 minutes." *Florida Institutional Legal Services v. Department of Corrections*, 579 So. 2d 267 (Fla. Dist. Ct. App. 1991). A fee of \$1 per page is permissible for copies of judicial records. *WFTV v. Wilken*, 675 So. 2d 674 (Fla. Dist. Ct. App. 1996).

Access to computerized records is generally provided through the use of programs used by the agency. Access by the use of a specially designed program prepared by or at the expense of the applicant may be permitted in the discretion of the agency. See *Seigle*, 422 So. 2d at 66. If the agency refuses to permit access in this manner, the circuit court may permit such access where available programs do not access all of the public records stored in the computer's data banks, or the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items, or for any reason the format in which the information is proffered does not fairly and meaningfully represent the records, or the court determines other exceptional circumstances exist warranting this special remedy. *Id.* at 66-67.

E-mail. Theoretically, e-mail is treated no differently than other public records. See Op. Att'y Gen. Fla. 96-34 (1996) (official business related sent or received by agency employees are public records).

A Florida appeals court in May 2002 allowed the city of Clearwater to withhold e-mail messages sent between two employees, determining that the messages were personal and exempt from the state's open records law. The court held that the e-mail messages were not public records because they were not made pursuant to a statute or to further government business. *Times Publishing Co. v. City of Clearwater*, 2002 WL 944630, 27 Fla. L. Weekly D1073 (Fla. App. 2 Dist. May 10, 2002).

Software. The definition of "public records" specifically includes "data processing software." There are a couple of exemptions to the law: The statute prohibits disclosure of "data processing software obtained by an agency under a licensing agreement which prohibits its disclosure and which software is a trade secret." "Sensitive software" developed by an agency is also exempt. Fla. Stat. § 119.07(l)(q).

"Agency-produced data processing software which collects, stores, retrieves, and processes voter registration information pursuant to section 98.211, Florida Statutes, is a public record. However, such software is "sensitive" within the terms of § 119.07(3)(r), and not subject to inspection and copying." Fla. Op. Att'y Gen. 90-04

State agencies may now hold copyrights for data processing software they create, and charge license fees for its use. However, copyright concerns cannot be used to limit access to public records. Fla. Stat. § 119.083.

Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which is a trade secret, as defined in s. 812.081, and agency-produced data processing software that is sensitive are exempt

from the provisions of subsection (1).[4].

There is no specified fee prescribed for access to computerized public records. However, Fla. Stat. § 119.083(4) provides that fees for access to electronic records may be assessed as prescribed by Fla. Stat. § 119.07(1)(b). Under this provision, an agency may charge a reasonable special service charge based on the costs incurred for extensive use of information technology resources or extensive use of clerical and supervisory assistance. See Fla. Stat. § 119.07(b)(1); see also Op. Att'y Gen. 97-39 (1997).

An agency may sell or license copyrighted data processing software to any other public or private entity. Fla. Stat. § 119.083(2)(a). Prices or fees for the sale or licensing of copyrighted data processing software may be based on market considerations.

Cost recovery. When the Lee County property appraiser's office requested an opinion about whether they could charge a fee for access to a specialized computer system, the attorney general said no. "If the furnishing of copies were involved, the custodian would be allowed to charge for the actual cost of duplication of those copies. However, duplication of records is not involved in this instance. In the view of principles of law discussed above and in the absence of statutory authority for the above-described fee or charge, I must conclude that the levying of the above-described fee or charge is not permissible." Fla. Op. Att'y Gen. 84-03.

The clerk of the court in Indian River County may not recoup some of the in-house costs involved in writing computer programs. "Unless and until legislatively amended otherwise, the clerk of the circuit court does not have the authority to charge a fee, other than the actual cost of making the copy, for providing copies of computer software programs in order to recoup the costs associated with writing such programs." Fla. Op. Att'y Gen. 87-01.

Resources. First Amendment Foundation: www.floridafaf.org; Marion Brechner Center: brechner.org

GEORGIA



One issue that has been difficult for Georgia reporters is gaining access to some law enforcement records. But a recent decision is a positive move for reporters. The state recently agreed to release felony conviction data in all jurisdictions. David Milliron, computer-assisted reporting editor for the *Atlanta Journal-Constitution*, requested the records on the heels of the Connecticut Supreme Court's decision in *The Hartford Courant Co. v. Freedom of Information Comm.*, and the Delaware Superior Court's decision in *The State of Delaware v. Gannett Co. Inc.* Historically, Georgians could obtain a criminal history once they found a cooperating law enforcement agency to run a "Type P" (in-state felony conviction) report. The report cost up to \$20 and the requestor had to provide the subject's name, birth date, Social Security number, gender and race. GBI had cited O.C.G.A 35-3-34(d.2) in previously withholding the information.

A coalition of Georgia media and law enforcement organizations has produced an open records guide for the state's law enforcement officers. The Georgia First Amendment Foundation and eight other media and law enforcement groups worked together to produce the "Georgia Law Enforcement and the Open

Records Act: A Law Enforcement Officer's Guide to Open Records in Georgia." The 40-page manual purports to help police officers navigate Georgia's open records laws. In an introduction to the manual, Georgia Attorney General Thurbert Baker said it is critical that law enforcement officers be "as well informed as possible regarding the laws governing the access" that the public has to government information. "Open government is not merely a good way for government to operate, it is the only way for it to operate efficiently," he said.

The law. The Open Records Act was amended in 1992 to include computer records. The law defines public records as "all documents . . . tapes, photographs, computer-based or generated information, or similar material." Ga. Code Ann. § 50-18-70(a).

"Public record" also means items received or maintained by a private person or entity on behalf of a public office or agency that are not otherwise subject to protection from disclosure. Agencies cannot put information in the hands of a private person to avoid disclosure.

Any computerized index of county real estate deed records must be "printed for purposes of public inspection" every 30 days. § 50-18-70(c).

Cases & opinions. Before the open records law was amended to specifically include computer-generated information, the state supreme court did not question the application of the statute to computer printouts that were not otherwise exempt from disclosure. *Doe v. Sears*, 263 S.E.2d 119 (Ga. 1980), cert. denied, 446 U.S. 979 (1979).

The government does not have to create programs to provide access to computerized information by personal computer modems absent legislation requiring the access. *Jersawitz v. Hicks*, 448 S.E.2d 552 (Ga. 1994). The supreme court unanimously affirmed a trial court's denial of plaintiff's request for on-line computer access to the Fulton County real estate deed records: "While we are mindful that the prevalence of computers in homes, offices and schools may make on-line access to computerized public records desirable, requiring that means of access must be addressed by the General Assembly."

A lower court decision implies that an agency must sell a computer tape to any requester if it is already providing that tape to another private entity or business. *Price v. Fulton County Commission*, 318 S.E.2d 153 (Ga. Ct. App. 1984). An agency must comply with a request for information that can be retrieved by a minimal computer search. However, there is a distinction between compiling computer-stored information and preparing a new program designed to retrieve facts in a substantially different format. An agency must determine on a case-by-case basis whether programming constitutes the creation of new material, which is not required by the open records law. Ga. Att'y Gen. Op. 89-32 (June 30, 1989).

Although not specifically mandated by the Act, government entities often comply with requests for customized searches of computer databases. The Georgia Supreme Court has held, however, that state agencies are not required to create new programs, to provide public access via personal computers, or otherwise to have a computer technician create a computer program to compile data according to criteria conceived by the citizen. *Schulzen, Ward & Turner, LLP v. Fulton-DeKalb Hosp. Auth.*, 272 Ga. 725, 535 S.E.2d 243 (2000) (finding that hospital authority had no duty to search for and compile new document from its existing

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computerized records); *Jersawitz v. Hicks*, 264 Ga. 553, 448 S.E.2d 352 (1994) (finding Act applied to real estate database but refusing to require accessibility by modem).

Fees. An agency may charge the "actual cost of a computer disk or tape" when requested information is maintained by computer. Ga. Code Ann. § 50-18-71(f). The custodian may charge for time that the custodian supervises the work. However, 15 minutes of search time is free. § 50-18-71(d). An agency is required to "utilize the most economical means available for providing copies of public records." § 50-18-71(e). An agency may develop reasonable rules to recover "direct administrative costs for search and retrieval." Ga. Op. Att'y Gen. 89-32 (June 30, 1989); Ga. Op. Att'y Gen. 90-5 (Feb. 8, 1990). The Georgia Crime Information Center may charge a fee for access to its computerized records sufficient to allow it to recover the direct and indirect costs of dissemination. § 35-3-34(a)(3). However, no criminal records fee may exceed \$20 per person whose criminal history record is sought and a "grandfather clause" exists allowing those authorized to receive records prior to 1995 to receive records free of charge. § 35-3-34(d.3). The superior court clerk is authorized to sell court records for a profit. § 15-6-96. However, the sale price of records in public databases may only reflect the reasonable cost of retrieval plus the cost of the computer disk or device used to store the record and, after the first quarter hour of work, only the hourly wage of the lowest paid full-time employee capable of overseeing or performing transfer. *Powell v. VonCanon*, 467 S.E.2d 193 (Ga. Ct. App. 1996).

Software. The statute does not apply to "any computer program or computer software used or maintained in the course of operation of a public office or agency." § 50-18-72(f)(2).

E-mail. E-mail documents are not treated differently than written correspondence. Because the Act by its terms applies to both "computer based or generated information" and to "letters," e-mail correspondence is subject to the Act. Ga. Code Ann. § 50-18-70 (a).

Resources. Georgia First Amendment Foundation: www.gfaf.org

HAWAII

"Case-by-case" is the key to access to electronic information and other records in Hawaii. Agencies are granted leeway to decide whether a computer record should be released under the Uniform Information Practices Act. If confidential information is contained in a record, the agency should determine whether the information is "reasonably segregable" from the rest of the information. The Office of Information Practices has found that computer records of voters and water system users should be released in electronic format. The UIPA has an extensive list of how fees may be assessed for various records. The fee structure changes based on the type of record and sometimes on a case-by-case basis.

The law. The Uniform Information Practices Act defines a "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). Unless information is readily retrievable by an agency in the form in which it is requested, an agency does not have to prepare a compilation or summary

of its records." § 92F-11(c). Agencies must "assure reasonable access to facilities for duplicating records and for making memoranda or abstracts." § 92F-11(d). According to the Office of Information Practices, the appropriate format is determined on a case-by-case basis. A separate statute makes legislative information and services available to the public through online networks. § 21D-1 to -4. A special fund has been established to improve computer access to legislative materials. § 21D-5(b), §92F-42.

When information in a requested record is not required to be disclosed under Haw. Rev. Stat. § 92F-13 or any other law, an agency shall assess whether the information is reasonably segregable from the requested record. If the record is reasonably segregable, the agency shall: (1) Provide access to the portions of the record that are required to be disclosed under chapter 92F; and (2) Provide a notice to the requester in accordance with § 2-71-14(b) regarding information that is not disclosed.(b) An agency shall segregate information from a requested record in such a way so that it is reasonably apparent that information has been removed from the record. An agency shall not replace information that has been segregated with information or text that did not appear in the original record. Haw. Rev. Stat. §92F-42; §92F-11.

Cases & opinions. Regarding powers and duties of the office of information practices: The director of the office of information practices: "(13) Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records, as well as to provide for a waiver of such fees when the public interest would be served. The public apparently has a right to inspect and copy computer tapes containing data in voter registration records, but the attorney general has the authority to definitely determine whether conflicting municipal ordinances preclude the inspection of the voter records." OIP Op. Ltr. 90-22 (June 21, 1990).

Although an agency is not required to create a new record, an electronic mailing list of people who declared water use with the Commission of Water Resource Management was a "readily retrievable" open record. The opinion stated that an agency must treat commercial and noncommercial requesters the same. OIP Op. Ltr. 90-35 (Dec. 17, 1990).

An electronically stored mailing list of registered lobbyists must be made available for public inspection and copying. An agency must provide a copy of the record in the format requested, such as on a computer diskette, unless there is a risk of damage, loss or destruction of the original. OIP Op. Ltr. 92-12 (Aug. 13, 1992).

The disclosure of an individual licensee's or license applicant's home address, home telephone number, and date of birth, as contained in their license application, would "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Based upon previous OIP advisory opinions, individuals have a significant privacy interest in this information. Further, the disclosure of this information would say little, if anything, concerning "what the government is up to" or about the conduct of public officials. OIP Op. Ltr. No. 90-10 (Feb. 26, 1990).

Under the UIPA, each agency "shall disclose . . . [g]overnment records which pursuant to . . . a statute of this State, are expressly authorized to be disclosed." Haw. Rev. Stat. 92F-12(b)(2). Chapter 11, Hawaii Revised Statutes, expressly provides that voter registration affi-

davits, and records "appertaining to" the registry of voters or to elections, be available for public inspection and copying. Insofar as sections 11-15(d) and 11-14(b), Hawaii Revised Statutes, permit the inspection and duplication of voter registration affidavits. "We do not believe that the Legislature intended section 11-14(b), Hawaii Revised Statutes, be applied to restrict access to computer tapes containing similar data." OIP Op. Ltr. No. 90-22 (June 21, 1990)

With respect to police blotter data concerning identifiable juvenile offenders, its disclosure is prohibited by section 571-84(e), Hawaii Revised Statutes, and under the UIPA, the county police departments should not make that information available for inspection or copying. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1990). With respect to police blotter data concerning adult offenders, none of the UIPA's statutory exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, applies to this information. Accordingly, it must be made available for inspection and copying upon request by any person. Haw. Rev. Stat. § 92F-11(b) (Supp. 1990). Although chapter 846, Hawaii Revised Statutes, prohibits the dissemination of "criminal history record information," including identifiable records and notations of arrest, this statutory prohibition on disclosure does not apply to police blotter data that is chronologically compiled. Similarly, police blotter data is not protected from disclosure by federal laws applicable to criminal history record information. OIP Op. Ltr. No. 91-4 (March 25, 1991)

Fees. Fees must be reasonable, but not more than 25 cents per page. However, the agency may include labor costs for locating and copying records in the fee. Haw. Rev. Stat. § 92-21. The law directs the Office of Information Practices to set rules for fees and "waiver of such fees when the public interest would be served." § 92F-42(13).

There are no fee provisions for the state's legislative information service, Access/Legislative Information Service, but everything on the system is provided "as is." § 21D-3. Information acquired from private sources and contained in a state geographic information system database is exempt from disclosure as confidential commercial information if release would frustrate the state's ability to obtain such information in the future and cause the private party to suffer competitive injury. Haw. OIP Op. Ltr. 97-9 (Dec. 17, 1997).

The OIP has an extensive list of how fees may be assessed. For more information, refer to the Office of Information Practices at www.state.hi.us/oip/index.html.

GIS. The State has made GIS information available to the public under the UIPA. However, because the Hawaii Natural Heritage Program ("HINHP") GIS database within the State GIS constitutes confidential commercial information exempt from disclosure, the Office of Planning may segregate the HINHP GIS database from the public information contained in the GIS before making the GIS available to the public. See OIP Op. Ltr. Nos. 89-5 (Nov. 20, 1989); 90-8 (Feb. 12, 1990); 90-31 (Oct. 25, 1990); 91-1 (Feb. 15, 1991); 94-17 (Sept. 12, 1994); 95-13 (May 8, 1995). OIP Op. Ltr. No. 97-9

The geographic information system digital data file is the only electronic record that is specifically mentioned in the section relating to the costs of copying government records. While the fees for those data files vary according to the agency having control of such data, the cost will include the labor cost for searching and reproducing the data

and the material cost (including electricity and equipment). Haw. Rev. Stat. § 92-21. Although not specifically provided for by statute, it is likely that the fees for the reproduction of any other electronic record will be assessed in a similar manner.

E-mail. E-mail is considered a public record on a case-by-case basis. In other words, accessibility depends on the substance of the communication and not its form. See Haw. Rev. Stat. Sec. 92F for analysis.

Software. Software is not a public record. **Resources.** Hawaii Office of Information Practices: www.state.hi.us/oip

IDAHO

 Journalists in Idaho have obtained databases to do a variety of stories. In 1999, the *Spokesman Review* did a series of stories showing how a land broker was secretly planning to trade 2 million acres of public land in Idaho — national forests and BLM land — to logging, mining and ranching interests. Some journalists report that they have been asked for high fees for public records. Although the Idaho law exempts software, one thing this state's law does that few others do is specify that data contained within the software is public record.

The law. The Open Records Act defines a public writing to include "every means of recording, including . . . all . . . magnetic or paper tapes, . . . magnetic or punched cards, discs, drums, or other documents." The definition of copying encompasses duplication "by . . . any means so long as the public record is not altered or damaged." Idaho Code § 9-337. "Computer programs developed or purchased" by an agency are generally exempt from disclosure. However, a program does not include "original data . . . , analysis, compilation and other manipulated forms of the original data produced by use of the program . . . , or mathematical or statistical formulas that would be used if the manipulated forms of the original data were to be produced manually." § 9-340(16). Another section exempts computer programs entirely if they qualify as "trade secrets." § 9-340(2).

Cases & opinions. The law does not require an agency "to create a computer program to present data in a more convenient or more easily retrievable format." However, if the information cannot be retrieved at all without a computer program, then an agency must write a program. If the programming requires "many hours of sophisticated programming by highly trained professionals," the agency may demand that the requester pay the programming costs. Letter from John McMahon, Chief Deputy, Office of the Attorney General, to J.D. Williams, State Auditor, Office of the State Auditor (June 25, 1993).

Fees. The law limits the copying fee to "the actual cost to the agency," excluding "administrative or labor costs resulting from locating and providing a copy of the public record." But it permits a higher fee for a copy of "a computer tape, computer disc, microfilm or similar or analogous record system." That fee may equal the "direct cost of copying" plus "the standard cost, if any, for selling the same information in the form of a publication." § 9-338(8). An agency may charge the cost of computer programming when records are requested in a form that does not yet exist. Letter from John McMahon, Chief Deputy, Office of the Attorney General, to J.D. Williams, State Auditor, Office of the State Au-

ditor (June 25, 1993).

Idaho Code § 9-338(8)(b) provides for fees to be assessed for the duplication of computer tape, computer disk, microfilm or similar or analogous record system containing public information. The fee shall not exceed the sum of the agency's direct cost of copying the information in that form, and standard cost, if any, for selling the same information in the form of a publication.

A special provision prohibits government agencies from distributing or selling mailing or telephone number lists without first obtaining the permission of the persons on the list. Idaho Code § 9-348. Civil penalties up to \$1,000 may be assessed for bad faith violations of this provision. *Id.*

ILLINOIS

 While the state's law covers electronic records, reporters often are at the mercy of an agency that can decide in what format data will be made available and whether the agency will do a custom search.

Reporters find that many agencies delay requesters. Because documentation for databases is not necessarily public information, reporters may be denied file layouts, which are crucial to analyzing any database. In addition, some databases that are readily available in other states, are not public record in Illinois.

The law. Under the Freedom of Information Act, public records are "all records, . . . cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics." Copying is "reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means." 5 Ill. Comp. Stat. 140/2(c)-(d). Under Illinois law, the requester can choose a format for receiving records. There is no statutory basis for this outcome, but case law suggests that the requester can choose a format.

Agencies must "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." 5 Ill. Comp. Stat. 140/5. The statute allows an agency to withhold "administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section." 5 Ill. Comp. Stat. 140/7(p). Any public record may be reproduced in a digitized electronic format. Public records scheduled for disposal after the statutorily mandated retention period may be digitized for record-keeping. (Pub. Act 90-701, amending ch. 116, para. 43/107, effective July 1, 1999). A public body may not grant any person or entity, whether by contract, license or otherwise, the exclusive right to access or disseminate any public record or court record. 116 Ill. Comp. Stat. 203; 25 Ill. Comp. Stat. 13.

Cases & opinions. Courts have required agencies to do customized searches of their

files when requesters will pay for necessary computer programming. The supreme court suggested some limits on that ruling. For example, the request should not interfere with an agency's other services and the request should not "place an onerous burden on the agency." *Family Life League v. Dept. of Public Aid*, 493 N.E.2d 1054 (Ill. 1986). However, "mere administrative inconvenience is not enough to override . . . the right of access," especially when the requester is willing to pay for programming to excise non-disclosable material. *Hamer v. Lentz*, 525 N.E.2d 1045 (Ill. App. Ct. 1988). Segregating exempt from non-exempt material and "scrambling a record" to ensure privacy of test scores are not "unduly burdensome" and do not constitute creation of a "new" record. *Bowie v. Evanston Community Consolidated School Dist.*, 538 N.E.2d 557 (Ill. 1989). "When voter registration records [are] on computer tapes, it makes no sense and accomplishes no legitimate purpose to force individuals and organizations to copy the information from [printed documents] rather than from the tape. . . . Therefore, as a general rule, interested individuals and organizations may copy computer tapes containing voter registration records." Ill. Op. Att'y Gen. S-1323, 1975-76 Report, p. 219 (Dec. 15, 1977). An agency must provide data in the format requested, such as computer tape, unless it can cite a specific exemption listed in the statute. The mere fact that the same information had already been provided in a printout does not justify denial of a request for a copy of the computer tape. *AFSCME v. County of Cook*, 555 N.E.2d 361 (Ill. 1990).

The voter registration database maintained by the State Board of Elections is not exempt from disclosure under subsection 7(1)(a) of the FOI Act. The registration record cards from which the voter registration database is created are public records open to inspection by the public. It is equally clear that the General Assembly has enacted express limitations upon the use of information contained in electronic voter records. Although the statutes cited expressly prohibit political committees or individuals from " * * using the computer tapes or computer discs or other electronic data processing information containing voter registration information for * * * commercial solicitation or other business purposes," sections 4-8, 5-7 and 6-35 of the Code do not "specifically prohibit" the disclosure of the electronic voter registration records to the public. Ill. Op. Att'y Gen. 02-009 (Aug. 28, 2002).

Fees. An agency may charge only for the "actual cost" of copying a record or for "use . . . of the equipment of the public body to copy records." The fee may not include "the costs of any search for and review of the record . . . unless otherwise provided by State statute." The agency may waive fees when releasing information "is in the public interest." 5 Ill. Comp. Stat. 140/6. Courts have allowed agencies to charge for computer programming to excise material exempt from public disclosure. *Family Life League v. Dept. of Public Aid*, 493 N.E.2d 1054 (Ill. 1986); *Hamer v. Lentz*, 525 N.E.2d 1045 (Ill. App. Ct. 1988).

It has long been recognized that public officers may collect fees only as authorized by law. *Crocker v. Finley* (1984), 99 Ill. 2d 444, 452; *Dille v. Rice* (1905), 120 Ill. App. 353, 358. Although, under the provisions of division 3-5 of the Counties Code, a county recorder is authorized to charge for, or receive a fee related to, the filing of various instruments, 55 Ill. Comp.

Stat. 5/3-5018, and the certifying of specified records, 55 Ill. Comp. Stat. 5/3-5039, nothing in the provisions of the Code, the Electronic Commerce Security Act, the FOI Act or any other pertinent statutory provisions either expressly or impliedly authorizes a county recorder to collect a fee for the examination of the county recorder's records, either electronically or otherwise. Ill. Att'y Gen. Op. 00-012 (Oct. 12, 2000).

Software. While the definition of public records does not specifically address software, software nonetheless may be available if it would otherwise fit within the definition, such as if the requested software were "electronic data processing records" or "documentary materials." See 5 Ill. Comp. Stat. 140/2(a). Likewise, software that generally fits the definition of the records exempted from disclosure under 5 Ill. Comp. Stat. 140/7(1) may be exempted as well. Note also that the exemption contained in 5 Ill. Comp. Stat. 140/7(1)(p) does specifically exempt "[a]dministrative or technical information associated with automated data processing operations, including but not limited to software . . . that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt" under 5 Ill. Comp. Stat. 140/7.

GIS. A Senate bill exempting computer geographic system information from the state's FOI Act became law on July 11, 2002. (SB 1706; P.A. 92-0645, eff. July 11, 2002)

"The county board of any county that provides and maintains a countywide map through a Geographic Information System (GIS) may provide for an additional charge of \$3 for filing every instrument, paper, or notice for record in order to defray the cost of implementing or maintaining the county's Geographic Information System." Ill. Att'y Gen. Op. 00-012 (Oct. 12, 2000).

Resources. Illinois Press Association: www.il-press.com

INDIANA

 Indiana pioneered the statewide freedom of information audit used subsequently in many states. In 1998, seven newspapers published the results of their audit of government compliance with the state's open records laws. The project led to reforms in the state, including the creation of the position of Public Access Counselor. The new position was implemented to "ensure that we continue to follow through on our commitment to an open government," according to Gov. Frank O'Bannon. The counselor primarily acts in an advisory capacity, informing the public and helping to instruct government officials in the applications of the state's open government laws and issuing advisory legal opinions about the laws. The move has helped reporters who struggled with getting information because agencies did not want to "create" a new records or when agencies made no efforts to output electronic information. The counselor has found that agencies must make a "reasonable" effort to provide databases.

The law. The Access to Public Records Act defines a public record to include information "generated on . . . magnetic or machine readable media, or any other material, regardless of form or characteristics." Copying a record means "reproducing by any . . . means." Ind. Code § 5-14-3-2.

A public agency shall make reasonable ef-

orts to provide a copy of all disclosable data if the medium requested is compatible with the agency's data storage system. § 5-14-3-3. An agency may refuse to release "computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it, and portions of electronic maps entrusted to a public agency by a utility." § 5-14-3-4(b)(11).

The law seems to limit disclosure of lists of names and addresses "unless the public agency is required to publish such lists and disseminate them to the public pursuant to a statute." § 5-14-3-4(c).

Lists of public employees, students and some others may not be used at all for "commercial purposes." § 5-14-3-4(c)(3). If a record "on computer tape, computer discs, microfilm, or a similar or analogous record system" is made available, the agency must not release a copy without striking material that is confidential. § 5-14-3-6(b). An agency may provide enhanced access to its records through a computer gateway administered by the state "intelenet commission." Subject to certain restrictions, the agency may enter into contracts with third parties to provide enhanced access. § 5-14-3-3.5.

A public agency may provide enhanced access to public records, which involves using an electronic device to inspect information that requires the compilation or creation of information that does not result in its permanent electronic storage. An agency may exempt "computer programs, computer codes, computer filing systems, and other software that are owned by the public agency . . . and portions of electronic maps," also known as geographic information systems. § 5-14-3-4(b)(11).

Cases & opinions. The Indiana Public Access Counselor position was created to provide advice and assistance concerning Indiana's public access laws to members of the public and government officials and their employees. The Counselor provides written advisory opinions in response to formal complaints so long as there is no pending judicial proceeding under the Indiana Open Door Law (governing meetings of public agencies) or the Indiana Access to Public Records Act (governing records of public agencies) on the same matter.

It was permissible to bar a candidate for political office from obtaining a computer tape of county voter registration records because the board of voters registration adopted a uniform policy against release of computer tape to the public. *Laudig v. Marion County Board of Voters Registration*, 585 N.E.2d 700 (Ind. Ct. App. 1992).

The Indiana Department of Correction did not violate the Access to Public Records Act when it denied a request for a database of prisoner names and addresses from its computer records because the department is not required to create such lists under Indiana Code section 5-14-3-4(c). PAC Op. 02-FC-40 (Sept. 9, 2002).

A public agency must make reasonable efforts to provide any disclosable information maintained in a computer database regardless of whether the public agency currently prepares a similar report. In addition, the sales information received and maintained in the Hoosier Lottery's database is not a "trade secret" of its retailers under Indiana Code § 5-14-3-4(a)(4), and therefore, must be disclosed upon request under the APRA. (PAC Opinion 99-8, Oct. 29, 1999.)

Fees. The act specifically prohibits charging the public for inspecting records. An agency may not charge for its own examination or re-

view of records to decide if they may be released. Ind. Code § 5-14-3-8(b) (1993). Copying charges for standard-size documents are limited to "actual cost" or 10 cents per page, "whichever is greater." § 5-14-3-8(c). The legislative services agency may charge additional fees to recoup "a reasonable percentage of the agency's direct cost of maintaining its information storage system." § 5-14-3-8(g)(3)(1997).

A public agency may charge the direct cost of any reprogramming necessary to separate disclosable from the nondisclosable information. Ind. Code § 5-14-3-6(c). A public agency may also charge the direct cost for providing a duplicate of a computer tape, computer disc, microfilm, or similar analogous record system containing information owned by the public agency. § 5-14-3-8(g). Direct cost is defined as: 105 percent of the sum of the cost of: the reprogramming, if any; the labor required to retrieve electronically stored data; and any medium used for electronic output; for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter. Ind. Code § 5-14-3-2.

Resources. Public Access Counselor: www.in.gov/pac

IOWA

 Along with North Carolina, Iowa is cited by the Marion Brechner Center at the University of Florida as one of the states with the most open access to computerized information. Although the law does not specifically refer to electronic records, attorney general opinions and court cases have said the law applies to computer records. Reporters there face fewer barriers when it comes to high fees for data or custom searches on data. The law, however, specifies that a geographic computer database may be withheld by an agency.

Statutes: The open records act defines public records to include "all records, documents, tape, or other information, stored or preserved in any medium." The "lawful custodian" of a record does not include "an automated data processing unit of a public body if the data processing unit holds the records solely as the agent of another public body." Iowa Code § 22.1. Therefore, a requester must ask for records from the agency that generated and controls them. The act allows an agency to deny access to "a geographic computer data base . . . except upon terms and conditions acceptable to the governing body." § 22.2(3). Recently enacted law provides that, although a government body may not restrict access to a public record because it is combined with government-developed data processing software, access to the software itself may be restricted. § 22.3A. A government body that develops data processing software is allowed to apply for legal protection "necessary to secure a right to or an interest in" the software, including copyright, patent and trademark protection. § 22.3A(3).

Cases & opinions. Computer tapes of property tax assessment rolls are public records available for reasonable copying costs. Iowa Op. Att'y Gen. (Kudart, Sept. 6, 1979). The public has no right of access to electronic databases and programs if they are trade secrets. Measures such as encrypting software and establishing confidentiality requirements in the

contract between the state and a private corporation showed reasonable efforts to maintain secrecy, which triggered protection under the trade secret statute. *Brown v. Iowa Legislative Council and Legislative Service Bureau*, 490 N.W.2d 551 (Iowa 1992).

Fees. A custodian of records or his or her deputy must supervise any person who examines and copies records and may charge a reasonable fee for the supervision and any necessary expenses of providing a place for the work. Copying fees "shall not exceed the cost of providing the service." § 22.3; Iowa Op. Att'y Gen. (Kudart, Sept. 6, 1979). A county cannot charge for its computer system's depreciation, maintenance, electricity and insurance costs incurred while retrieving, reproducing and printing electronic records. Iowa Op. Att'y Gen. 96-2-1 (Feb. 2, 1996).

For a "geographic computer data base," an agency is required to "establish reasonable rates and procedures for the retrieval of specified records, which are not confidential records, stored in the data base upon the request of any person." Iowa Code § 22.2(3). An agency may not charge a fee for the mere examination of a public record. But the Transportation Department may require a citizen seeking listings of drivers whose licenses have been suspended or revoked to pay a fee for the tapes and costs incurred in their transcription, so long as the fee reflects the actual cost incurred in making the copies. If the agency has already copied a public record from an electronic storage system into a printed format, it must make copies of the record available in printed form and may charge a reasonable fee to cover copying costs. Att'y Gen. Op. 81-8-18 (Aug. 13, 1981). The government shall bear any costs incurred in separating public documents from data processing software; however, the government may charge additional fees for specially processing records requests. §22.3A(2). If access to data processing software is necessary to search or retrieve public records, the government may charge "direct publication costs," incurred in developing and transferring the software to the requester. §22.3A(2)(a). Fees for access to legislative information are set by the legislative council which must ensure the widest practicable access with fees at "the lowest price practicable," no more than costs attributable to "producing, editing and disseminating" the information. § 7A.22 (3).

GIS. Iowa Code § 22.4 provides: "However, notwithstanding subsections 1 and 2, 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."

Resources. Iowa Freedom of Information Council: www.drake.edu/journalism/foi/ifo2.html

KANSAS

Based on his experiences, Kansas City Star database editor Greg Reeves said he would describe the state of open records in Kansas as "pretty grim." Reeves and other journalists report lengthy struggles to negotiate down high fees. Drivers records are available online for a fee. Death records and birth records are closed. On the plus side, Reeves says, "we've received data on bad bridges, restaurant inspections, building inspections, road conditions and voter regis-

tration, to name a few, with little or no trouble."

The law. The Open Records Act defines a public record as "any recorded information, regardless of form or characteristics." Kan. Stat. Ann. § 45-217(f)(1). The act anticipates access to electronic records by providing fees for such access. The statute exempts from disclosure "software programs for electronic data processing and documentation thereof." It requires the agency to "maintain a register, open to the public," describing information in electronic records and the form in which that information can be supplied "using existing computer programs." § 45-221(16). Many records are now available electronically through the Information Network of Kansas.

Cases & opinions. Information stored in computers is a public record subject to disclosure. The agency must compile specific information requested, but may require the requester to pay the costs of programming the computer to retrieve that information and of deleting nondisclosable material. *Kansas ex rel. Stephan v. Harder*, 641 P.2d 366 (Kan. 1982). A requester has the right to obtain a computerized voter registration list in computer format if the public agency is capable of providing the record in that format. Kan. Op. Att'y Gen. 88-152 (Oct. 27, 1988). An agency is not required to acquire or design a special program to produce information in a desired format, but may allow the requester to design or provide a computer program to do so. Kan. Op. Att'y Gen. 89-106 (Aug. 21, 1989).

State open records provisions apply to all public records contained on a county computer system even when access is through paid subscription and these records remain public and must be available upon a record request. Kan. Op. Att'y Gen. 95-64 (June 20, 1995). A county appraiser's office must provide access to the office database, as long as the records requested are open records and the format is available. A requester may repackage the data in a different format for sale. Kan. Op. Att'y Gen. 94-104 (Aug. 19, 1994).

Any person has the right to obtain a computerized voter registration list in computer format if the public agency has the capability of providing such record in computer format. Op. Att'y Gen. 88-152 (1988) See also Kan. Stat. Ann. § 45-501.

The Kansas Attorney General opines that the form of a public record, computerized or hard copy, does not alter the applicability of the Kansas Open Records Act, K.S.A. 42-215, et seq. Kan. Op. Att'y Gen. 95-64 (1995).

Fees. An agency may charge for providing access to or furnishing copies of public records, and may demand advance payment and a written request. Kan. Stat. Ann. § 45-218 (1997). Fees "shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available." § 45-219(c)(1). "Fees for providing access to records maintained on computer facilities . . . shall include only the cost of any computer services, including staff time required." § 45-219(c)(2). A fee of 25 cents per page is deemed to be a reasonable fee for records held by agencies under the executive branch of government. § 45-219(c)(5). Fees for judicial branch records are to be established by state supreme court rules. § 45-219(c)(4). Public records accessible through a county's proprietary computer system are available "at a fee not exceeding their actual cost of production." Kan. Op. Att'y Gen. 95-64 (June 20, 1995).

Fees for providing access to records main-

tained on computer facilities shall include only the cost of any computer services, including the staff time required. Kan. Stat. Ann. § 45-219(c)(2).

The Secretary of Revenue is authorized to fix, charge and collect fees to provide access to or to furnish copies of public data in the Vehicle Information Processing System (VIPS), the Kansas Computer Assisted Mass Appraisal System (KS CAMA) and other electronic database systems of the Department of Revenue. These fees shall be in the amount to recover all or part of the costs incurred in providing access to or furnishing copies of the data that is stored or maintained on such system. § 74-2022.

Software. A public agency is not required to disclose software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register that is open to the public which describes: (1) the information that the agency maintains on computer facilities, and (2) the form in which this information can be made available using the existing computer programs. Kan. Stat. Ann. § 45-221(a)(16).

E-mail. A record created by use of e-mail may be subject to the KORA if the electronic record in question meets the definition of "public record" found in Kan. Stat. Ann. § 45-217. Whether e-mail communications between or involving individual city commissioners are "public records" will depend upon whether such e-mail communications are "made, maintained, or kept by or [are] in the possession of a public agency," and whether any of the exceptions to the definition apply. The statutory definition of the term "public agency" includes political and taxing subdivisions and their officers or employees. However, the definition of a "public record" excludes records that are "made, maintained or kept by an individual who is a member of . . . the governing body of any political or taxing subdivision." Thus, if a specific e-mail communication is not made, maintained or kept by the city, but rather is exclusively made, maintained or kept only by the individual city commission members, it is not a "public record" as defined by Kan. Stat. Ann. § 45-217. Kan. Op. Att'y Gen. 2002-1 (Jan. 3, 2002).

The Kansas Open Records Act (KORA) declares the public policy of the state to be that "public records shall be open for inspection by any person" and the KORA is to be "liberally construed and applied to promote such policy." The effect of this provision is that all public records are open unless otherwise permissibly or mandatorily closed by law. Section 45-221(a) lists various categories of records that a public agency may discretionarily close. "The burden of proving that an item is exempt from disclosure is on the agency not disclosing."

Records may be closed under the Kansas Open Records Act exception only for a "clearly unwarranted invasion of personal privacy" when release would be highly offensive, reveal intimate details of personal life, or present an unusual danger. In instances in which there is no other statutory authority to close names and addresses, they are presumed open, absent special circumstances. Kan. Stat. Ann. §§ 21-3914, 45-216, 45-221.

Disclosure of a list of members of a public golf club should be open to public inspection.

"Membership at a golf course, however, is not unusually embarrassing. It is a public activity played at a public facility. Nor does disclosure of golfers' names and addresses present any special danger. Absent actual knowledge that disclosure of a particular name or names

on the list would create a special hazard (such as a woman who has notified the city that she has moved from an abusive spouse and is in hiding), we believe the entire list is open." The attorney general noted that with the expansion of easily available information through the Internet, privacy interests may be changing. But the attorney general also noted that given current statutes and the tradition in Kansas that names and addresses are open, any large shift in openness of names and addresses is a policy decision for the legislature to make. Kan. Op. Atty. Gen. 2001-33 (July 26, 2001).

In *Wichita Eagle and Beacon Publishing Company, Inc. v. Simmons*, the newspaper sought an order and judgment in mandamus to compel Charles Simmons, Secretary of Corrections for the State of Kansas, to provide reporters with access to and/or copies of correctional records, including documents that would identify releasees who were charged with murder or manslaughter from 1996 through 1999, under the Kansas Open Records Act (KORA), Kan. Stat. Ann. § 45-215 *et seq.* The district court determined that supervision history records were privileged pursuant to § 22-3711 and § 45-221(a)(20) and that the work-product doctrine would exempt documents and other tangible things prepared in anticipation of litigation from disclosure under KORA. In addition, the district court found that production of the records would be contrary to the public policy encouraging self-critical analysis and that redaction of the remaining information by the secretary of corrections would leave little to be disclosed. The district court stated the newspaper could glean the remaining information from alternate and more appropriate sources. The state supreme court found that the district court did not err when it denied the secretary of corrections' motion for summary judgment in its entirety. However, the appellate court did find that the district court erred in concluding that the Department of Corrections need not furnish redacted records. "We find the language of the KORA provision clear and unequivocal. It mandates that a public agency 'shall separate or delete such material and make available to the requestor that material in the public record which is subject to disclosure pursuant to this act.'" (Emphasis added.) § 45-221(d). It is the duty of a public agency to make available records containing material disclosure. *Wichita Eagle and Beacon Publishing Company, Inc. v. Simmons*, 50 P.3d 66 (Kan. 2002).

The Kansas Bureau of Investigation's disclosure over the Internet of sex-offender registration, when construed in harmony with the Kansas Open Records Act, does not violate the Kansas Sex Offender Registration Act, a unanimous supreme court held in 2000. The court held that sex offenders have been on notice since April 14, 1994, that if they commit certain crimes they will be subject to public disclosure. *State v. Edward B. Wilkinson*, 9 P.3d 1 (Kan. 2000).

Resources. Kansas Court/Attorney General Opinion search: www.kscourts.org/ksag/search/srchfull.htm

KENTUCKY



Reporters in Kentucky say that one of the biggest barriers to getting electronic data is inconsistent costs. This happens especially when a government agency contracts

with a private vendor for data processing services. Reporters in Kentucky have a useful appeals process when an agency denies records because attorney general opinions there are binding. The state's laws regarding electronic access are unusual in that records that are produced using public equipment are public record unless exempt. This came into play in October 2000 when the attorney general opined that a list of a sheriff's cell phone records were public because they documented "the use of public equipment at public expense."

The law. The Open Records Act defines a public record to include "cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics." Ky. Rev. Stat. Ann. § 61.870(2).

Since 1994, the ORA has treated all public records similarly, regardless of their format. A requestor is entitled to obtain a hard copy of a public record or an electronic file, if available. As with all public records in Kentucky, a requestor intending to use the information for commercial purposes faces a higher fee.

Records created on public equipment, whether for agency or personal purposes, must be disclosed under the Act unless the agency can articulate a specific exception. Ky. Op. Att'y Gen. 00-97. See also Ky. Op. Att'y Gen. 99-112 (school district improperly withheld a copy of pornographic materials allegedly copied from an Internet site by a school district employee. "Records which were obtained on public time and on public equipment are, in our view, public records"); 98-ORD-92 ("telephone records for calls originating from a telephone line used in a legislative leadership office may be disclosed"); Ky. Op. Att'y Gen. 98-31 ("a tape recording documenting a personal conversation of some duration between a Division of Fire and Emergency Service employee and another employee on a telephone extension dedicated to public use for 911 emergency calls may be disclosed"); and Ky. Op. Att'y Gen. 96-238 ("records reflecting the names and facsimile numbers of all facsimile transmissions made for personal, and not agency purposes on agency equipment, may be disclosed").

If the requestor desires an electronic format other than ASCII, the agency may comply with this request and charge the requestor for its time and expenses: "If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred." § 61.874(2)(b).

Kentucky has recognized the relationship between the ORA and electronic storage and retrieval of public records, and has directed public agencies to make their computerized information available under the ORA: The general assembly finds an essential relationship between the intent of this chapter and that of Ky. Rev. Stat. Ann. § 171.410 to 171.740, dealing with the management of public records, and of § 61.940 to 61.957, dealing with the coordination of strategic planning for computerized information systems in state government; and that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. § 61.8715.

Cases & opinions. A requestor is entitled to copies of computer tapes from the secretary of state containing public information on corpo-

rations. Ky. Op. Att'y Gen. 77-480 (Aug. 8, 1977). Likewise, a requester has a right to copies of computer tapes and disks listing registered voters. Ky. Op. Att'y Gen. 79-77 (Feb. 5, 1979). But where a record was not yet complete and a computer system that could use the record was not yet fully installed, the agency justifiably denied computer data to a requester since source documents were available for inspection. Ky. Op. Att'y Gen. 87-59 (Sept. 8, 1987).

In noncomputer cases, the attorney general told agencies the law did not require them to create a new document or a list. Requesters must inspect the records and compile their own lists. Ky. Op. Att'y Gen. 375 (July 6, 1976); Ky. Op. Att'y Gen. 78-231 (April 4, 1978); Ky. Op. Att'y Gen. 80-308 (May 14, 1980). A requestor is entitled only to an up-to-date computerized listing of names of appointees when the list is in existence or part of a database. An agency is not required to prepare the list to satisfy the open records request. Ky. Op. Att'y Gen. 90-101 (Oct. 23, 1990).

An agency is only required to make the material available in the format that it was collected. A local police department that does not store arrest records and reports of domestic violence and abuse in a database does not have to create one. Ky. Op. Att'y Gen. 91-12 (Jan. 22, 1991). Records of gubernatorial appointments to various boards and commissions are open records and may be obtained in either paper form or electronic format. Ky. Op. Att'y Gen. 91-18 (Jan. 24, 1991). An agency is not required to create a list from public records where such a list does not already exist. Ky. Op. Att'y Gen. 92-99 (June 15, 1992).

Because the geographic information system statute requires commercial requesters to declare the commercial purpose for which the data will be used, an agency could charge a requestor who failed to indicate whether the system would be used for a commercial purpose. Ky. Op. Att'y Gen. 93-14 (Feb. 2, 1993); Ky. Op. Att'y Gen. 93-70 (June 7, 1993); Ky. Op. Att'y Gen. 93-73 (June 14, 1993). The state department of personnel must provide a requestor a printout of its existing database of all paralegals and legal secretaries employed by the state, the agency in which they are employed, their classification and salaries with redactions of non-public information such as Social Security numbers. Ky. Op. Att'y Gen. 93-118 (Oct. 15, 1993). A public agency must allow access to electronically stored records, as opposed to hard copy records, under state disclosure provisions. Ky. Op. Atty. Gen. 95-43 (March 21, 1995).

If the database exists, a requestor is entitled to have a search for nonexempt material in that database. However, "a public agency is not required to create a list or a database to satisfy a particular request." Ky. Op. Att'y Gen. 93-118 (Oct. 15, 1993).

In addition, the agency does not have to provide unfettered access to its computers so that the requestor can attempt to prove that he didn't receive the records he requested. Ky. Op. Att'y Gen. 00-8 (Jan. 20, 2000); 99-96 (June 4, 1999).

A computer crash was no excuse for the Elsmere Police Department's decision to deny records. "Inability of a requestor to obtain information reflects poor records management. Electronic record-keeping is to enhance access, not to impede access." Ky. Op. Att'y Gen. 02-149 (Aug. 21, 2002).

In response to a directive from the Kentucky attorney general, the Cabinet for Health Services turned over to a newspaper its records of

Medicaid payments to Lt. Gov. Steve Henry, which the agency believed may be subpoenaed by a federal grand jury looking into possible Medicare fraud. A newspaper sought the documents under state open records law because prosecutors have made Henry, who also is a physician, the subject of a federal grand jury investigation of possible health care fraud. The attorney general wrote that the records were clearly not protected from disclosure under the exemption for law enforcement records because the agency is not a "law enforcement agency," the records were not "compiled in the process of detecting and investigation statutory or regulatory violations," and the agency did not "provide a sufficient description of the harm" it would suffer if the records were disclosed. Ky. Op. Att'y Gen. 01-67 (April 19, 2001).

The Kentucky Supreme Court ruled that a compilation of school disciplinary records that does not identify individual students is not exempt from the state's open records act. (*Hardin County Schools v. Foster*, 40 S.W.3d 865 (Ky. 2001)).

The attorney general affirmed the education department's denial of a request to access the department's computers to search for records that it had denied existed. "The Open Records Act does not permit a person to search through an agency's files to determine the truth of an agency's response that it does not have the requested records or that they do not exist. . . . The Open Records Act is not a search warrant statute. It is a records statute." Ky. Op. Att'y Gen. 99-96 (June 4, 1999).

Fees. An agency "may prescribe a reasonable fee for making copies of public records which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." Ky. Rev. Stat. Ann. § 61.874(3). An agency may charge the cost to prepare, program and reproduce a list that did not exist when the request was made. Ky. Op. Att'y Gen. 88-19 (March 14, 1988). An agency that allows online access to electronic records may charge fees limited to the cost of physical connection and reasonable cost of computer time. Ky. Rev. Stat. Ann. § 61.874(6).

If the records obtained online are being used for commercial purposes, the agency may charge additional fees based on the cost to the agency to create, purchase, maintain and produce a copy of the records. Ky. Rev. Stat. Ann. § 61.874(6)(b). It is reasonable for an agency to charge \$350 for the creation of a custom-made database. The fee included reasonable cost of computer and personnel time and printing cost. Ky. Op. Att'y Gen. 91-19 (Jan. 24, 1991). An agency properly denied a request for a copy of its computer database when the requester's purpose was clearly commercial. Purpose is relevant when determining the propriety of release of a database. Ky. Op. Att'y Gen. 91-116 (July 22, 1991).

Fees differ for commercial and noncommercial requestors. Noncommercial requestors seeking ASCII formatted files may be charged only the actual cost of reproduction, excluding staff time: "The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required." Ky. Rev. Stat. Ann. § 61.874(3). Commercial requestors may

be charged a "reasonable" fee. § 61.874(4)(a). As with any other public record requested for commercial use, the public agency may consider either or both of the following factors in determining a "reasonable" fee: (1) Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public records or records; (2) Cost to the public agency of the creation, purchase, or other acquisition of the public records. § 61.874(4)(c).

Software. Software is defined as the "program code" but not "specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records." Ky. Rev. Stat. Ann. § 61.870(3)(a). Nonexempt electronic public records used for noncommercial purposes are available in either electronic or hard copy format. § 61.874(2).

However, an agency is not required to make electronic copies of records available only in hard copy. § 61.874(2). News media use is not considered commercial. § 61.870(4)(b). The law also allows online access to electronic public records at the discretion of the agency. § 61.874(6). "If the applicant desires copies of public records other than written records, the records custodian shall permit the applicant to duplicate the records, but may ensure that duplication will not damage or alter the records." § 61.874(1). Each agency is required to adopt regulations relating to records access. § 61.876.

The term "software" is included in the definition of "public record." § 61.870(2). However, "software" is defined so as to exclude passwords and materials prohibited from disclosure by licensing agreements: (3)(a) "Software" means the program code which makes a computer system function, but does not include that portion of the program code which contains public records exempted from inspection as provided by § 61.878 or specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system. (b) "Software" consists of the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs, but does not include that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency." § 61.870.

GIS. The geographic information system statute, Ky. Rev. Stat. § 61.970(4), provides that a database or geographic information system is exempt from disclosure notwithstanding another provision. Ky. Op. Att'y Gen. 91-4 (Jan. 15, 1991). A separate fee section that addresses the use of geographic information systems states that "commercial purpose" does not include "publication, broadcast, or other related use . . . by a newspaper or periodical; or . . . use . . . by a radio or television station in its news or other informational programs." § 61.960(3)(b)(1), (2). Commercial users of geographic information systems must contract for use of the database with the owner and must pay fees. § 61.970(2). The media "shall not be held to have used or knowingly allowed the use of the database or geographic information system for a commercial purpose as a result of its publication or broadcast." § 61.970(3)(c).

Resources. Search Attorney General Opinions: kyattorneygeneral.com/cgi/search.idq; Kentucky Press Association: www.kypress.com

LOUISIANA



In February 2003, the Public Affairs Research Council of Louisiana Inc. released a year-long study on the state's public records laws, "Louisiana's Sunshine Laws: The Promise and Peril of New Technology." In the report, the Council makes several suggestions on how to improve the laws in light of electronic records, including amending the law to include e-mail and Web data as public records and requiring the Louisiana State Archives and Office of Information Technology to post electronic records management guidelines.

Reporter Linda Lightfoot of Baton Rouge's *The Advocate* said reporters are often successful accessing records, though e-mail as public record remains a point of contention among legislators. "I think in Louisiana, the press is pretty aggressive, so we do well," she said.

The law. The Public Records Act defines public records to include "cards, tapes, recordings, . . . regardless of physical form or characteristics, including information contained in electronic data processing equipment." La. Rev. Stat. Ann. § 44:1.

"Information contained in electronic data processing equipment" is specifically included in the definition of "public records." La. Rev. Stat. Ann. § 44:1(A)(2). Electronic information therefore is subject to the general provisions of the Public Records Act. See Ops. Att'y Gen. 98-366 (records stored via electronic imaging system); 90-576 (computer records of 911 calls subject to Public Records Act), 90-576 (computer information generated by office of assessor is subject to Public Records Act), 90-398 (computer information regarding student records subject to Public Records Act).

The statute exempts certain records held by a port commission, including "any computer system or program including any computer software or related [materials], and any other computer operating or support materials" when they are part of "any automated broker interface system or any automated manifest system." § 44:4(13). The statute allows records to be stored by "an electronic digitizing process capable of reproducing an unalterable image of the original source document," providing such a system meets state standards. The "electronically digitized copy" is considered an original even if the true original exists. § 44:39.

Cases & opinions. Computer records of property sales and tax assessments must be available for public inspection after non-public records are separated out. La. Op. Att'y Gen. 87-301 (May 4, 1987). Records of assessors, including computer records about sales information, are open to public inspection. La. Op. Att'y Gen. 97-301-A (June 11, 1987). Computer information generated by the office of the assessor is subject to the Public Records Law. The records belong to the public "for informational, commercial, investigative, legal or any other lawful purpose." La. Op. Att'y Gen. 90-330 (July 26, 1990). Computer records of 911 calls, including names, addresses and telephone numbers, are public. La. Op. Att'y Gen. 90-576 (Dec. 4, 1990). A custodian must comply with a request even if the information is kept in a format different from that which is requested; however, the custodian is not required to create a new record if the requested record does not currently exist. *Nungesser v. Brown*, 667 So.2d 1036 (La. 1996).

Generally, a records requestor need only

describe records sought with enough specificity that a custodian may identify and locate records. Op. Att'y Gen. 89-602A. Thus, if a requestor reasonably describes information that the custodian can locate through a search of a database, the request should be granted. Arguably, customized requests are analogous to "creating" a document not already in existence. See, e.g., *Nungesser v. Brown*, 667 So. 2d 1036 (La. 1996) (reversing Court of Appeal decision that required commissioner of insurance to provide a list of certain investments requested by plaintiff, where list did not exist in the form specified by the plaintiff). In the context of electronic databases, however, the *Nungesser* analysis would largely negate the act's specific coverage of "information contained in electronic data processing equipment" and would be contrary to the general rule requiring that the Public Records Act be construed so as to favor disclosure. *Title Research Corp. v. Rausch*, 450 So. 2d 933, 936 (La. 1984).

Fees. The law does not permit levying fees for examining or reviewing records during normal business hours. La. Rev. Stat. Ann. § 44:32(A) (West 1992). A records custodian may charge "reasonable fees" for copies. § 44:32(C)(1)(a) (West Supp. 1998). State agency fees may be set by regulation or law. Fees may be waived for indigent requesters. § 44:32(C)(2). Agencies may not charge for examination of computer records, but may charge reasonable fees for a copy. La. Op. Att'y Gen. 87-301 (May 4, 1987). The fee should reflect only the expense of generating the information, not its value. La. Op. Att'y Gen. 90-330 (July 26, 1990).

E-mail. No specific provisions, but under La. Rev. Stat. Ann. § 44:1, governmental e-mail should be treated as a public record and should be produced to a requestor absent an applicable exemption.

Resources. Louisiana Press Association: www.lapress.com

MAINE



A statewide public records audit released in January 2003 found that many public officials still violate the Freedom of Access Act. Auditors frequently were asked to identify themselves when they requested information. Law enforcement agencies were the most frequent violators of the access law.

The law. The Freedom of Access Act defines a public record to include "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 that is in the possession or custody of an agency or public official of this State or any of its political subdivisions." Me. Rev. Stat. Ann. tit. 1, § 402(3) (1998). Records are available in either electronic or paper form; however, a requestor who seeks records in a form other than one in which they exist may be required to pay the costs of translation. § 408. A law enacted in April 1998 allows creation of a new state system to provide fee-based electronic access to public information available under the Freedom of Access law and other statutory provisions. § 531. The Information Resource of Maine, or "InforME," network is intended to provide enhanced access to state public records. § 533.

Cases & opinions. None found.

Fees. An agency may charge "the cost of

copying any public record. . . . Whenever inspection cannot be accomplished without translation of mechanical or electronic data compilations into some other form," the state may charge in advance for "the cost of translation." Me. Rev. Stat. Ann. tit. 1, § 408 (1998). Fees for access to the InforME network must be reasonable, but sufficient to support the network and subsidize the maximum amount of information to be provided at no charge. § 534.

If a translation of the data is required, the governmental agency may charge a fee for such service in advance. § 408. Through InforME fees for enhancements of public records are charged. If no enhancements are sought, then the records are available either at no cost or for a statutory fee, such as for certain corporate records or driving records. §§ 532-538.

E-mail. The Act does not specifically address e-mail, but if the e-mail message is in the custody of an agency or official of government, (for example, in digital form on a storage device in the custody of an agency or official of government) and contains information that relates to the transaction of governmental or public business, it is available as a consequence of the definition of public records (i.e. "any mechanical or electronic data compilation from which information may be obtained.") Me. Rev. Stat. Ann. tit. 1, § 402(3).

Software. The definition of public records is broad enough to include both an electronic data collection and the operating program. Public records are not limited to media or information to which the government has legal title. Possession or custody is sufficient. Consequently, it is immaterial that the program is only licensed for use by the government, as is the case with most software. Moreover, license restrictions in and of themselves would not override the Freedom of Access Act. The Copyright Act would, however, preempt any state law that purports to require reproduction of material protected by a third party's copyright.

Online. The state has extended online dissemination of records substantially. Nearly all business records of the secretary of state are available, along with all state regulations, statutes and legislative information over the state's Web site, on which most state agencies now have a page. The official State of Maine Web page can be accessed through <http://www.state.me.us>. InforME: The Information Resource of Maine was created to manage the state's Web page and to create and maintain E-Government services through online transactions. InforME can be accessed at www.state.me.us/inform. Me. Rev. Stat. Ann. tit. 1, §§ 531-538. It is not yet entirely clear how the State's InforME contract will affect access to public records. The statute creating InforME provides that it may not affect the rights of persons to inspect or copy public records under the Freedom of Access Act (§533) and further provides that the InforME Board may not authorize InforME to charge for a service that merely provides access to public records and data in the form they are maintained by the data custodian (§534.5.F(1)).

Resources. Maine Press Association access guide: www.maineypress.org/references/freedom_of_access_law.html; Maine Freedom of Information Coalition: www.mfoic.org/

MARYLAND



The state's Public Information Act was amended in 2002 to shorten the turnaround time for requests.

The new law requires custodians of state records to designate specified public records that will be available immediately upon request and to maintain a list of those public records. Items on the list will be available without a formal written request. If a custodian determines that a requested record does not exist, he must notify the requestor within 30 days of the request. All grants and denials of requests must be made within 30 days of receipt of the request under the new law. A custodian may not routinely deny a request based on the requestor's identity, affiliations or reasons for the request but may ask for identity, affiliations or reasons if he determines that inspection of a part of the public record is against the public's interest. In a dispute between the custodian and the requestor, the custodian must prove by clear and convincing evidence that he did not knowingly or willfully fail to disclose any part of a record required to be released.

The law. The Public Information Act defines a public record to include "a computerized record," a "recording" or a "tape." Md. Code Ann., State Gov't § 10-611. A records custodian must deny access to any "part of a public record that contains information about the security of an information system." § 10-617(g). When the public is entitled to examine a public record, a requester may obtain a copy or a printout. If the custodian does not have facilities to make a copy or printout, the requester may have access to make a copy, printout, or photograph using the requester's equipment. § 10-620.

A separate statute addresses access to geographic information systems. § 10-901 to 905. These systems, developed with public funds, "should not be unreasonably withheld from private commercial users . . . but should not provide a public subsidy to private commercial users." § 10-902. An agency may set fees from geographic information system products and services, but fees may be reduced or waived if the products and services "are to be used for a public purpose." Reductions and waivers must be "uniformly" applied to similarly situated people. § 10-904. Online access to geographic data may only be given to someone who has contracted with an agency. § 10-905.

The PIA does not grant the requestor the right to determine the format in which the copies are made; rather, that right lies with the agency. *P/A Manual*, at 9. Thus, a requester may not force the agency to provide the records in a computerized format when the agency offers to provide the information in a printout. *Id.* However, the attorney general's office urges agencies to voluntarily accede to the requester's choice of format if doing so imposes no significant cost or other burden on the agency. *Id.*

Cases & opinions. The Open Meetings Act does not apply to e-mail communications among members of a public body, unless a quorum of the public body is engaged in a simultaneous exchange of e-mail on a matter of public business. The Public Information Act applies to electronically stored e-mail messages or hard copies of those messages in the custody and control of public officers and employees, if those messages are related to the conduct of public business. As public records, e-mail messages are subject to statutory restrictions on the destruction of public records. Md. Op. Atty. Gen. 96-016 (May 22, 1996).

The public is entitled to inspect records that reflect the earnings of government officers and employees, whether those earnings consist

ACCESS TO ELECTRONIC RECORDS

solely of a regular salary or are augmented by a bonus or performance award. Md. Op. Atty. Gen. 98-025 (Dec. 18, 1998).

Fees. The act requires a records custodian to give requesters access to records at "the least cost and least delay." § 10-12(b). The statute allows "reasonable" fees for searching, preparing and copying records. But "if another law sets a fee for a copy, printout, or photograph of a public record, that law applies." The custodian may charge for supervising and providing facilities where requesters make their own copies or printouts. The first two hours of search time must be provided at no cost. The custodian may waive all fees if providing the records is "in the public interest." Md. Code Ann., State Gov't § 10-621.

The PIA does not create an obligation for an agency to create records to satisfy a PIA request, or to "reprogram its computers or aggregate computerized data files so as to effectively create new records." *PIA Manual* at 7.

The original or any copy of a public record in any form is covered by the PIA, including a computerized record. § 10-611(g)(1)(2); see also 81 Op. Att'y Gen. 117 (1996) (printed and electronically stored versions of e-mail messages are public records). However, information concerning the security of an information system is exempt from disclosure. § 10-617(g). On October 24, 1983, the governor issued Executive Order 01.01.1983.18 establishing a State Data Security Committee regarding security measures for the protection of state agencies maintaining computerized record systems. Md. Admin. Code tit. 1, 01.01.1983.18.

E-mail. Agency e-mail is a public record. 81 Op. Att'y Gen. 117 (1996) (Agency printed and electronically stored versions of e-mail messages are public records).

Software. Information systems are public records except for that part relating to system security. § 10-617(g).

GIS. A governmental unit may sell mapping system services and products to the general public for a fee that reasonably reflects the cost of creating, developing, and reproducing the product in whatever format is available. § 10-904. Section 10-901 *et seq.* provides for the development, at public expense, of geographic mapping information system services for use by the public. § 10-902.

Persons who have entered into a contract with a governmental unit may have online access to the geographic data in a system under the terms of the contract. § 10-905. If copy privileges are granted, then the contract is to specify the circumstances under which the data is to be copied and the amount of compensation that the governmental unit will receive for the privilege. § 10-905. In addition, the Maryland State Department of Assessments and Taxation provides on-line dissemination of its corporation and partnership records. Likewise, Maryland's Code of Regulations (COMAR) is available on the internet. To view COMAR online, see constmail.gov.state.md.us/comar/dsd_web/default.html.

Resources. Maryland Attorney General opinions: www.oag.state.md.us/Opinions/index.htm

MASSACHUSETTS



Reporters in Massachusetts say that general access to electronic record is pretty good.

Some journalists say they have been charged what seem to be "unreasonably" high fees. For a January 2003 story about traffic stops, *Boston Globe* correspondent Bill Dedman said he had to do a lot of negotiating to get the data he needed for the story. At one point, the state denied some of the information under the state's Driver's Privacy Protection Act. The newspaper analyzed more than 750,000 tickets, from every police department in the state, and found a wide racial disparity in traffic tickets and vehicle searches. In addition, Massachusetts allows agencies to restrict the use of mapping data and some agencies may charge a special fee for access to the information.

The law. The Public Records Law defines a public record to include "recorded tapes, financial statements, statistical tabulations or other documentary materials or data, regardless of physical form or characteristics." Mass. Gen. Laws ch. 4, § 7, cl. 26; Mass. Admin. Code tit. 950, § 32.03. State administrative regulations encompass computer records by providing fees for access to them (*see below*). Statutes limit access to computer files of some state offices.

State tax information is exempt from the public records law and only the commissioner of revenue may authorize "public access to terminals or other data processing equipment for the purpose of copying, reading, collecting, printing, analyzing or manipulating any data or other information . . . or to authorize the release of the original or copies of tapes, cards, disc files or other methods of electronic storage." Mass. Gen. Laws ch. 59, § 52C. A statute limits access to computer terminals of the registrar of motor vehicles to government employees, law enforcement agencies, "insurance companies and their authorized agents and service carriers, . . . and the trial courts or computer manufacturers or data processing consultants under contract with the commonwealth." Mass. Gen. Laws ch. 90, § 30A.

Cases & opinions. Prior to passage of the Public Records Law, the attorney general concluded that the registrar's computer files of drivers license suspensions and revocations were public records. The registrar of motor vehicles could make a computer terminal available to the insurance industry to obtain access to the records. Mass. Op. Att'y Gen. 7, 1971 Report, p. 43 (Aug. 28, 1970). The supervisor of public records ruled that the Department of Industrial Accidents must create a program to segregate non-exempt information from its database for release to a requester. The requester offered to pay for the programming, estimated at \$5,000. The estimated cost of paper copies was \$521,063. S.P.R. 90/205 (1990).

Central Voter Registry, a computer database created and maintained by the Office of the Secretary of the Commonwealth, is available to the public. The database includes the names, addresses, and effective dates of registration of all registered voters in the commonwealth. Mass. Op. Att'y Gen. 01/02-1 (Oct. 11, 2001).

Fees. Except where statutes mandate specific charges, a records custodian may demand "a reasonable fee" for a copy of a record and may also charge the "actual expense" for a search for records. Mass. Gen. Laws ch. 66, § 10(a). State regulations set the maximum fee for a computer printout at 50 cents per page. A custodian may charge "the actual cost incurred from the use of the computer time" for a search of electronic records, and "the actual cost incurred" for providing "copies of public records not susceptible to ordinary means of evaluation."

The custodian is "encouraged to waive fees where disclosure would benefit the public interest." When a person requests street census computer tapes and mailing labels, voter registrars may not charge more than one cent per name, provided that a minimum fee of no more than \$90 may be assessed. Fees for these materials may not exceed \$750. Mass. Admin. Code tit. 950, § 32.06 (July 1993).

There may be delays and increased expense if the information has to be reduced to producible form. In addition, an electronic database may contain both public and nonpublic information. See *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 528 N.E. 2d 880, (1988); 27 Mass. App. Ct. 1192, 543 N.E.2d 432 (1989). While there are no known court decisions on the relative availability of electronically and paper stored data, the Massachusetts Appeals Court has expressed reservations about the fact that modern data processing technology allows "the aggregation of pieces of personal information to large central data banks" and stated that "there is a negative public interest in placing the private affairs of so many individuals in computer banks available for public scrutiny." See *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 528 N.E.2d 880, 886 (1988).

Software. Proprietary issues surrounding software availability do not appear to be have been addressed in the statutes or case law, although it may be noted that personnel data is clearly confidential and should not be distributed in either software or hard copy form. See Mass. Gen. Laws ch. 30, § 63; ch. 66A, § 2; Mass. Regs. Code tit. 501, § 3.05; Mass. Regs. Code tit. 701, § 3.04. See also general exceptions to Public Records Law. Mass. Gen. Laws ch. 4, § 7, cl. 26 (a)-(m).

It also is a crime to obtain or attempt to obtain "any commercial computer service by false representation, false statement, unauthorized charging the account of another, by installing or tampering with any facilities or equipment or by any other means." Mass. Gen. Laws ch. 266, §33A. The statutory definition of "commercial computer service" appears to be broad enough to include government computer programs that are available only for a fee although there is no case law on the subject.

Profit making. Lists of motor vehicle registrations have been sold by the Registry of Motor Vehicles to commercial concerns since the time of the Ford Model A. See *Direct-Mail Service, Inc. v. Comm'r of Public Works*, 295 Mass. 9 (1936).

Many municipal assessors sell lists of properties, addresses, owners and assessed valuations. These also are available from commercial sources.

GIS. Where available, reuse may be restricted. For example, the terms and conditions for the use of digital data provided by MassGIS include the following: "Data provided under this Agreement are intended for the use of the receiving agency, organization or individual. They are not intended to be redistributed or resold to other agencies, organizations or individuals. . . All maps or other documents produced using data or data products supplied through this agreement should contain a data source credit, prominently displayed, such as 'source data supplied by the Massachusetts Executive Office of Environmental Affairs, MassGIS.'"

The main source for GIS information in Massachusetts is MassGIS at the executive office of environmental affairs ("EOEA"). This office offers three types of service to outside agencies and members of the public: distribution of

digital GIS data from the EOEA database; map production and printing; and coordination and assistance with GIS development, including data development.

Digital GIS data is distributed in sets covering the entire state or as custom orders for one or more geographic "tiles" or "coverage's." The standard format for digital data distributed by this office is ARC/Info Export (.EOO) with data in the Massachusetts State Plane coordinate system.

Fees are authorized by Mass. Gen. Laws ch. 653, §138 and for digital cartographic data files range from \$50-\$150 depending on the category of information sought.

For a so-called Category A map, which includes MassGIS theme maps of towns, quadrangles or other standard units or copies of other standard maps, the fee is \$50 for the first sheet and \$15 for additional copies of the same map. For Category B, which includes MassGIS theme maps of client-specified study areas and minor modifications of existing maps, the fee is \$100 for the first sheet and \$15 for additional copies.

GIS Information, which may not be as complete as that at the central MassGIS, is often available from other state agencies including the Department of Environmental Management, the Department of Environmental Protection, the Water Resources Authority and the Metropolitan District Commission as well as some of Massachusetts' 13 regional planning authorities. The form in which it is available at these sources varies from computer disk to hard copy.

Online. A list of what is currently available from state government may be obtained from MagNet's Massachusetts Access to Government Information Server (www.mapet.state.ma.us/govserv.htm).

On the other hand, access to information at what might generally be described as the county level is clearly spotty. Likewise, the state of automation in the county registries of deeds varies. In some, registry index information identifying buyers and sellers and dates of sale is available online. In others, it is not. There is no capability to image copies of deeds or other real estate instruments without special software.

Resources. Massachusetts Secretary of State Public Records Division: www.state.ma.us/sec/pre/prelaw/lawidx.htm

MICHIGAN



Requesters in Michigan have a right to electronic format, although courts have found that databases constitute a greater possible invasion of privacy than printed records. Fees also are an issue for journalists there.

"Everybody's charging us now, any fees they can justify under FOIA," Dawn Phillips Hertz, an attorney for the Michigan Press Association, said of the current state of public records in Michigan. However, she said, a 1996 statute named Enhanced Access to Public Records allows for governmental bodies to charge higher fees for "enhanced access," as well as access to geographical information systems. Meanwhile, she said requesters are often charged for only the cost of the tape or other electronic format, and on occasion, staff time.

The law. The Freedom of Information Act defines public records to include "every . . . means of recording, and includes . . . magnetic or paper tapes, . . . magnetic or punched cards, discs, drums or other means of recording or retaining meaningful content." Mich. Comp. Laws §

15.232(2)(e).

Where a computer record exists, a requester generally has the right to the record in that form. See *Farrell v. City of Detroit*, 209 Mich. App. 714 (1995) ("In Michigan, computer records constitute public records subject to disclosure under the FOIA"). *Payne v. Grand Rapids Police Chief*, 178 Mich. App. 193 (1989) (plaintiff entitled to copy of tape recording of 911 emergency calls, even where city offered to provide transcript of tape). See also Mich. Comp. Laws § 15.232(f).

Cases & opinions. In a 3-3 decision, the state supreme court let stand a ruling that denied to a commercial requester a computer tape containing names and addresses to be printed in a student directory. The high court found that providing the tape "was a more serious invasion of privacy than disclosure in a directory form" because "computer information is readily accessible and easily manipulated." Dissenting justices wrote that "we cannot accept the conclusion that the Legislature intended to allow a public body to exempt otherwise public records from disclosure by the simple expedient of converting the public record from one form to another." *Kestenbaum v. Michigan State University*, 327 N.W.2d 783 (Mich. 1982).

Access was denied to a computer tape of information on traffic accidents even though the requester wanted the tape for a statistical study. The court found a potential privacy violation because the FOIA Act has no provisions to control use of information after it is disclosed. *Mullin v. Detroit Police Dept.*, 348 N.W.2d 708 (Mich. Ct. App. 1984). The state supreme court let stand a decision that a requester could not have copies of "bad jokes" files from the University of Michigan student conference electronic mail system. The court side-stepped the issue of access by ruling that the requester already had copies of the jokes and, therefore, the agency did not have to disclose them. *Ascher v. University of Michigan*, No. 113362 (Mich. Ct. App. 1st Dist., April 20, 1990), *appeal denied*, 437 Mich. 897 (1991).

Computer data on the conditions of streets and roads must be provided in electronic format, if that is the format requested. Since the information was available in the desired format at the assessor's office, production of the data did not require creation of a new public record. *Zeff v. City of Ann Arbor*, No. 93-1548-CZ (Mich. Cir. Ct. 1994). Similarly, a printer backup tape of computer records that Detroit used to generate lists of taxpayers was a public record because the tape was already in existence and not subject to any exemption. *Farrell v. City of Detroit*, 530 N.W.2d 105, 209 (1995).

Washtenaw County adopted an e-mail use policy that makes all information in the electronic mail system subject to the open records law. Washtenaw County Res. 94-0030 (Feb. 2, 1994). The University of Michigan maintains a policy that "electronic mail and computer files are considered private to the fullest extent permitted by law." Access can occur only with "permission of the sender/receiver of a message or the owner of the file . . . , court order, or other actions defined by law." *Privacy of Electronic Mail and Computer Files, General University Policies, University of Michigan* (Dec. 1, 1993) (on file with the school).

Records in the state police STATIS computer database meet the statutory definition of a public record. Therefore, the state police department must search STATIS when complying with a search request. Mich. Op. Atty. Gen. 6820 (Oct. 11, 1994).

The Michigan Court of Appeals held in March

2002 that Wayne County employee salaries are not exempt from the state's FOI Act and required the county to release the records to a local newspaper. The *Detroit News* brought action against Wayne County for the names, job titles and pay rates of all county officials and employees for 2000 and 2001. The newspaper also requested the names of all employees who received pay for leave of absences during 1999 and 2000, the names of all employees who received pay for sick leave, as well as the amounts, and the names of all employees who used a county vehicle. The county denied the requests, saying the records were exempt under the Civil Service Act, which requires employee records to be confidential and not open for public inspection. The state FOI Act prohibits the release of any document exempted by another state or federal statute. The court found that the Civil Service Act, in requiring confidentiality of employee records, did not provide a statutory exemption from disclosure. *Detroit News v. County of Wayne*, 2002 WL 410484 (Mich. App. 2002).

Fees. A public body may charge a fee for "a public record search, the necessary copying of a public record for inspection or for providing a copy of a public record." Fees are limited to "actual mailing costs and to the actual incremental cost of duplication or publication including labor, the cost of the search, examination, review, and the deletion and separation of exempt from nonexempt information." Search fees may be waived if the public body determines that it is in the public interest to do so. A deposit may be required. Fees for personnel costs shall be no more than the hourly wage of the lowest paid public employee capable of performing the task. A public body shall utilize the most economical means of making copies. Mich. Comp. Laws § 15.234 (1997).

If a public record contains material that is not exempt under section 13, as well as material that is exempt from disclosure under section 13, the public body shall separate the exempt and non-exempt material and make the nonexempt material available for examination and copying. [. . .] Under section 4(3) of the FOIA, a public body may not charge a fee for the cost of its 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. This fee limitation, however, does not apply to a public body's costs incurred in the necessary copying or publication of a public record for inspection, or for providing a copy of a public record and mailing the copy." Mass. Op. Att'y Gen. 7083 (June 7, 2001).

E-mail. There is no specific case law on the issue of electronic mail. A recent amendment to the FOIA recognizes that written requests can be transmitted by e-mail. Mich. Comp. Laws § 15.232(i). A strong argument can be made that, under *Farrell* and *Payne*, e-mail is subject to disclosure under the FOIA.

Software. Computer software is expressly excluded from the definition of public record. § 15.232(2)(e). The law provides that a public body is not required "to make a compilation, summary, or report of information." Mich. Comp. Laws § 15.233(3) (1993). A written request for records may now be transmitted via e-mail or other electronic means. § 15.232(2)(i) (1997).

MINNESOTA



One of the biggest problems reporters in Minnesota report is high processing fees from government agencies. And because software and

programming are exempt from the law, reporters have no way of knowing if they were charged fairly. Minneapolis Star-Tribune reporter Dan Browning notes that typically "it's free to inspect records. I've taken the approach of asking to inspect data first, then asking for selected copies. I've even done this with databases. It makes it more difficult for them to jack up the charges if you know what they're dealing with."

When a state representative requested e-mail backup tapes from the Minnesota Department of Transportation, the agency said that back-up tapes were not contained in database format and that restoring the information would cost about \$99,950. Before beginning the process, the agency requested a prepayment of \$51,000. A Minnesota Department of Administration opinion (*see below*) said that inspection of the information should be free.

The law. The Government Data Practices Act defines "government data" to include "all data collected, created, received, maintained or disseminated . . . regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.01, subd. 7. All "government data collected, created, received, maintained or disseminated by a state agency, political subdivision, or statewide system" must be kept "in such an arrangement and condition as to make them easily accessible for convenient use." § 13.03, Subd. 1. The Data Practices Act does not apply to "records" but to "data." The Act makes it clear that the format of the data is not critical to its accessibility. "Photographic, photostatic, microphotographic, and microfilmed records shall be considered as accessible for convenient use regardless of the size of such records." § 13.03, subd. In addition, if an agency maintains public data "in a computer storage medium," a requestor may specify a copy of the data in that medium, if the government entity "can reasonably make the copy or have a copy made." § 13.03, subd. 3(e).

Cases & opinions. In Minnesota, open records requesters can appeal to the state's commissioner of Administration. Reporters regularly appeal requests to the commissioner. In addition, any government entity can request an advisory opinion from the Commissioner on any question concerning public access to government data, rights of subjects of data, or classification of data. An advisory opinion is not binding on the government entity whose data are the subject of the opinion. However, a court must give deference to the opinion in a proceeding that involves the data in dispute. A government entity or person that conforms with an opinion will not be liable for compensatory or exemplary damages, awards of attorneys fees or penalties. The state welfare department had to release data stored on a computer tape because the storage format did not affect the information's status as a public record, but the requester had to pay all costs, including the cost of programming to compile the specific data sought. *Minnesota Medical Association v. Minnesota*, 274 N.W.2d 84 (Minn. 1978).

"E-mails generated or received by the Minnesota Department of Transportation (Mn/DOT) employees and that contain information about the Hiawatha Light Rail Transit (LRT) project are presumed public. Pursuant to Chapter 13, the e-mails in question are government data, regardless of the form in which they are maintained. Pursuant to Chapter 13, Mn/DOT's back-up tapes are government data and are presumed public. Under Chapter 13, a government entity may not require the data requestor

to make an initial payment of \$51,000 before processing the request for access to data. In this case, the requestor seeks only to inspect the data; pursuant to section 13.03, subdivision 3, inspection of public government data is free." Minn. Dept. of Administration Advisory Opinion:00-019, June 16, 2000.

When a television station requested copies of the Hennepin County Property Tax System, the county quoted a price of \$13,500. The Department of Administration's advisory opinion on that matter found that the county had not properly justified the charge. Advisory Opinion: 02-004, Feb. 7, 2002.

Fees. A government agency may not charge a requester who only inspects data. Fees for copies or electronic transmittal of data may include "the actual costs of searching for and retrieving government data, including the cost of employee time, and for making, certifying, compiling, and electronically transmitting the copies of the data or the data, but [the agency] may not charge for separating public from not public data." When a copy contains "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." That fee may include a share of the "actual development costs of the information." Minn. Stat. § 13.03(3).

If electronic data are made available in electronic form on a remote access basis, inspection includes both remote access and the ability to print copies of or download the data. An agency may charge a fee for such remote access "under a specific statutory grant of authority." It may also charge a fee for remote access to data "where either the data or the access is enhanced at the request of the person seeking access." § 13.03, subd. 3(b).

If the government data in question have "commercial value," and are "a substantial and discrete portion of or an entire formula, . . . compilation, program, . . . database, or system developed with a significant expenditure of public funds . . ." the agency may charge a "reasonable fee for the information in addition to the costs of making, certifying, and compiling the copies." The fee must clearly "relate to the actual development costs of the information." § 13.01, subd. 3(d).

Finally, an agency shall provide an electronic copy of public government data maintained in "a computer storage medium" if the agency "can reasonably make the copy or have a copy made." The agency may charge "the actual cost of providing the copy." § 13.03, subd. 3(e).

If a database contains both public and nonpublic data, an agency cannot charge for separating the data. § 13.03, subd. 3(c). However, separating such data stored in electronic format may involve complicated programming, which might slow access.

Software. Section 13.03, subd. 3 states that a request for an entire "program" with commercial value may trigger a fee related to the development costs of a program. Section 13.03, subd. 5 allows an agency to acquire a patent copyright for a software program, or program components thereof, and to enforce such rights. If the program or component is patented, it is treated as "trade secret information" protected by § 13.37. If a third party has provided propri-

etary software to the state, it may not fall within the definition of government data, or would be protected as "trade secret information." § 13.37, subd. 1(b).

Resources. Information Policy Analysis Division, Department of Administration opinion index: www.ipad.state.mn.us/opinions/index.html

MISSISSIPPI

Records requesters in Mississippi may specify electronic format and the Supreme Court has found that electronic information is covered by the public records law. One problem with the state's law, however, is that software is protected by a "trade secrets" exemptions, which can make getting data from a proprietary software more difficult in negotiations.

The law. The Public Records Act defines public records to include "cards, tapes, recordings . . . and any other documentary materials, regardless of physical form or characteristics." Miss. Code Ann. § 25-61-3(b) (1991). Each public body must ensure reasonable access to electronically maintained records. The legislature has stated that automation must not erode the right of access to public records. § 26-61-2 (Supp. 1997).

Mississippi has the usual exemption for "trade secrets," which some states use to protect software. However, the law requires the government to release trade secrets after a waiting period unless the owner obtains a court order forbidding disclosure. Trade secrets "developed by a college or university under contract" are exempt, however. § 25-61-9. Use of proprietary or "sensitive" software by a public body cannot be allowed to restrict public access to records.

Records may be provided in ASCII format or with a legally obtainable copy of the software, § 25-61-10. If records are maintained in a particular format, they must be provided in that format, if requested. § 26-61-10. A public body may not enter into a contract for creation or maintenance of a public database if the contract impairs the public's ability to inspect or copy records. § 25-61-10. A 1997 law requires the state's Administrative Office of the Courts to draw up rules to effect "computer and/or electronic filing and storage of all court records and court-related records throughout the state" and to "assist courts and county offices in meeting those standards."

All courts and county offices that store records electronically are to use standardized systems. Court and county offices are authorized, but not required, to institute procedures for the electronic filing and storage of court documents "to further the efficient administration and operation of the courts. H.B. 1219, amending § 9-1-51. This statute may not overrule Op. Atty Gen. Aug. 14, 1995 to Rickey Gray, which says the electronic version of Mississippi Code does not have to be released because it is copyrighted. § 1-1-9.

Cases & opinions. In a dispute over fees, the Mississippi Supreme Court did not question applicability of the Public Records Act to computer records, ruling that the Department of Public Safety could not charge more than actual costs for providing licensed-driver lists to political organizers. The opinion did not distinguish computer tapes from printouts. *Roberts v. Mississippi Safety Highway Patrol*, 465

So. 2d 1050 (Miss. 1985). Voter registration lists retained in electronic format on hard disk drives, diskettes and magnetic tape are subject to the Public Record Act. Miss. Op. Att'y Gen. (Jan. 16, 1990).

Computer software programs developed by the state, which often contain confidential file access information, are not subject to public disclosure. Miss. Op. Att'y Gen. (April 3, 1992). Addressing digital mapping data, the attorney general said that "computerized data must be treated like any other public record." An agency must provide the record or information in the format requested if that format is reasonably available. An agency may restrict copying of computer data that is proprietary, such as digital mapping data in a geographic information system, that were developed and copyrighted by private third parties. Miss. Op. Att'y Gen. (Feb. 10, 1994); Miss. Op. Att'y Gen. (Feb. 25, 1994).

The Department of Wildlife, Fisheries and Parks must provide a list of employee names and the accumulated comp time they are entitled to in response to an open records request, the Supreme Court ruled in August 1999. The court said that the Mississippi Public Records Act requires disclosure of that information and that it would not be protected by which would not be covered by an exemption in the law for "certain" personnel records. *Mississippi Department of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement Officers' Association*, 740 So.2d 925, Miss., 1999 (Aug. 19, 1999).

Social Security numbers, telephone numbers, and date of birth and age information retained in statewide, district, county and municipal voter registration files shall be exempt from and shall not be subject to inspection, examination, copying or reproduction (Sections 23-15-139 et seq., Miss. Code Ann., Section 23-15-140). Copies of statewide, district, county or municipal voter registration files, excluding Social Security numbers, telephone numbers, and dates of birth and age information, shall be provided to any person in the order of requests received, in accordance with the Public Records Act of 1983 at a cost not to exceed the actual cost of reproduction. Miss. Op. Att'y Gen. 97-0760 (Dec. 5, 1997).

Fees. Fees must be "reasonably calculated to reimburse [an agency] for, and in no case to exceed, the actual cost of searching, reviewing, and/or duplicating and, if applicable, mailing copies of public records." Agencies may collect fees before complying with requests. Miss. Code Ann. § 25-61-7 (1991). There are no statutes "empowering public bodies to impose fees or charges for compliance with open records requests except to recover reasonable and necessary expenses" such as retrieval and copying. Miss. Op. Att'y Gen. (Feb. 10, 1994). The state must make records available at the state's actual cost. *Roberts v. Miss. Rep. Party State Exec. Comm.*, 465 So. 2d 1050, 1054 (Miss. 1985).

In response to a request for a computer disk, the Workers Compensation Commission estimated that the request would involve approximately 1,500 individual records and would require an analyst to construct and test a search program to retrieve the data from a data base at the rate of \$75 per hour, totaling \$550. The Attorney General opined that the fee was valid under § 25-61-10 of the Mississippi Code, which provides in pertinent part that "the public body shall provide a copy of the record in the format requested if the public body maintains

the record in that format, and the public body may charge a fee which must be in accordance with Section 25-61-7." Section 25-61-7 states that: Each public body may establish and collect fees reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of searching, reviewing, and/or duplicating and, if applicable, mailing copies of public records. Such fees shall be collected by the public body in advance of complying with the request." Miss. Op. Att'y Gen. 2000-0285 AUTH (June 16, 2000).

Software. Not if obtained pursuant to a licensing agreement that prohibits disclosure and not if the software is "sensitive." §§ 25-61-3(c), (d); 25-61-9(6). See Miss. Op. Att'y Gen. Dec. 7, 1995 to W. R. Lewis.

Resources. Mississippi Attorney General Opinions: www.agopin.state.ms.us/

MISSOURI

 Access to electronic records in Missouri is pretty good compared to some states. The law allows agencies leeway to make determination in charging fees and whether to do custom searches. As a result, some agencies are access-friendly, others are not. In some cases, agencies have provided databases to news organizations that could have been withheld under the law. Agencies that have been particularly difficult to get databases from include law enforcement agencies and universities.

The law. The Sunshine Law defines "public record" as "any record, whether written or electronically stored . . . including any report, survey, memorandum, or other document or study." Mo. Rev. Stat. § 610.010(6).

A public body may close records relating to "software codes for electronic data processing and documentation thereof." § 610.021(10). A separate law provides access to "records, instruments or documents" required to be kept pursuant to a statute or ordinance. §§ 109.180, 109.190. If a community creates a geographic information system, it may set terms and conditions to limit access to the database. § 67.319(2)-(3). Political subdivisions of the state may place their records into state data processing machinery and allow the state to take responsibility for storage, retrieval and copying. § 67.350.

No public governmental body shall grant any person or entity the exclusive right to access and disseminate public records, although there is a narrow exception when there is a need to facilitate coordination with industry regulators. § 610.023(2). A public governmental body keeping records in an electronic format is strongly encouraged to provide online or other electronic access to public records. Agencies are to provide information in a usable electronic format "to the greatest extent feasible." § 610.029.

A public governmental body "may" provide electronic services involving public records to members of the public. By statute, public governmental bodies are "strongly encouraged," but not required, "to make information available in usable electronic formats to the greatest extent feasible." § 610.029.1. Customized searches of computer databases are authorized, but not mandated, by the statute. § 610.029.

Cases & opinions. The Missouri State Library, the Missouri public institutions of higher education and local public libraries can restrict

copying of records received from a not-for-profit online computerized cataloguing service that provides a shared database of bibliographic records. Mo. Op. Att'y Gen. 138-87 (Dec. 18, 1987). The Court of Appeals held that selling state statutes on computer tape through bidding impermissibly limited public access by depriving it to all but the highest bidder. It was irrelevant that the highest bidder later marketed these statutes to the public. *Deaton v. Kidd*, 932 S.W.2d 804 (Mo. Ct. App. 1996).

The names, addresses, and water bills of customers of a public water supply district are records subject to disclosure under Chapter 610, Mo. Rev. Stat. Att'y Gen. Op. 95-2001 (June 4, 2001).

Pursuant to subsection 3 of Section 566.617, Mo. Rev. Stat., as enacted by Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 56, 89th General Assembly, First Regular Session (1997), a local law enforcement agency shall provide to any person upon request a complete list of the names and addresses of sex offenders registered within such agency's jurisdiction as well as the crime for which each offender was convicted. Mo. Op. Att'y Gen. 145-97 (Sept. 5, 1997).

Electronic information is treated the same as paper information. In the instances where litigation has been brought to secure the information, the electronic status of the information was not an issue. See, e.g., *Pulitzer Publishing Co. v. Missouri State Employees' Retirement System*, 927 S.W.2d 477 (Mo. Ct. App. 1996) (pension payment records, which were stored electronically, were ordered disclosed).

Fees. The Sunshine Law limits "fees for providing access to public records maintained on computer facilities, recording tapes or discs" to "the cost of copies and staff time required for making copies and programming, if necessary, and the disk or tape used for the duplication." Mo. Rev. Stat. § 610.026.1(2). Fees for copying public records shall not exceed the actual cost of document search and duplication. Upon request, the governmental body shall certify in writing that the actual cost of document search and duplication is fair, reasonable and does not exceed the actual cost incurred. § 610.026.1(1). The custodian may require advance payment. § 610.026.1(2). However, waiver or reduction of fees is allowed when disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the public governmental body and is not primarily in the commercial interest of the requester." § 610.026(1)(1). The public records law allows a records custodian to charge "a reasonable rate for his services or for the services of a deputy for the use of the room or place where" a requester makes his own copies. § 109.190.

"Fees for providing access to public records maintained on computer facilities, recording tapes or discs, video tapes or visual items or devices, shall include only the cost of copies and staff time required for making copies and programming, if necessary, and the disk or tape used for the duplication." Mo. Rev. Stat. § 610.026.1(2).

Software. Software codes for electronic data processing and documentation thereof may be closed. Mo. Rev. Stat. § 610.021(10).

GIS. Political subdivisions may charge a fee covering developmental costs, in addition to actual costs, for information from, or a copy of, a geographical information system database. §

ACCESS TO ELECTRONIC RECORDS

67.319(1)(1998).

Resources. Missouri Press Association:
www.mopress.com

MONTANA

The state law specifically defines public records as information stored in electronic format. Although the law does protect privacy concerns, in one case, public disclosure took precedent over privacy interests. Fees vary as agencies are allowed to develop their own fee schedules.

The law. The Public Records Act states that "each person is entitled to a copy of information compiled, created, or otherwise in the custody of public agencies that is in electronic format. . . All restrictions relating to confidentiality, privacy, business secrets, and copyright are applicable to the electronic information." Mont. Code Ann. § 2-6-110(1) (1997). The Public Records Management Act, which sets procedures for handling and preserving state records, defines a public record to include "any . . . magnetic tape, computer storage media, . . . or other document . . . regardless of physical form or characteristics." § 2-6-202(1) (1993). The act prohibits release of names for use as a mailing list without permission from the people on the list. However, that restriction does not apply to lists of voters or certain government employees. § 2-6-109.

Cases & Opinions: The restriction on releasing names does not apply to lists of businesses, agencies or associations, but applies whenever the requester plans unsolicited mailings, house calls or phone calls. An agency does not need to determine the intended use of such a list. A disclaimer signed by the requester under threat of penalty for misrepresentation is sufficient. Mont. Op. Atty Gen. 59, vol. 38, p. 207 (Nov. 28, 1979). In a noncomputer case, the attorney general advised that the law may require public access to records that do not qualify as "public writings." Mont. Op. Atty Gen. 17, vol. 39, p. 62 (June 3, 1981).

The Montana Supreme Court in May 1998 ruled that a state committee appointed to evaluate proposals for the construction of a private prison must provide access to records associated with the selection process. *Great Falls Tribune Co. v. Day*, 959 P.2d 508 959P.2d 508 (Mont. 1998)

In June 2000, several Montana news organizations won a six-year legal battle against the state Department of Revenue to obtain access to tax information about coal companies, after the state supreme court ruled that the department's rule limiting access to the information was unconstitutional. The rule disregarded a constitutional provision requiring all government records to be made public unless a significant privacy concern outweighed the public's right to know, the court said. *Associated Press, Inc. v. Montana Dept. Of Revenue*, 4 P.3d 5 (Mont. 2000).

Fees. The law requires a public officer to give a citizen a certified copy of a "public writing . . . on payment of the legal fees therefor." Mont. Code Ann. § 2-6-102(2) (1993). An agency may charge a fee for access to electronic records equal to: the actual cost of the electronic media used to transfer the data, if not provided by the requester; expenses incurred by the agency in maintaining online access to the requester; other out-of-pocket expenses. § 2-6-110(2) (1997). Additional fees may be imposed for more than 30 minutes of

copying time. § 2-6-110(2)(e). The Department of Revenue may charge certain additional fees as reimbursement for the cost of creating and maintaining the property valuation and assessment system database. § 2-6-110(3).

Resources. Montana Newspaper Association: www.mtnewspapers.com

NEBRASKA

In the last few years, electronic issues in Nebraska have centered around whether an agency can hire a private contractor to handle its data. Debates on the issue began in 1995 after the State Library Commission contracted with a private entity to provide for electronic record access without first seeking legislative approval. In the 1996 legislative session, a law went into effect that created a committee charged with studying the entire area of access to electronic records. In 2000, the Nebraska Legislature passed a bill to deal specifically with electronic records. Because of the surrounding controversy, however, more legislation may continue to modify this area of the law. Since passage of the legislation, many questions have come up about what constitutes a "reasonable" fee for computer processing.

The law. Neb. Rev. Stat. § 84-712.01 defines public records for purposes of the public records statutes. Under that section, except where other statutes expressly provide that a record shall not be made public, public records are all records and documents, regardless of physical form, of or belonging to the state and its various political subdivisions, departments, boards and commissions. Under this definition, public records are broadly defined, and the scope of the bodies covered is also wide. Data that is a public record in original form remains so when maintained in a computer.

Legislation introduced in 2000 added information specifically about electronic records: Requesters have the statutory right to obtain copies of public records in any form in which the record is maintained or produced. This includes photocopies, print outs, electronic data, disks and tapes. Neb. Rev. Stat. § 84-712.01 (2000) provides in part: "Data which is a public record in its original form shall remain a public record when maintained in computer files." Neb. Rev. Stat. § 84-712.01(2) more specifically provides that agencies may charge a fee for the reasonable cost of producing documents, including an approved fee for gateway services and other electronic media. By this reference, electronic data is included in the open records laws. Neb. Rev. Stat. § 84-712(3)(b).

A requester may designate any form in which the public record is maintained or produced, including, but not limited to, printouts, electronic data, discs, tapes and photocopies. Neb. Rev. Stat. § 84-712(3)(a). However, the agency need not produce or generate any record in a new or different form or format modified from the original form or format of the public record. Neb. Rev. Stat. § 84-712(3)(c). Also, persons may request copies only if the custodian has copying equipment reasonably available. Neb. Rev. Stat. § 84-712(3)(a). Persons also can choose a format for receiving records with regard to certain agencies whose records are available through Nebraska Online, a private online service.

An agency is not required to obtain computer capability to produce records "in a new or different form when that new form would require

additional computer equipment or software not already possessed by the governmental entity." § 84-712.01(2).

A requester may elect to receive a record in any form that the agency is capable of providing. No request may be denied on the grounds that the custodian has made or prefers to make the record available in another medium. Neb. Rev. Stat. § 84-1204 (1998).

An agency may deny a request for a record in a particular medium if the record is unreasonably complicated, if the medium is not one used by the agency, if complying with the request would cause undue time and expense or if the record is available from another source in the requested medium at a fee equal or lower to fees charged by the agency. § 84-1204.

A Task Force on Electronic Access to State Government assessed statutes and practices of state agencies regarding fees and access to records through electronic and other means. Neb. Rev. Stat. § 84-713.05 (1998).

The legislature also has declared that agencies should use technology to provide access to records and cited the need for a uniform policy "regarding the management, operation and oversight of systems providing electronic access to records." § 84-1201 (1998). The State Records Board shall explore ways in which both the amount of records and accessibility may be improved through expanded electronic access. § 84-1204. The secretary of state may provide a computerized system for "inquiry and confirmation" of financing statement records. § 52-1316.

Cases & opinions. Except for source codes of computer programs, the computer database and all pertinent computer programming and instructions used by the state Department of Education pursuant to the Tax Equity and Educational Opportunities Support Act are public record. 1996 Neb. Op. Atty. Gen. 74. On the other hand, computer "source files" or "dynamic application text files" which contain primarily alphanumeric characters, including punctuation and/or special characters used to control printing are not public records.

Birth and death records should be made available to the public under the public records statutes. Op. Atty Gen. No. 91004, (Jan. 28, 1991); Neb. Op. Atty Gen. No. 90039 (Nov. 20, 1990).

Fees. The statute mandates examination of records at no charge. § 84-712.01 (1998). A custodian in a county with a population of 100,000 or more may charge a "reasonable fee" for transmitting a copy of a public record "from a modem to an outside modem." The fee may include "a portion of the amortization of the cost of computer equipment, including software, necessarily added in order to provide such specialized service." § 84-712.01(2). Fees will not be charged for inspection of financing statements on file for up to 10 name searches a day. Fees may be charged for each search in excess of 10 names a day. § 52-1316. The State Records Board may establish reasonable fees for electronic access to public records. The fees shall not exceed charges for records available through non-electronic means. State agencies may charge rates without board approval for unique, one-time requests for records "in an unusual format." § 84-1204.

Section 84-712.01 (2) provides that the custodian of a public record of a county may charge a reasonable fee to members of the public for transmitting copies of public records held by that custodian from a modem to an outside modem.

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The fee in question must be based on the amortized portion of the cost of acquiring the computer equipment necessary to provide the service, and no county is required under the section to acquire new computer equipment or software to generate public records in a new or different form. This provision was added by LB 1275 in 1994 and amended by LB 628 in 2000.

Profit-making. The single greatest criticism of the contract between the Library Commission and Nebraska Online is that the private entity was allowed to set the fees for access. Future contracts will likely have fees set pursuant to legislation.

Special Cases. Motor vehicle records can be disclosed to the news media when the purpose fits within the general criteria of helping prevent crime or enhance safety. The law would also permit re-disclosure by publication of such information, if the story fits the criteria

Resources. Nebraska Attorney general guide to open records: www.ago.state.ne.us/public_records/public_records.html#

NEVADA

Nevada is one of a few states where the law does not specifically address electronic format in some way. Since the law does not specifically provide for different formats, such requests must be negotiated with the public agency from which the records are requested. Some public agencies have attempted to use the failings of their own computer systems as excuses for failing to provide access to public records.

The law. The Open Records Law mandates that a person may request a copy of a public record in any readily available medium. No custodian may refuse to provide a copy in a "readily available medium" on the grounds "he has already prepared or would prefer to provide the copy in a different medium." Nev. Rev. Stat. § 239.010 (West 1998). State law does not define public records *per se*, but provides that records must be open to inspection and copying unless "otherwise declared by law to be confidential." § 239.010.

A section relating to document destruction allows a custodian to save records on "a computer system which permits the retrieval and reproduction of that information. A reproduction of that film or that information shall be deemed to be the original." § 239.051(1).

The Nevada Administrative Code states that "record" means all documents, papers, . . . software used to process electronic data, computer printouts . . . information stored on a magnetic tape, computer, laser disc or optical disc, or on a material which is capable of being read by a machine." Nev. Admin. Code § 239.101. A state agency that produces an electronic record must include the entire record or image and each record must include the date it was produced, as well as the date of any alterations. Nev. Admin. Code § 239.760 (1). The state has also enacted legislation allowing for the electronic submission, verification and signing of records. Nev. Rev. Stat. § 239.042-044. Agency records that are to be stored must be sent to state archives on bond paper, microfilm or microfiche and not on computer disc or in a tape format. Nev. Admin. Code § 239.760(5).

Cases & opinions. State-owned or licensed software is not a public record. All information on a computer must be assessed on a case-by-case basis to determine if it is public. Nev.

Att'y Gen. Op. 89-1 (Feb. 6, 1989).

Personal information from the Department of Motor Vehicles files may be released prior to establishing an "opt in" system for bulk distribution of surveys, marketing materials or solicitations, provided that the information is to be used for one of the purposes specified in the exceptions set forth in Nev. Rev. Stat. 481.063(5). The release of personal information in connection with matters relating to emissions testing services falls within the listed exceptions, and the DMV may charge the requestor a reasonable fee to access such information. Nev. Att'y Gen. Op. 2002-12 (March 8, 2002)

Washoe County may establish written standards to charge for the extraordinary use of personnel or technological resources necessitated by an unusually burdensome request for copies of public records. Those standards may include a reasonable time threshold to define "extraordinary use of personnel" and a definition of actual cost based on the hourly rate of pay of the staff member performing the retrieval and copying of a record. Nev. Att'y Gen. Op. 2002-32 (Aug. 27, 2002)

The supreme court ruled that records showing the telephone numbers of incoming and outgoing calls on publicly owned cellular telephones are not confidential or private. *DR Partners v. Board of County Commissioners*, 6 P.3d 465 (Nev. 2000) The court's ruling requires the release of unredacted — or unedited — records of cellular telephone use by county officials.

Fees. The law allows "fees as may be prescribed for the service of copying and certifying." Nev. Rev. Stat. § 239.030. If fulfilling a request requires "extraordinary use" of state personnel or resources, the state may charge further "reasonable" fees. § 239.055. A modified fee schedule, effective July 1, 1999, provides that, absent a statute to the contrary, copy fees shall not exceed the actual cost of providing the copy. § 239.052. Government entities may provide free copies if there is statutory authority to do so or may waive fees upon adoption of a fee waiver policy. § 239.052

The law permits the governmental entity to charge a fee for extraordinary use when providing a copy of the public record to the requestor requires "extraordinary use of its personnel or technological resources." Nev. Rev. Stat. 239.055(1). Technological resources is defined as "any information, information system, or information service acquired, developed, operated, maintained, or... used by a governmental entity." Nev. Rev. Stat. § 239.055(2).

Software. A 1989 Attorney General opinion states that computer programs are intellectual property owned or licensed by the state and are not public records. Nev.A.G.O. 89-1 (Feb. 6, 1989). Public information contained in a computer program, may, of course, be disclosable.

GIS. Nevada law permits government agencies to charge for information from a geographic information system. A geographic information system is a system of hardware, software and data files on which spatially oriented geographic information is digitally collected, stored, managed, manipulated, analyzed and displayed. In addition to the actual cost of the copy, the government agency may also charge reasonable costs of gathering and entry of data into the system, maintenance and updating of the database, hardware, software, quality control and consultation with the employees of the agency.

Nev. Rev. Stat. 239.054.

Resources. Nevada Attorney General Opinions: ag.state.nv.us/agopinions/home.htm

NEW HAMPSHIRE



The state law leaves agencies a lot of leeway when it comes to the format in which they must provide records. In some cases, an agency may choose to provide a computer printout in lieu of an actual database.

However, in some cases courts have ordered agencies to provide computer records of hard copy. In addition, agencies may charge fees for geographic information systems.

The law. The Right to Know Law does not define public records, but provides that "any body or agency which maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record . . . which the agency has the capacity to produce in a manner that does not reveal information which is confidential." The statute grants a right of inspection and copying to a requester. N.H. Rev. Stat. Ann. § 91-A:4, para. V (1990).

RSA 91-A:4 does not require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist. *Brent v. Paquette*, 132 N.H. 415 (1989).

The state legislature has made clear in the voter checklist laws that records pertaining to that issue may be requested either in hard copy or on computer disk. R.S.A. 654:31.

Cases & opinions. Computer records are not exempt from the public records law. In a case decided before the legislature added the "computer storage system" clause to the statute, the Supreme Court ordered a public agency to copy a computer tape rather than require a researcher to examine 35,000 cards containing the same information. *Menge v. City of Manchester*, 311 A.2d 116 (N.H. 1973). However, the legislature passed a measure in 1986 that invalidated the court decision, amending the statute to give agencies discretion to provide computer printouts or copies of source documents without regard to cost or usage by the requester. A computer tape of the names of subscribers to the New Hampshire Sweepstakes Commission's weekly game is subject to the Right to Know Law. Subscribers do not have an expectation of privacy when they enter the program, so the tapes are subject to public inspection. N.H. Op. Att'y Gen. 84-60-I (April 17, 1984).

In *Hawkins v. New Hampshire Department of Health and Human Services*, the state supreme court found that the Department of Health and Human Services is not required to create new records. "RSA chapter 91-A does not require HHS to compile data into a format specifically requested by a person seeking information under the statute. It does, however, require that public records received by HHS be maintained in a manner that makes them available to the public. See N.H. Rev. Stat. Ann. § 91-A:4, III-V. The trial court correctly ruled that HHS was not required to create a new document. However, "to the extent that the plaintiff requests the Medicaid claims compiled in their original form, we remand for further proceedings[. . .]" In its analysis determining that the requested information was not a public record, the trial court used cost as a factor. Under § 91-A:5, cost is not listed as an exemption to disclosure of otherwise public information. In addition,

in §. 91-A:4, IV, where cost is addressed directly, it is not contemplated as a factor that could prohibit disclosure. "[. . .] We find that cost is not a factor in determining whether the information is a public record. We do not reach the question of who bears the burden of paying for the cost of producing the information requested, because the issue is not ripe for our review." No. 2000-012 *Cassandra Hawkins v. New Hampshire Department of Health and Human Services*, 788 A.2d 255 N.H., 2001 (Dec. 31, 2001)

In *Devere v. Flynn*, No. 99-E-033 (Merrimack Super. Ct. Apr. 5, 2000), the plaintiff sought information relating to 64 people who were denied the ability to purchase handguns in New Hampshire in 1998 because they were fugitives from justice. The court ruled that agency must provide information fashioned from a cross reference of names of the 64 against the list of licensed drivers and determine whether they are licensed and if so whether their licenses are suspended. The court said the public agency was not being asked to compile random information from numerous documents as in *Brent*, as such a request was not burdensome and any administrative burden outweighed by the public interest.

Fees. The statute allows agencies to collect "the actual cost of providing the copy," unless other statutes establish specific fees. The statute does not require an agency to provide copies if it does not have the necessary equipment. N.H. Rev. Stat. Ann. § 91-A:4, para. IV (1990). Counties may establish computer-based geographic information systems and charge fees for access to them. N.H. Rev. Stat. § 24:13-bb (1997). Towns and cities are afforded the same powers. The word "fees" is not defined in the statutes. § 47:11-c (1997)(cities) and § 31:95-f (1997) (towns).

Checklists used by voters in meetings and elections are available for a reasonable fee. Checklists are also available on computer disk or tape, or in any form other than paper, and fees may be charged for providing them "based solely on the additional costs incurred to provide such checklist." N.H. Rev. Stat. Ann. § 654:31 (1997). The New Hampshire statute making voter checklists available for inspection and copying provides that the fee for providing the checklist on computer disk or tape shall be based solely on actual costs incurred. § 654:31.

GIS. Counties, cities and towns may establish computer-based geographic information systems and control the distribution of that information, subject to the right-to-know law, R.S.A. 91-A. Counties, cities and towns are empowered to set up these systems themselves, or to establish non-profit corporations to handle the systems. The statutes also provide that fees may be charged for use of the system. § 24:13-b (counties); § 47:11-c (cities); § 31:95-f (towns).

Resources. New England Press Association: www.nepa.org

NEW JERSEY



New Jersey passed a comprehensive new open records and meetings law on Jan. 8, 2002, which took effect on July 1, 2002.

Published analyses characterized New Jersey's previous 38-year-old public-records law as among the weakest in the nation. Significantly, the law allowed public access only to those documents an agency was required to maintain and imposed no time limit on when an agency

was required to respond to a request for documents. The new law assumes that records are open, unless covered by an exemption. The new law specifically addresses computerized records, but it also contains strong language in regards to protecting individual privacy.

The New Jersey Press Association withdrew its support from the bill in the final hour, however, after legislators added a provision exempting their own correspondence from disclosure.

The law. Open Public Records Act declares records to be public unless they fall within certain exceptions. (PL 2001, c. 404) In enacting the new law, the legislature concluded as a matter of public policy that "government records shall be readily accessible for inspection, copying or examination by citizens of this state, with certain exceptions, for the protection of the public interest." Mirroring the open-records laws in most other jurisdictions, the legislature mandated that "all records shall be subject to public access" unless specifically exempted.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include interagency or intra-agency advisory, consultative, or deliberative material.

A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology or for the labor cost of personnel providing the service.

The revised law imposes on public agencies "an obligation to safeguard from public access a citizen's personal information with which it had been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J. Stat. Ann. § 47:1A-1 Thus, it exempts from disclosure certain documents relating to crime victims, sexual-harassment complaints filed against public employers, and "that portion of any document which discloses the Social Security number, credit-card number, unlisted telephone number or driver-license number of any person." The law also establishes a 13-member Privacy Study Commission that will study the law's impact on privacy issues. N.J. Stat. Ann. § 47:1A-11 (a)

Software. Two exemptions to the new law may impact reporters' access to software or to documentation. "Administrative or technical in-

formation regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security" and trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement that prohibits its disclosure, "as well as proprietary information as to computers."

Cases & Opinions. The new public records law created the Government Records Council to respond to questions regarding the law. The GRC had issued only a handful of opinions by March 2003, two of which addressed electronic records.

In response to a request for police blotter data to which a city charged a requester \$150 for processing, the GRC concluded that a city did not present the council with any evidence that the one hour of labor and computer time to produce a copy of the police blotter or log for July 2, 2002 represents "a substantial amount of manipulation or programming of information technology" or the "extensive use of information technology ..." pursuant to N.J. Stat. Ann. § 47:1A-5c, notwithstanding the age of the City's computer system. The council ordered that custodian "shall charge the requester only the per-page copy rates in N.J. Stat. Ann. § 47:1A-5b for the record in question. The custodian shall refund to the requester any sum paid that exceeds the per-page copy cost for the record in question." GRC Complaint 2002-46 (Aug. 26, 2002)

In regards to a requester who sought e-mails sent or received by city officials, the custodian denied the request on the basis that the e-mails were "intra-agency advisory, consultative or deliberative materials" (ACD) and, thus, not "government records" accessible under OPRA. N.J.S.A. 47:1A-1.1. The custodian offered no evidence describing the general content of any e-mail for the council to assess the validity of the claim as to any particular e-mail communication. The township attorney advised the council that he would review the e-mail personally and provide the council with additional evidence in support of any ACD claim being made for each item. No further decision had been made on this issue. GRC Complaint 2002-58 (Jan. 17, 2003).

Most other cases and opinions in New Jersey apply the previous statute or common law.

Where a commercial requester sought access to daily computer printouts, the law required a public utility to provide time for inspecting the printouts. If a computer record qualifies as a public record under the Right to Know Law, access may not be denied to any requester. Even when a computer printout does not qualify as a public record under the law, a requester may have a common law right of access if the interests in disclosure outweigh the need for confidentiality of the records. *Technisan v. Passaic Valley Water Common*, 549 A.2d 1249 (N.J. 1988).

A newspaper had no right of access to a computer spreadsheet prepared for a government body because the law did not require the agency to make or keep the printout, a private consultant prepared it, and the reporter could reconstruct the analysis from public documents. *Asbury Park Press v. State Dept. of Health*, 558 A.2d 1363 (N.J. Super. Ct. App. Div. 1989), cert. denied, 569 A.2d 1344 (N.J.)

A private company that provides access to real estate tax assessment records is entitled to a computer tape of the assessments of each

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municipality under common law. *Higg-A-Rella, Inc. v. County of Essex*, No. A4830-92T3 (N.J. Super Ct. App. Div. Sept. 26, 1994). The court said that under the common law right of access to government documents, a requester could selectively copy files from a computer database where such copying had been done for others and where the requester was willing to pay the cost of creating and running necessary computer search programs. *Board of Educ. Of Newark v. New Jersey Dept. of Treasury*, A-67-95, 678 A.2d 660 (N.J. 1996).

Fees. With regard to the costs which may be charged for the copies, the statute sets the following maximum charges:

"A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$0.75 per page; eleventh page to twentieth page, \$0.50 per page; all pages over twenty, \$0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. C.47:1A-5 (b)

For computer records "the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both."

Resources. Government Records Council: www.nj.gov/grc

NEW MEXICO

It remains unclear in New Mexico whether a government agency that provides a computer printout is satisfying a public records request. The statute allows an agency to provide a hard copy partial printout of data containing the public information if "necessary to preserve the integrity of the computer data or the confidentiality of exempt information."

The law. The Public Records Act defines public records as "all documents . . . tapes . . . and other materials, regardless of physical form or characteristics." N.M. Stat. Ann. § 14-2-6. The statute requires "proper and reasonable opportunities" to inspect and examine public records. § 14-2-7. If a computer database contains both exempt and nonexempt information, "a partial printout of data containing public records or information may be furnished in lieu of an entire database" to "preserve the integrity of computer data." § 14-2-9. Absent exemptions, information contained in state databases is considered a public record and shall be subject to disclosure in printed or typed format by the state

agency that inserted the information into the database." § 14-3-15.1.

Additionally, § 14-3-15.1(c) provides specifically that "information contained in information systems databases shall be a public record," but some restrictions and variations on access to this information exist, including the payment of a "reasonable fee."

A different article states that "no attorney, health care provider or their agents shall inspect, copy or use police reports or information obtained from police reports for the purpose of the solicitation of victims or . . . relatives of victims of reported crimes or accidents." § 14-2A-1.

A statute that regulates agency practices related to the preservation of records describes public documents to include "documentary materials, regardless of physical form or characteristics." § 14-3-2(C). Under the recent Electronic Authentication of Documents Act, which allows individuals to "sign" electronic documents, the state secretary shall adopt regulations allowing for reasonable public access to public keys (which decode the authentication) maintained by the Office of Electronic Documentation. N.M. Stat. Ann. § 14-15-5 (Supp. 1997). Under the act, "document" is defined as including "correspondence, agreements, invoices, reports, certifications, maps, drawings and images in both electronic and hard copy formats." § 15-15-1.

The Inspection of Public Records Act specifically provides that the act should not be construed to require a public body to create a public record. § 14-2-8(B), NMSA 1978. Under the specific computer database statute, § 14-3-15.1, a customized search is discretionary.

Cases & opinions. Computer tapes are not exempt from the statute merely because of their format. Political organizers had a right to a computer tape listing county voters; disclosure did not create special privacy concerns. The "right to inspect public records should . . . carry with it the benefits arising from improved methods and techniques of recording and utilizing information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety." *Ortiz v. Jaramillo*, 483 P.2d 500 (N.M. 1971).

In September 2001, a New Mexico district judge imposed \$29,000 in damages on the state Department of Public Safety for failing to provide either the arrest records or justification for withholding them. (*Cooper v. New Mexico Dep't of Public Safety*)

Fees. A fees provision was added to the public records statute in 1993. Custodians may charge "reasonable fees" for copies. Photocopies may not exceed \$1 a page. Advance payment may be required. Fees may not be charged for the cost of determining whether information is subject to disclosure. N.M. Stat. Ann. § 14-2-9 (Michie Supp. 1994). However, fees shall be charged if the information in the databases is "searched, manipulated or retrieved or a copy of the database is made for any private or nonpublic use." N.M. Stat. Ann. § 14-3-15.1 (1998).

Software. Software generally is not public record; see § 14-3-15.1 and it is likely that § 14-2-1(A)(8) and the recent Supreme Court pronouncement in *City of Las Cruces v. Public Employees Labor Relations Board*, 121 N.M. 688, 917 P.2d 451 (1996) suggest a narrow proprietary interest of the state might be protected.

Resources. New Mexico Foundation for Open Government: www.roswell-record.com/fog/fog.html; New Mexico Commission of Pub-

lic Records: www.nmcpr.state.nm.us/index.htm

NEW YORK

The state law specifically includes information stored on computer, but in a few cases, agencies have been able to deny records that existed only on computer and not in paper. The state's Committee on Open Government has found that e-mail of public officials is covered by the FOIL. Courts have found that information maintained by a private entity that related to government business is covered by the open records law. New York journalists report what they find to be "excessive fees" for electronic records.

The law. Under the Freedom of Information Law, a record is "any information . . . in any physical form whatsoever including, but not limited to . . . computer tapes or discs." N.Y. Pub. Off. Law § 86(4) (McKinney 1988). The law exempts computer access codes. § 87(2)(l). It forbids "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." § 89(2)(b)(iii). The Department of Labor may "use optical disk technology to record and maintain public records, papers, documents or matters." N.Y. Labor Law § 35(1) (McKinney 1988). Legislative information is available over the Internet at no cost, including the text of bills and resolutions, the constitution and laws of the state, and vote information for the final passage of bills.

Case law states, however, that access to information in a computer cannot be restricted because it is not in printed form. *Babigian v. Evans*, 104 Misc.2d 140, 427 N.Y.S.2d 688 (Sup. Ct. 1980), aff'd, 97 A.D.2d 992 (1st Dept. 1983). On the other hand, an agency is not required to prepare any record not possessed or maintained by it. N.Y. Pub. Off. Law. § 89(3) (McKinney 1988)

Cases & opinions. The New York Committee on Open Government is responsible for overseeing and advising with regard to the Freedom of Information, Open Meetings and Personal Privacy Protection Laws (Public Officers Law, Articles 6, 7 and 6-A respectively).

The prohibition against releasing lists of names when they would be used for commercial purposes did not extend to real estate assessment rolls stored in computers because of a "history of public access to assessment records." The form of the records and petitioner's purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy the computer tapes. *Szikszay v. Buelow*, 436 N.Y.S.2d 558 (N.Y. Sup. Ct., Erie County 1981). An agency with electronic records must honor a requester's choice of computer tape or printout. The requester wanted the tape rather than a printout that would have exceeded one million pages. *Brownstone Publishers v. New York City Dept. of Buildings*, 560 N.Y.S.2d 642 (N.Y. App. Div. 1990).

Records contained in an indexed computer database may be protected by the New York State Personal Privacy Protection Law ("PPPL"), which was enacted to protect against the danger to personal privacy posed by modern computerized data collection and retrieval systems. See Public Officers Law, Art. 6-A (McKinney); *Spargo v. New York State Commission on Government Integrity*, 140 A.D.2d 26, 531 N.Y.S.2d 417 (3d Dept. 1988).

In a case involving a request for specific

information in computer files, a judge wrote that "information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form." *Babigian v. Evans*, 427 N.Y.S.2d 688 (N.Y. Sup. Ct., New York County 1980). A private company representing property owners challenging their real property assessments did not get access to copies of a computer data management system where the computer tape file contained information from both property cards, which are public, and from real property transfer reports, which are not. The court said "the computer data management system derived from the exempt forms is . . . protected." *Property Valuation Analysts, Inc. v. Williams*, N.Y.S.2d 545 (N.Y. App. Div. 1990).

An agency must disclose information if it is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, but it is not required to disclose the information that can only be retrieved by new programming or the alteration of existing programs. N.Y. Comm. On Open Gov't Op. 7595 (March 4, 1993). An agency which reprograms or develops new programs in order to create a new record, is acting above and beyond the requirements of the disclosure laws. N.Y. Comm. On Open Gov't Op. 7686 (May 3, 1993).

Fees. The law limits the cost of a photocopy to 25 cents, "or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed" by statute. N.Y. Pub. Off. Law §§ 87(l)(b)(iii), 88(l)(c).

Software. A computer program to allow assessors and others to query property information on a proprietary Web site, does not have to be open to the public. "As I understand its function, the application is essentially a tool that enables assessors and others to use data; it is not data itself and, therefore, in my opinion, it could not be characterized as a 'record' as that term is defined in §86(4) of the Freedom of Information Law. The application, like calculators or computers that provide individuals with the means to create or use data, but which are not themselves 'records', would not in my opinion constitute a record for purposes of that statute. Further, although agencies are increasingly making data available to the public via the Internet, I do not believe that there is any obligation to do so." N.Y. Comm. On Open Gov't Op. 12366 (Oct. 30, 2000).

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. Since §89(3) does not require an agency to create a record, an agency would not be required to reprogram or develop new programs to retrieve information that would otherwise be available [see *Guerrier v. Hernandez-Cuevas*, 165 AD 2d 218 (1991)]. N.Y. Comm. On Open Gov't Op. 10566 (Jan. 22, 1998).

"Software would itself constitute a record that falls within the framework of the Freedom of Information Law, for it would be analogous to a written manual describing a series of procedures to be followed to carry out a certain function. As such, I believe that it would constitute a record falling within the coverage of the Law." N.Y. Comm. On Open Gov't Op. 10882 (June 24, 1998)

E-mail. Government agency e-mail is considered a public record. In addition, when officials conduct business via e-mail, it may violate the open meetings law. N.Y. Comm. On Open Gov't Op. 12348 (Oct. 19, 2000)

Resources. Freedom of Information Law Advisory Opinion Listing www.dos.state.ny.us/coog/fe.html

NORTH CAROLINA



North Carolina has long been deemed one of the best states for access to electronic records by journalists who do computer-assisted reporting. In a recent study by the Marion Brechner Center at the University of Florida, North Carolina and Iowa were rated the top states as far as access to computerized information. In a couple of instances, federal agencies asked state agencies to withhold information that they thought would be exempt under the federal Freedom of Information Act, but was not exempt in North Carolina. In addition, agencies are required to provide indices of their databases — a great starting point for a reporter wanting to use data on the beat.

Although access to data is much better in this state than in some others, reporters still experience difficulties. Reporters still face the argument that if an agency has to write a computer program to retrieve a record, it is creating a record, which is not required by law.

The law. The Public Records Law defines records to include "magnetic or other tapes, electronic data-processing records, . . . or other documentary material, regardless of physical form or characteristics." N.C. Gen. Stat. § 132-1 (1993). The law requires agencies to permit inspection and examination of records "at reasonable times." § 132-6. Requesters may receive copies in any media in which the public agency is capable of producing them. N.C. Gen. Stat. 132-6.2(a) (1998). However, an agency does not need to create a record in a format in which it does not already exist. § 132-6.2(c). No records custodian may deny a request for records in a particular medium on the grounds that the custodian has made or prefers to make the records available in another medium. § 132-6.2(b). Each state agency is required to create an index of computer databases created or compiled by it. § 132-6.1(b). Persons requesting copies of computer databases may be required to make or submit the request in writing. The agency receiving the request shall respond "as promptly as possible." § 132-6.2 (c).

Cases & opinions. It is lawful for a county tax official to provide a requester with a computer tape containing information relating to about 164,000 parcels of land. The information also may be provided "on computer screen, terminal or other form." *Greensboro News & Record, Inc. v. Guilford County*, 92-CVS-7139 (N.C. Super. Ct. 1993). Databases maintained by the departments of transportation and administration are public records, and other executive agency databases may be included

after a nine-month test period. When public and exempt information is "commingled" in a single database, the burden of separating the information falls on the government. Copies may be requested in any format. Exec. Order 37 (Jan. 28, 1994).

The courts ordinarily construe legislative silence with regard to the confidentiality of a record to constitute an intention by the legislature to make the record a public record. See *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 474, 412 S.E.2d 7, 13 (1992).

In June 2000, legislation amended the law to provide that the identity of a state law enforcement officer making a traffic stop and the location of the stop must now be collected and maintained. See CH. SL 00.0067. Section 17.2(a) amends N.C. Gen. Stat. § 114-10(2a). It further provides that "[t]he identity of the law enforcement officer making the stop . . . may be accomplished by assigning anonymous identification numbers to each officer" and that "[t]he correlation between the identification numbers and the names of the officer shall not be a public record and shall not be disclosed by the agency except when required by order of a court." The identity of the officer is not a public record. The location of the stop, however, is part of the public record. N.C. Att'y Gen. Adv. Op. 472 (July 20, 2000); Traffic Law Enforcement Statistics; Public Records; G.S. § 114-10(2a)

A party has requested the ESC to replace the confidential Social Security numbers with a nonidentifying code in order to allow the analysis of the data without revealing confidential, personally identifiable information. Nothing in the General Statutes would require the ESC to comply with such a request. N.C. Gen. Stat. § 132-6.1(c) specifically addresses the issue of creating new databases: "[n]othing in this section shall require a public agency to create a computer database that the public agency has not otherwise created or is not otherwise required to be created." Therefore, the ESC is not required to replace the Social Security numbers with a different uniform identifying character, to do so would be to create another database that the ESC "has not otherwise created or is not required to be created." § 132-6.1(c). Re: Advisory Opinion 433, Sept. 20, 1999; Public Records: § 132-1 et al; Release of data from the Common Follow-Up System: § 96-33

A list of employees or former employees of the Department of Motor Vehicles who are receiving disability income must be released. "The only information it provides is the name of the individual and the amount of money he or she is receiving as disability income. It gives no particulars as to the type of disability or the reasons why the individual was placed on disability. For reasons which follow, such a list is a public record which should be released." N.C.G.S. § 126-22 provides that the "(p)ersonnel files of State employees, former State employees, or applicants for State employment shall not be subject to the inspection and examination (as public records) as authorized by G.S. 132-6." This section then defines what personnel file information consists of. Advisory Opinion 298, March 18, 1997; Public Records; Employee Personnel Information; N.C.G.S. §§ 126-22 and 126-23

A personnel file consists of any information gathered by the department, division, bureau, commission, council, or other agency subject to Article 7 of this Chapter which employs an individual, previously employed an individual, or considered an individual's application for employment, or by the office of State Person-

ACCESS TO ELECTRONIC RECORDS

nel, and which information relates to the individual's application, selection or nonselection, promotions, demotions, transfers, leave, salary, suspension, performance evaluation forms, disciplinary actions, and termination of employment wherever located and in whatever form. N.C. Gen. Stat. § 126-22. Advisory Opinion 298, March 18, 1997; Public Records; Employee Personnel Information; § 126-22 and 126-23.

Fees. The statute requires an agency to provide "certified copies . . . on payment of fees as prescribed by law." N.C. Gen. Stat. § 132-6 (1993). An agency may charge a "reasonable" fee to compile records in a format not already available if it voluntarily elects to provide records in an otherwise unavailable format. § 132-6.2(e) (1998).

Agencies may charge the actual costs of providing uncertified copies of public records. "Actual costs" are limited to direct, chargeable costs related to the reproduction of a public record and include only costs incurred as a result of the request. Additional fees may be charged for requests requiring extensive use of resources or staff assistance so long as they are reasonable and are based on expenses that are actually incurred. § 132-6.2(b).

In a ruling that the public has access to real estate records, the court refused to determine the appropriate fee for the information on computer tape. However, the court said the issue involved determining "the appropriate charge per record for the computerized records." *Greensboro News & Record, Inc. v. Guilford County*, 92-CVS-7139 (N.C. Super. Ct. 1993).

GIS. Counties and cities must provide access to geographic information systems databases and data files by public access terminals or other output devices. A recipient of an electronic copy of such data must agree in writing not to resell the copy or otherwise use it for commercial purposes. News media requesters do not have to make such an agreement. Copies of records in the database are to be made available at a reasonable cost. § 132-10. The statute allows for the assessment of a "reasonable cost" for GIS records.

E-mail. E-mail is not expressly addressed in the Public Records Law but would fall within the definition of a public record, which includes any "documents, papers, letters, . . . regardless of physical form or characteristics." § 132-1(a). Advisory opinions from the attorney general also indicate that e-mail would be treated as any other correspondence.

Each legislator is properly treated as the custodian of his or her e-mail communications whether directly available in the legislator's computer or stored in the legislature's computer system. We are unable to determine the legal status of communication solely between legislators about redistricting and recommend that the General Assembly address the issue. (Att'y Gen. Adv. Op. Public access to legislator's redistricting communications, custodians of records (Feb. 14, 2002) N.C. Gen. Stat. § 129-133; N.C. Gen. Stat. § 132-1, *et seq.*)

Software. In 1998, the Attorney General's office rescinded an opinion finding software to be a public record and opined instead, "[W]e are of the opinion that such software is not a 'record', and, additionally, its disclosure may cause a breach in software security inconsistent with N.C. Gen. Stat. § 132-6.1(c)." 1998 WL 459785, *1 (N.C.A.G.). The opinion concludes, "the explicit language of § 132-6.1 distinguishes software used to generate records

from records it generates. Thus, we are of the opinion that in light of current law, the General Assembly did not intend to mandate disclosure of State-owned computer software pursuant to § 132-1 *et seq.*"

Resources. North Carolina Advisory Opinions: www.jus.state.nc.us/lr/agoopn.htm

NORTH DAKOTA

[REDACTED]

Although the law does not specifically say that electronic records are covered by the open records law, case law and attorney general opinions have found that computerized information is covered by the law. Some problems with the law center around exemptions for software. Using this exemption, agencies may prevent reporters from getting certain types of databases or documentation necessary to interpret databases. In addition, a 1999 law allowed additional fees for searching for records.

The law. The Open Records Statute provides that unless exempt by law, "all records of a public entity are public records, open and accessible for inspection during reasonable office hours." N.D. Cent. Code § 44-04-18 (1998). "Records" are defined as "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded or reproduced." N.D. Cent. Code § 44-04-17.1.

Computer programs, or components thereof, contracted for, developed or acquired by the state or a state agency are exempt. § 44-04-18.5. The law exempts trade secrets and defines them to include "a computer software program and components of a computer software program which are subject to copyright or patent . . . supplied to any state agency . . . which is the subject of efforts by the supplying person or organization to maintain its secrecy and that may derive independent economic value . . . from not being generally known to . . . other persons or organizations that might obtain economic value from [their] disclosure or use." § 44-04-18.4(2). A public entity may enter into agreements for the sale, licensing and distribution of its licensed, patented or copyrighted computer programs. § 44-04-18.5.

Upon request for a copy of specific public records, an agency shall furnish the requester one copy of the record requested. The request need not be stated in writing or in person. § 44-04-18(1). Agencies are not required to create or compile records that do not exist. Access to an electronically stored record must be provided at the requester's option in either a printed document or in any other available medium. A computer file does not constitute an "available medium" if the agency is unable to redact any closed or confidential information contained in the file. A public entity is not required to provide an electronically stored record in a different format, structure or organization. The public entity is not required to provide the requester with access to a computer terminal. § 44-04-18(3). State-level public agencies may establish procedures for providing access from an outside location to any computer database or electronically filed or maintained information it possesses. § 44-04-18(4).

Cases & opinions. "The request for e-mails received and sent by the mayor and other city commissioners in an electronic format is a request for specific records that the City is required to provide the requester. N.D. Cent.

Code § 44-04-18(2), (3). It is my opinion that the City's denial of the electronically stored e-mails in an electronic format on grounds the request was not specific and was overbroad violated § 44-04-18. [. . .] The City may charge \$25 per hour, after the first hour, for locating the e-mails requested by Mr. Gretum after the e-mails on the backup tape are transferred to the server. In addition, the City may charge its actual costs for making a copy of the e-mails." N.D. Att'y Gen. Op. 2003-O-04 (Feb. 25, 2003)

A park district argued that separating exempt or confidential information in its computerized membership records from any information that must be open to the public would require the creation of a new record. "This argument contradicts several sections in N.D. Cent. Code § 44-04. A public entity may not deny a request for an open record because the record also contains confidential or closed information; the entity is required to withhold the confidential or closed information and disclose the rest of the record." § 44-04-18.10. N.D. Att'y Gen. Op. 98-O-22 (Oct. 16, 1998)

Fees. An agency processing a request for documents may charge a reasonable fee for making and mailing the copy, or both. An agency may require prepayment of fees. The agency may subcontract its document copying operations to a public or private entity and fees are to be paid to that entity. Fees are limited to the actual costs of making or mailing a copy of a record or both, including labor, materials, postage and equipment, but excluding any search or redaction costs. N.D. Cent. Code § 44-04-18. The attorney general recommended that a city official could not charge a fee for inspection of records during reasonable office hours. N.D. Op. Att'y Gen. 2 (Jan. 20, 1982).

In 1999 an new fee provision was added: "An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour . . ." § 44-04-18(2)

Software. Software may, in some cases, be withheld under the "trade secret" exemption, which includes: "A computer software program and components of a computer software program which are subject to a copyright or a patent, and any formula, pattern, compilation, program, device, method, technique, or process supplied to any state agency, institution, department, or board which is the subject of efforts by the supplying person or organization to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons or organizations that might obtain economic value from its disclosure or use." § 44-04-18(4)

Resources. North Dakota Attorney General Opinions: www.ag.state.nd.us/opinions/Opinions.htm

OHIO



When Columbus Dispatch Projects Editor Doug Haddix requested every crash record in the past several years from the Ohio Department of Public Safety, the department provided the data in no time. But when he requested basic information from the state's transportation department, the department took months to disclose the records.

he said, "It really depends on the government office or agency." While Haddix calls their success obtaining records from state agencies "fortunate," retrieving records on the local level proves to be more difficult. He said many local agencies are not as familiar with the state public records law and often have outdated computer systems.

Fees, however, have not been a problem. "We presume this is public information so the public's already paid for it. It's been our approach and it's been pretty successful."

The law. State laws define a record as "any document, device, or item, regardless of physical form or characteristic." Ohio Rev. Code. § 149.011(G) (1998). The open records statute applies to "any record that is kept by any public office," unless exempted by law. It requires that "governmental units shall maintain public records in such a manner that they can be made available for inspection to any person at all reasonable times during regular business hours." § 149.43. Another statute authorizes public offices to use electronic records, including magnetic tapes. That statute says the office "shall keep and make readily available to the public the machines and equipment necessary to reproduce the records and information in a readable form." § 9.01.

Cases & opinions. If an electronic record contains any information not contained in paper documents, the public must be given access to the information in the electronic record. The agency is required to have equipment by which the public can access that record. Printouts must be provided at no greater cost than obtaining photocopies of similar paper documents. If the agency uses a contractor to provide computer services, the agency must obtain requested information from the contractor for the requester. However, when a commercial requester wanted both a computer tape and the software to use it, the agency had discretion to provide the tape but was not required to do so. *Ohio ex rel. Recodat v. Buchanan*, 546 N.E.2d 203 (Ohio 1989).

In a review of *Recodat*, the Supreme Court ruled that an agency must allow copying of portions of computer tapes if the requester has presented a legitimate reason why a paper copy of the records would be insufficient or impracticable. The requester must assume the expense of copying the computer tape. An agency is not required to create records or store records in a particular medium to provide greater public access. The court limited *Recodat's* discussion of obtaining software by third-party contractors to the facts of that case. *State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665 (Ohio 1992).

The requester can choose a format for receiving records so long as the computer is already programmed to produce the information in that format, but there is no duty to compile information in a way not already permitted by the existing computer program. *State, ex rel. Scanlon v. Deters*, 45 Ohio St. 3d 376, 379, 544 N.E.2d 680 (1989).

The requester can choose the medium upon which public records will be copied. Thus, where public records are stored electronically, the requester has the right to choose a paper printout or a computer disk or computer tape. Ohio Rev. Code § 149.43(B)(2).

The state's high court also said that time, expense and possible interference with other duties were not sufficient to excuse failure to provide for public inspection and copies of in-

formation in computer files. A records custodian must maintain files so confidential material may be excised and the remainder of the file can be provided to the public "within a reasonable time. . . . This is the public's business, not the [custodian's] private record." *Ohio ex rel. Beacon Journal Publishing v. Andrews*, 358 N.E.2d 565 (Ohio 1976).

Personal e-mail that contained racial slurs was not a public record because it did not serve to document the business functions of a sheriff's department. However, to the extent that an agency e-mail will "document the organization, functions, policies, decisions, procedures, operations or other activities of the office," it is likely to be a public record. *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, No. 97-797 (Ohio, May 20, 1998).

The Department of Highway Safety may use the optical disk process to store records. Original documents may be destroyed after recording by the optical disk process. Op. Att'y Gen 89-042 (June 8, 1989). The Toledo Municipal Court has a legal duty to make available vehicle identification information, which may be accessed from an office computer and may be printed out. A clerk at the court cannot be prosecuted for theft in office for making the information available upon request. *State v. Sanchez*, 606 N.E.2d 1058 (Ohio Ct. App. 1992).

A nonprofit organization of property owners had a right to obtain certain rental property records stored on computer diskettes. Supplying the information on paper was insufficient when the requester specifically asked for the information on disk. "The basic tenet of *Margolius* is that a person does not come — like a serf — hat in hand, seeking permission of the lord to have access to public records." *State ex rel. Athens County Property Owners Assn, Inc. v. Athens*, 619 N.E.2d 437 (Ohio Ct. App. 1992).

Computer tapes containing a city's year-end employee master payroll files are public records. The tapes contained information on 2,500 employees including name, address, telephone number, birth date, education, position, employment status, rate of pay, service rating, overtime, and year-to-date earnings. The city improperly redacted employee Social Security numbers, which the court said are public records. *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, 21 Media L. Rep. 2052 (Ohio Ct. App. 1993).

The 1993-1994 Monthly Record Ohio Admin. Code 4501:2-10-06(B) at 1467 restricts all information contained in or processed through the Law Enforcement Automated Data System (LEADS) to the use of law enforcement agencies and criminal justice agencies for the administration of criminal justice. Records of information contained in or processed through LEADS, including data entered directly into a LEADS data base, computer tape logs created by LEADS of transactions on LEADS, and hard copies of data on a LEADS data base or from other data bases accessed through LEADS, are not public records subject to disclosure pursuant to R.C. 149.43(B). Op. Att'y Gen 94-046 (Aug. 5, 1994.)

A county recorder who makes indexed public records available for inspection during regular business hours may grant the public additional access to such records through the Internet, provided that making the public records available in that manner neither endangers the records nor interferes with the discharge of the recorder's duties. A county recorder may not charge and collect a fee for

providing Internet access to indexed public records. A county recorder may not charge and collect the fee prescribed by R.C. 317.32(I) for photocopying a document when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains. A county recorder may not limit Internet access to indexed public records to real estate title companies. Op. Att'y Gen 2000-046 (Dec. 29, 2000)

Data, photographs, maps and other information created, collected, prepared, maintained and published pursuant to R.C. 1504.02(A)(6) by the Department of Natural Resources' Division of Real Estate and Land Management are public records for purposes of R.C. 149.43. 2. If the Department of Natural Resources stores, produces, organizes or compiles public records in such a manner that enhances the value of data or information included therein, it may charge for copies an amount that includes the additional costs of copying the information in such enhanced or "value-added" format. Op. Att'y Gen 2001-012 (March 28, 2001)

In the absence of facts indicating that the names and addresses of a county sewer district's customers fall within one of the exceptions to the definition of "[p]ublic record" contained in Ohio Rev. Code. § 149.43(A)(1), such names and addresses are public records that are subject to disclosure by the sewer district in accordance with § 149.43. Op. Att'y Gen 2002-030 (Nov. 12, 2002).

Fees. The public records statute requires that copies be made "available at cost." Ohio Rev. Code § 149.43(B) (1998). The Bureau of Motor Vehicles may adopt rules allowing for additional charges for "bulk commercial special extraction requests" for commercial purposes. Such fees are to be limited to actual costs to the bureau and special extraction costs, plus an additional 10 percent. "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs and any direct equipment operating and maintenance costs, including actual costs paid to contractors for copying services. The bureau may also charge fees for redacting information. Reporting or newsgathering is not considered a commercial purpose. § 149.43 (E)(1),(2).

For purposes of determining the fee that may be charged under § 149.43(B) for a customized document created by coordinating and compiling information from public records, "at cost" means actual costs, exclusive of any charges for employee labor or computer programming time involved in either the preparation or actual production of the document. Op. Att'y Gen 99-012 (Feb. 2, 1999).

The cost charged cannot exceed the amount charged for copying paper records. *State, ex rel. Recodat v. Buchanan*, 46 Ohio St. 3d 163, 546 N.E.2d 203 (1989). But, where copying computer tapes creates an "increased financial burden" on the public office, that increased financial burden can be passed on to the requester. *State, ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992). Public offices may arrange with outside contractors to copy computer tapes, and pass the cost of that service directly to the requester. *State, ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992).

E-mail. Neither the public records statute nor Ohio Rev. Code 9.01 address e-mail. The test of whether the public may inspect or copy e-

ACCESS TO ELECTRONIC RECORDS

mail is identical to the test applied to any paper document: (1) is it a record under Ohio Rev. Code § 149.011(A) and (2) is it a public record ("kept by a public office") under Ohio Rev. Code § 149.43(A). However, internal e-mail by county employees using county equipment during county time supposedly communicating racial epithets were not "records" because they did not document the activities of the county. *State, ex rel. Wilson-Simmons v. Lake County Sheriff's Department*, 82 Ohio St. 3d 37, 693 N.E.2d 789 (1998) (rejecting the assertion that e-mail can never be public records.)

Software. Proprietary software needed to access electronically stored public records is not a public record, at least where the information at issue is available on paper. *State, ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992); *State, ex rel. Recodat Co. v. Buchanan*, 46 Ohio St. 3d 163, 546 N.E.2d 203 (1989).

Resources. Ohio Attorney General Opinions: www.ag.state.oh.us/sections/opinions/ag_opinions.htm; Ohio Newspaper Association: www.ohionews.org/

OKLAHOMA

The Oklahoma public records law specifically covers electronic records. Two problems thwart reporters in Oklahoma. First, software is not considered a public record. This distinction in the law makes it easy for an agency to claim that because they use proprietary software, certain records are not public. In addition, the two-track system of fees —commercial and noncommercial—has been interpreted by agencies to mean that if they give data to a reporter in a newsroom, there is no way to prevent them from sharing it with the commercial side of the newspaper. One agency told one newspaper reporter that if the newspaper kept the data after the story for which it was acquired was published, it made it commercial use.

The law. The Open Records Act defines a record as "all documents, including . . . data files created or used with computer software, computer tape, disk. . . or other material regardless of physical form or characteristic." "Record" does not mean computer software. Okla. Stat. tit. 51, § 24A.3(1) (West Supp. 1998). It allows "mechanical reproduction" of records in addition to "copying." § 24A.5(6). The law permits a public body to "keep confidential records relating to . . . computer programs or software but not data thereon" if disclosure would give competitors or bidders an unfair advantage. § 24A.10(B). In June 2000, legislation made information about sex offenders available.

The land description tract index of all recorded instruments concerning real property required to be kept by the county clerk of any county shall be available for inspection or copying in accordance with the provisions of the Open Records Act but such index shall not be copied and/or mechanically reproduced for the purpose of sale of such information. 51 O.S. 1999 Supp. § 24A.5.4.

Cases & opinions. An agency that has computerized public records "has the authority to allow a commercial entity access to specific data in that file in an on-line manner, providing that the system for permitting such on-line access assures that such computerized records will be fully preserved and safeguarded from destruction, mutilation and alteration." Okla.

Att'y Gen. Op. 85-36 (April 30, 1986). The state tax commission properly refused to disclose data relating to unclaimed property reports including financial reports, Social Security numbers, monetary amounts, property descriptions and other identifying information. *Merrill v. Oklahoma Tax Commission*, 831 P.2d 634 (Okla. 1992).

"So long as the item is connected with the transaction of official business, the expenditure of public funds, or the administration of public property, electronic mail created by or received by either a State public body or a public body of a political subdivision constitutes a record which is subject to the Oklahoma Open Records Act, 51 O.S. 24A.1 to 51 O.S. 24A.26 (1991-2000). [. . .]. For purposes of the Oklahoma Open Records Act, 51 O.S. 24A.1 to 24A.26, and the Records Management Act, 67 O.S. 201 to 67 O.S. 215 (1991-1999), electronic mail can be retained either in electronic form or on paper. However, if it is retained on paper, the agency must ensure that sufficient documentation in other records exists elsewhere in the agency so a person seeking the information could ascertain all significant material contained in the electronic record." Okla. Att'y Gen. Op. 01-046 (Nov. 7, 2001).

A state agency which has computerized its files, the information therein being of public record, has the authority to allow a commercial entity access to specific data in that file in an on-line manner, providing that the system for permitting such on-line access assures that such computerized records will be fully preserved and safeguarded from destruction, mutilation and alteration as otherwise required by Oklahoma law." Okla. Att'y Gen. Op. 85-036 (April 30, 1986)

Fees. The law limits fees to "the reasonable, direct costs of document copying, and/or mechanical reproduction." Copying fees are generally limited to 25 cents per page unless prescribed by state law. However, if a request for records is "solely for commercial purposes," or "clearly would cause excessive disruption of the public body's essential functions" then the public body may charge a reasonable fee to recover the direct cost of document search." A search fee may not be charged "when the release of said documents is in the public interest, including, but not limited to the news media, scholars, authors" and other specified requesters. The statute prohibits charges "for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." Okla. Stat. tit. 51, § 24A.5(3) (1998), see also Okla. Op. Att'y Gen. No 96-26 (Jan. 16, 1997).

Despite several years of consideration by the legislature, the issue of a fee structure for electronic records has not been resolved. The Open Records Act merely states that if the request is for "commercial purposes" or "would clearly cause excessive disruption of the public body's essential functions" then the public body "may charge a reasonable fee to recover the direct cost of the document search." However, "publication in a newspaper or broadcast by news media for news purposes shall not constitute a resale or use of data for trade or commercial purpose and charges for providing copies of electronic data to the news media for a news purpose shall not exceed the direct cost of making the copy." The same exception given to the news media should apply to the public when the release of documents is in the public interest. The act concludes that "fees shall not be used for the purpose of discouraging requests

for information or as obstacles to disclosure of requested information." 51 O.S. 1999 Supp. § 24A.5.3.

The Open Records Act states that if the request is for "commercial purposes" or "would clearly cause excessive disruption of the public body's essential functions" then the public body "may charge a reasonable fee to recover the direct cost of the document search." 51 O.S. 1999 Supp. § 24A.5.3.

Resources. FOI Oklahoma: www.foioklahoma.org; Oklahoma Press Association: www.foioklahoma.org/

OREGON

 Eugene Register-Guard reporter Diane Dietz said successfully obtaining electronic records from government agencies, in her experience, is a toss-up. "Some [agencies] are great and some are terrible." While a member of the public can read e-mails that pass between council members at the Eugene City Council, other agencies such as the police department are "not very forthcoming with their records."

While the 2003 legislature is trying to block security records and university donor names, Dietz said that the law clearly defines electronic records and that the problems often lie within the agency. "Some agencies have to be educated, especially when they don't have an aggressive paper there to educate them," she said.

The law. The Public Records Law covers information "regardless of physical form or characteristics," including "every means of recording, including . . . all . . . maps, files, facsimiles or electronic recordings." Ore. Rev. Stat. § 192.410.

Computer programs developed for or by a public body for its own use are exempt. § 192.501(15). However, "computer program" does not include original data, analyses, compilations and other manipulated forms of the original data produced by use of the program. § 192.501(15).

The law mandates "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." § 192.310. "If the public record is maintained in machine readable or electronic form, the custodian shall furnish proper and reasonable opportunity to assure access." § 192.430(1).

For electronic records, a custodian must "provide copies of the public record in the form requested if available." Otherwise, the custodian must provide it "in the form in which it is maintained." The statute allows agencies to collect fees for "summarizing, compiling or tailoring such record, either in organization or media, to meet the person's request." § 192.440. The law exempts from disclosure "computer programs developed or purchased by or for any public body for its own use." A "computer program" does not include "original data," or "analyses, compilations and other manipulated forms of the original data produced by use of the program," or "mathematical and statistical formulas which would be used if the manipulated forms of the original data were to be produced manually." § 192.501(16).

For the Secretary of State's business registry records, the statute allows fees for "computer generated lists on paper and electronic data processing media," for "terminal access

ACCESS TO ELECTRONIC RECORDS

to the files of the office," and "copies of the programs and files on paper or electronic data processing media," implying that such material is public. Ore. Rev. Stat. § 56.140 (1993). However, another section exempts "electronic data processing programs" and "electronic media used to record, process or store documents" filed with the Secretary of State under its business registry functions.

A requester may get a specific format if the format is one which is either used by the government agency or is one which is recognized by the Oregon State Archives Division under its adopted administrative rules. A requester should consult with the specific government agency from which it seeks the records. The Archives Division Rules are found in Oregon Administrative Rules (OAR) Ch. 166 - Divisions 1, 5, 10, 15, 17, 20, 25, 30 and 40. Ore. Rev. Stat. § 192.440 (2) states that if a record is maintained in electronic form, the custodian shall provide it in the form requested, if available. A customized search can be done only if it is compatible with a database software utilized by the public agency.

Cases & opinions. Subject only to reasonable rules to protect records and prevent interference with office work, a county may not refuse to copy a computer tape containing public information. It must allow a requester to make copies of written documents or computer tapes using the requester's equipment. 39 Ore. Op. Att'y Gen. 721 (1979). Two computer programs used by the Department of Revenue to generate appraisal information based on computer-stored data are public records and must be disclosed upon request. Printouts generated by the programs and containing information used in appraising real property also must be disclosed on request. However, the department is not required to provide automated appraisals that could be generated by these programs if the county has not actually applied the programs to a particular property. Ore. Op. Att'y Gen. OP-6126 (June 1, 1987).

Fees. The law allows "fees reasonably calculated to reimburse [the agency] for its actual cost in making . . . records available including costs for summarizing, compiling or tailoring such record, either in organization or media, to meet the person's request." Ore. Rev. Stat. § 192.440(3) (1993). Fees for access to the Secretary of State's electronic records must be "reasonable." § 56.140. When an agency copies a computer tape, the fee may not exceed the actual cost. 29. Ore. Op. Att'y Gen. 721 (1979). Fees for access to geographic information system data shall be based on "market prices or competitive bids." § 190.050.

E-mail. E-mail is treated the same as any "hard copy" record under § 192.420 and is subject to the same disclosure provisions and exemption claims.

Resources. Search Oregon Attorney General Opinions: www.doj.state.or.us/AGOffice/search.htm

PENNSYLVANIA

 Pennsylvania has been considered one of the worst states for access to any records, let alone electronic records. Reporters in this state have used sourcing and other tactics to get databases that they might not have a clear right to under the open records law. The law was updated in 2002. According to the Pennsylvania Newspaper Assoca-

ciation, "The most significant changes to the Act involve the agency's response to a records request and the appeals procedure. The definition of what is a "public record" has not changed."

The law. The Right to Know Act requires "certain records of the Commonwealth and its political subdivisions and of certain authorities and other agencies performing essential governmental functions, to be open for examination and inspection by citizens of the Commonwealth of Pennsylvania; authorizing such citizens under certain conditions to make extracts, copies, photographs or photostats of such records" Amending the act of June 21, 1957 (P.L. 390, No. 212).

The act defines an agency as: "Any office, department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, the State System of Higher Education or any State or municipal authority or similar organization created by or pursuant to statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function." 65 Pa. Cons. Stat. § 66.1.

The act defines a record as: "Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons." 65 Pa. Cons. Stat. § 66.1.

In addition to the requirements of subsection 65 Pa. Cons. Stat. § 66.2(a), an agency may make its public records available through any publicly accessible electronic means. If access to a public record is routinely available by an agency only by electronic means, the agency shall provide access to inspect the public record at an office of the agency. 65 Pa. Cons. Stat. § 66.2 (d).

When responding to a request for access, an agency shall not be required to create a public record that does not currently exist or to compile, maintain, format or organize a public record in a manner in which the agency does not currently compile, maintain, format or organize the public record. 65 Pa. Cons. Stat. § 66.2 (e). If a public record is only maintained electronically or in other non-paper media, an agency shall, upon request, duplicate the public record on paper when responding to a request for access in accordance with this act. 65 Pa. Cons. Stat. § 66.2 (f).

If an agency determines that a public record contains information that is subject to access as well as information that is not subject to access, the agency's response shall grant access to the information that is subject to access and deny access to the information that is not subject to access. If the information that is not subject to access is an integral part of the public record and cannot be separated, the agency shall redact from the public record the information that is not subject to access and the response shall grant access to the information that is subject to access. The agency may not deny access to the public record if the information that is not subject to access is able to be redacted. Information that an agency redacts in accordance with this subsection shall be deemed a denial under 65 Pa. Cons. Stat. § 66.3.3, §66.3.2.

Cases & opinions. Access was denied to

information on a computer tape where the data was not an account, voucher, contract, minute, order or decision within the definition of a public record. *Mitman v. County Comm'r's of Chester County*, 423 A.2d 1333 (Pa. Commw. Ct. 1980).

A commercial requester was entitled to have access to a computerized list of subscribers to a state-published magazine, but the agency could choose the form for releasing that information. The court added that "we expect that the agency will provide for the implementation of our order in an efficient manner, fair and suitable for all concerned." *Hoffman v. Pa. Game Comm'n*, 455 A.2d 731 (Pa. Commw. Ct. 1983). The Right-to-Know Act does not contemplate forcing state agencies to compile or distribute information they do not solicit or possess, *Dynamic Student Services v. State System of Higher Educ.*, 697 A.2d 239 (Pa. 1997).

Fees. Fees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities. 65 Pa. Cons. Stat. §66.7 (b)

If a public record is only maintained electronically or in other non-paper media, duplication fees shall be limited to the lesser of the fee for duplication on paper or the fee for duplication in the native media as provided by §66.7 (b) unless the requester specifically requests for the public record to be duplicated in the more expensive medium. §66.7 (d)

If an agency offers enhanced electronic access to public records in addition to making the public records accessible for inspection and duplication by a requester as required by this act, the agency may establish user fees specifically for the provision of the enhanced electronic access, but only to the extent that the enhanced electronic access is in addition to making the public records accessible for inspection and duplication by a requester as required by this act. The user fees for enhanced electronic access may be a flat rate, a subscription fee for a period of time, a per-transaction fee, a fee based on the cumulative time of system access or any other reasonable method and any combination thereof. The user fees for enhanced electronic access must be reasonable and may not be established with the intent or effect of excluding persons from access to public records or duplicates thereof or of creating profit for the agency. §66.7 (e).

An agency may waive the fees for duplication of a public record, including, but not limited to, when the requester duplicates the public record or the agency deems it is in the public interest to do so. §66.7 (f).

Resources. Pennsylvania Newspaper Association Legal Information: www.pnpa.com/legal/index.htm; Pennsylvania Center for First Amendment: www.psu.edu/dept/comm/about/first.html

RHODE ISLAND

 The law in this state is does not clearly give requesters access to electronic information. However, many reporters have used databases to do important stories. Access to criminal background information is especially restricted in Rhode Island. It is not clear from attorney general opinions whether a government agency has to provide electronic records over a compute printout.

ACCESS TO ELECTRONIC RECORDS

A 1998 public records study, conducted by Access/RI, a nonprofit group that promotes access to public records and public meetings, found that requests for voter lists on diskette were met with varying responses. A few jurisdictions denied access to these records, no matter what the form. In other jurisdictions, the list was not available in electronic form for mundane computer-related reasons: one jurisdiction was waiting for a new computer, another was waiting for a device to compress data, and at another the one person in the office with the necessary knowledge was not in at the time.

The law. The Access to Public Records Act defines a public record to include "tapes, . . . or other material regardless of physical form or characteristics." R.I. Gen. Laws § 38-2-2(d). It requires that "any public body which maintains its records in a computer storage system shall provide a printout of any data properly identified," but "nothing herein shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect such public records was made." § 38-2-3(e), (f). The law requires any public body to grant access to the records and to allow a requester to make his own copies. § 38-2-3(a). Use of information "to solicit for commercial purposes" or "to obtain a commercial advantage over the party furnishing that information to the public body" is prohibited. § 38-2-6.

The APRA expressly provides that storing a record in a compute does not affect the public record status of information. R.I. Gen. Laws § 38-2-3(g).

Cases & opinions. A town violated the Access to Public Records Act by charging \$2.50 for three documents that were created/compiled from data maintained by a computer. Since information was stored by a computer, and the public body would not have been unduly burdened in providing such data, the Access to Public Records Act requires that the requested information be compiled. R.I. Gen. Laws § 38-2-3(f). R.I. Att'y Gen. Advisory Op. ADV PR-00-10 (May 24, 2000).

Third parties may not have access to information in the Bureau of Criminal Investigations database. "If the General Assembly had intended to permit all members of the public access to the BCI database, it would have been superfluous for the General Assembly to enact specific provisions granting employers of identified professions access to this information. Since the General Assembly enacted several provisions permitting identified individuals access to BCI information, but did not codify other provisions permitting landlords/realtors access to BCI information, we believe this evinces the General Assembly's intent to exempt BCI information from public disclosure unless otherwise stated." See R.I. Gen. Laws § 12-1-4. R.I. Att'y Gen. Advisory Op. ADV PR-00-03 (March 10, 2000). A police department may redact the names of individual victims in initial arrest reports upon an appropriate case-by-case balancing test where the public's right to disclosure is weighed against the victim's right to privacy. R.I. Att'y Gen. Advisory Op. ADV PR-99-02 Sept. 7, 1999.

A city cannot charge for remote access to real estate records. A city requested an opinion on its plan for remote computer access in the following manner: annual access fee, \$50.00; telephone line time, \$.50 per minute; copy charge, \$1.50 per page; and remote user facsimile fee, \$2.00 per copy. The attorney general said the "public's right to access public

records via remote computer access presented a unique and complicated issue that lies more appropriately with the General Assembly than this Department. However, based upon the present codification of the APRA, we are of the opinion that R.I. Gen. Laws § 38-2-4(a) serves as an appropriate guide to address your request." Also, "[a] public body may not charge more than the reasonable actual cost for providing electronic records." R.I. Att'y Gen. Advisory Op. ADV PR 00-06, April 18, 2000.

Fees. Charges for copies may not exceed 15 cents a copy. A "reasonable charge" may be assessed for "search or retrieval." Hourly search and retrieval costs cannot exceed \$15 an hour, and no fee may be charged for the first 30 minutes. The requester must be informed of such charges when the request is made. R.I. Gen. Laws § 38-2-4. Individual abstracts of traffic records are available for \$16 each.

Profit-making. No person or business entity may use information obtained from public records to solicit for commercial purposes, or obtain a commercial advantage over the party furnishing that information to the public body. Anyone who knowingly and willfully violates this law is subject to punishment by a fine of not more than five hundred dollars (\$500.00) and/or imprisonment for no longer than one year shall, in addition to any civil liability. R.I. Gen. Laws § 38-2-6.

Resources. Access/RI: www.accessri.org; Attorney General's Public Records Guide and Opinions: www.riag.state.ri.us/access/default.htm

SOUTH CAROLINA

According to the South Carolina Press Association, the law clearly covers electronic records and government officials seem to abide by that standard. Attorney General opinions have found, however, that requesters may have to pay fees for processing of electronic information. Journalists there report inconsistencies in fees for electronic records. Chris Roberts, assistant business editor for *The State* in Columbia, says the law gives agencies leeway. "The kink in the state law says agencies don't have to 'create' a document for us. In one instance, a state agency wouldn't change one piece of an SQL statement to give me an entire database instead of trying to charge me \$150 each for three years of data."

The law. The Freedom of Information Act defines a public record to include "cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics." S.C. Code Ann. § 30-4-20(c). The law grants a right "to inspect or copy" any public record that is not exempt from disclosure. §30-4-30(a).

Cases & opinions. Under the state Election Code, officials must provide a computer tape rather than a printout or microfiche so long as the requester is willing to pay the cost. The agency may not resist when producing the requested format. "Potential misuses of the tape by commercial exploitation" do not justify its denial to any requester willing to pay reasonable costs. The court did not decide how the same issue would be resolved under the open records law. *Martin v. Ellisor*, 223 S.E.2d 415 (S.C. 1976).

The FOI Act requires disclosure of information in a database on government employees, but similar information on private employees should be released only after consultation with

private employers because of privacy concerns related to release of private employee salaries. 88 S.C. Op. Att'y Gen. 42 (May 26, 1988).

Fees. Fees may not exceed the actual cost of searching for or copying records. They must be furnished at the lowest possible cost and in a form that is both convenient and practical for use if it is equally convenient for the public body to provide the records in such form. Fees may be waived or reduced in the "public interest." Fees may not be charged for examining documents if they are subject to disclosure. A records custodian may charge a "reasonable hourly rate for making records available to the public and may require a reasonable deposit before searching or making copies." S.C. Code Ann. § 30-4-30(b).

SOUTH DAKOTA

In an attempt to clarify South Dakota's vague open records law, Attorney General Larry Long created the Government Openness Task Force. Comprised of nearly 30 members, including members of the media, the task force formed in December 2002 and has discussed access to electronic public records, among other practical issues not addressed in the law.

According to Assistant Attorney General Diane Best, the task force will very likely propose legislation in 2004 on electronic records management.

The law. South Dakota's open records law applies to records created in the transaction of official business "regardless of physical form or characteristics." S.D. Codified Laws § 1-27-9(2). The statute also stipulates that records custodians may copy records by an "electronic process." § 1-27-4.

Records can be retained as "magnetic tapes, disks, other machine-sensible data media within a data processing system," and to the extent a government agency is computerized, the agency need not maintain paper records. § 6-1-11.

However, if the state Department of Legislative Audit has requested state agency records, the state agency does not have to provide access to their copies. § 1-27-27.

Cases and Opinions. None found

Fees. Fees are only mentioned in a statute pertaining to "any subscription of license holder list maintained by the Department of Game, Fish and Parks." The list is accessible for a "reasonable fee." S.D. Codified Laws § 1-27-1. Court clerks may charge \$15 per search for court records, if requestor is not a party to the litigation. § 16-2-29.5.

While the open records law remains vague, fees are sometimes set by other statutes and by past attorney general opinions: County auditors may charge actual cost fees for compiling voter registration lists, including charges for the tape, layout and price per name. S.D. Op. Att'y Gen. 88-47. (1988). State agencies may recoup copying costs for staff time, material and supplies. The fees must be "reasonable." S.D. Op. Att'y Gen. 96-01 (1996).

Despite the vagueness of "reasonable," Best said, "We haven't had any complaints about records being withheld because of exorbitant fees."

Resources. The Government Openness Task Force list of applicable statutes: www.state.sd.us/attorney/office/openness/doc.htm

ACCESS TO ELECTRONIC RECORDS

TENNESSEE

A 1998 Tennessee Supreme Court decision that ruled in favor of the media, coupled with a new access-oriented governor, has made access to electronic records in Tennessee easier than its been in years, said Nashville's WSMV-TV investigative reporter Nancy Amons.

"I just got something I've been trying to get for 10 years," Amons said of her recent acquisition of both the Department of Corrections and State Employees databases.

However, the Department of Transportation continues to refuse to release bridge data, and driver's licenses are hard to come by because of the federal Driver's Privacy Protection Act. While outlying area agencies remain inconsistent on access, Amons said access at the state and metro government level is good: "We get most of what we ask for and we get it pretty quickly."

The law. The Public Records Act applies to all "state, county and municipal records" unless made confidential by statute. The act does not define records. Tenn. Code Ann. § 10-7-503(a). However, another statute defines public records to include "electronic data processing files and output, . . . or other material, regardless of physical form or characteristics." § 10-7-301(6).

A legislative committee has "exclusive authority" to approve "direct access" to the legislative computer system, if "protection of any confidential information is ensured." The statute provides that "if public information is stored in a computer-readable form, the committee has exclusive authority to determine the form in which the information will be reproduced for the requester. . . . If access to such public information is also available in printed form, it need not be provided in an electronic readable form. . . . The committee shall designate the terminals, if any, at which public access is given to public information." § 3-10-108 (Supp. 1993).

Government officials may maintain records on computer or on removable computer storage media, including CD-ROMs, instead of on paper if they remain available for public inspection. The official must be able to provide a paper copy of the information upon request and is not required to sell or provide the data media (tape, disk or CD) upon which records are stored or maintained. Tenn. Code Ann. § 10-7-121.

Each county official may provide computer access and remote electronic access for inquiry only to information contained in the records of that office, which are maintained on computer storage media in that office during and after regular business hours." § 10-7-123.

Cases & opinions. The Supreme Court held that if there is information that is stored on computer but not on the format desired by the requester, the agency is required to provide the information in the format requested. *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297 (Tenn. 1998) (electric power board was required to disclose its customer names, addresses, and telephone numbers as a public record, even though it did not have a list of only that information.). This 1998 decision probably overturns *Seaton v. Johnson*, 898 S.W.2d 232 (Tenn. App. 1995) (stating that the Act does not require that state conduct a computer search for a particular type of record).

A federal district court ruled that the media plaintiff had no First Amendment right to City of Cookeville employees' Web browser history and "cookie" files, which store information about web sites that the user has visited. The court noted that it did not address whether the files would be available under the state Public Records Act. *Putnam Pit v. City of Cookeville*, 23 F. Supp. 2d 822 (M.D. Tenn. 1998), aff'd in part, rev'd in part by 221 F.3d 834 (6th Cir. 2000).

A citizen may obtain a duplicate of a public record on magnetic tape at an appropriate cost. Tenn. Op. Att'y Gen. 78-10 (Jan. 9, 1978). A county election commission that keeps its voter registration list on a computer system "is not required to make copies of the voter registration list in a computerized format." The list must be available for copying in printed format. Tenn. Op. Att'y Gen. 92-63 (Oct. 8, 1992).'

Fees. The law does not directly address fees, but requires the lawful records custodian to adopt and enforce reasonable rules for copying. Tenn. Code Ann. § 10-7-506. The section governing records of traffic and local ordinance violations requires a "reasonable fee" for any copy. § 10-7-507. A county may charge a fee that reasonably approximates the cost of copying for a magnetic tape containing information on registered voters. 80 Tenn. Op. Att'y Gen. 272 (1980).

If a request is made for a copy of a public record that has "commercial value" and the request requires copying "all of a portion of a computer-generated map or other similar geographic data that was developed with public funds," additional fees may be charged. Additional fees include labor costs, design and development costs, and costs to ensure the data are accurate and current. The provision only applies in counties with populations between 300,000 and 480,000 people. Tenn. Code Ann. § 10-7-506.

County government records are available electronically. County officials may charge a fee sufficient to recover the costs of providing remote electronic access. When determining reasonable fees for online access to review records, fees shall not include the cost of storage and maintenance of the records or of the electronic record storage system. All fees are to be uniformly applied and once a remote electronic access system is in place, all members of the public are to have equal access, even if they seek to use the information for proprietary purposes. Tenn. Code Ann. § 10-7-123.

Tenn. Code Ann. § 10-7-503(a) does not authorize a local government body to charge a fee for allowing inspection of a public record. "We are not aware of any provision in Title 10, Chapter 7 of the code that would allow a local agency to charge a research and/or location fee *per se*. Conditioning the right to inspect a public record upon the payment of a fee unauthorized by state law would be tantamount to denying the right of inspection that is set forth in Tenn. Code Ann. § 10-7-503." Tenn. Op. Att'y Gen 01-021 (Feb. 8, 2001).

Online. Criminal case dispositions, including dispositions through diversion, may be made available for public inspection over the Internet. Criminal case dispositions, including dispositions through diversion, as well as all records, documents, and pleadings filed with the court clerk, are public records that may be made available for public inspection over the Internet pursuant to Tenn. Code Ann. § 10-7-123. Tenn. Op. Att'y Gen. 00-014 (Jan. 26, 2000).

TEXAS

The biggest change in recent history to freedom of information laws in Texas was the 1995 major overhaul of the existing Open Records Act to include electronic records in the state's newly named Public Information Act, said Freedom of Information Foundation Executive Director Katherine Garner. While Garner calls access "responsive," she said many access issues arise when records are confidential per Texas code, notwithstanding the Public Information Act.

However, with the legislature in session for the first time since September 11, some concern arises over new bills that limit the act's scope, including access to emergency plans and hiked fees for electronic records. There are nearly 30 bills affecting access to public information in the 2003 session, the majority of which the Legislative Advisory Committee of the Texas Press Association opposes.

The law. Texas' Public Information Act applies to information in "magnetic, optical or solid state device that can store an electronic signal." The general forms that contain public information include "voice, data, or video representation held in computer memory." Tex. Gov't Code Ann. § 552.002(b).

Records custodians may only ask for the identification of the requestor, not why the records are needed, and must treat all requests for information uniformly without regard to . . . the status of the individual as a member of the media. §§ 552.222(a), 552.223.

In 1997, the legislature redefined "written request" to include electronic mail and facsimile transmission. § 552.301. Judicial records are governed by Supreme Court of Texas rules. § 552.003.

Texas law states that public information contained in an electronic or magnetic medium may be copied on either paper or in an electronic medium providing that the agency has the technical ability to do so. Also, the agency is not required to purchase software or hardware to comply and must adhere to copyright agreements between the government and a third party in the requested medium. § 552.228(b).

While government agencies are not required to create new information, manipulating existing data to comply with a request is allowed with certain provisions. § 552.231.

Cases & opinions. In an opinion dealing with a request for source code, documentation and computer program documentation standards, the attorney general said that information "used solely as a tool to maintain, manipulate, or protect public property" was not public. Tex. Op. Att'y Gen. ORD-581 (1990). Records custodians must allow the public to inspect copyright material, unless it falls under the open records law, but the custodian may not make copies. The requester is allowed to furnish copies "unassisted by the state." Tex. Op. Att'y Gen. ORD-672 (1987).

Fees. The Texas Building and Procurement Commission mandates charges for open records per Tex. Gov't Code Ann. § 552.009(d).

Government bodies are not allowed to charge for the inspection of records, even in an electronic medium, if the information is not available online. § 552.272(a).

A public agency may not charge a copying

fee for electronic records "available by direct access on its Internet web site" but may charge if a request entails "processing, programming, or manipulation on the government-owned or government-leased computer." Tex. Op. Att'y Gen. ORD-668 (2000).

Resources. The Freedom of Information Foundation of Texas: www.foift.org

UTAH



As legislative monitor for the Utah Press Association, Joel Campbell knows that technology is raising the ante for public records. "We've had pretty good success," Campbell said of obtaining databases while a reporter at the *Deseret News*. But the status quo leaves room for improvement, he said: Reporters don't often request electronic data and the government "raises alarm" in response to electronic records requests.

As the media representative on the Utah Information Technology Commission, Campbell has worked with interpreting existing law to pertain to online records. The 2003 session saw the passage of bills allowing records custodians to charge commercial market value of certain records as well as the breakdown of the commission and the creation of a new body without a media representative.

The law. The Government Records and Management Act allows states that "every person has the right to inspect a public record free of charge," and includes electronic data in its definition of public records. Utah Code Ann. §§ 63-2-201(1), 63-2-102(18)(a).

While the law restricts many records deemed private, controlled or protected under different sections of GRAMA, there are several instances in which a records custodian may release the data if "the public interest in access outweighs the interests in restricting access." § 63-2-201(5)(b).

The request shall be filled or denied within 10 business days, though a custodian must comply with request within five days if a request "benefits the public." However, an agency may take longer if a request requires "extensive editing" or computer programming. §§ 63-2-204(3)(a), 63-3-204(7-8).

The Uniform Electronic Transactions Act passed in 2000 may indirectly affect access to electronic records. However, there are no known instances of its application. § 46-4-101.

While a government agency is not required to create a new record, it may provide the requested records in a specified format if such an action does not interfere with the agency's duties and responsibilities. § 63-2-201(8).

GRAMA stipulates that the public is entitled to inspect portions of records not exempt by law, and that the exempt information "shall be segregated" from the records to examine. § 63-2-202(3).

Cases & opinions. None found.

Software. Proprietary software is not considered a record under GRAMA. Utah Code Ann. § 63-2-102(18)(a)(iv). If the government "chooses not to disclose" a computer program, the original data must be disclosed. § 63-2-301(l).

Fees. Agencies may charge a "reasonable fee" to recoup the "actual cost" of copying the record. If the record is compiled in a form "other than normally maintained," an agency may charge for staff time spent summarizing, compiling, tailoring, searching and retrieving

the records. Records generated by a computer (other than word processing) may accrue additional fees. "the actual incremental cost of providing the electronic services and products" and a "reasonable portion of the costs associated with formatting or interfacing the information." Utah Code Ann. § 63-2-203.

If requester uses his own "copying facilities and personnel" to make copies at the agency office, the fees may be waived. § 63-2-201(9)(b). However, agencies are not allowed to charge for the inspection of a record. § 63-2-203(5)(b). The agency may waive fees if they believe disclosure to be in the public interest. § 63-2-203(4).

Special cases. Ethics Committee records: One set of records considered "private" under GRAMA are Senate and House ethics committee records in regard to "alleged violation of the rules on legislative ethics" either prior to or after a closed meeting. Utah Code Ann. § 63-2-302(1)(a)(iv).

Government employees: Personal information and records on government employees are deemed "private" records. Utah Code Ann. § 63-2-302(1)(a)(vi).

Public body meetings: Transcripts, minutes or reports of a closed meeting are "protected" records. Utah Code Ann. § 63-2-304(32).

Donors to public bodies: If donor or prospective donor requests anonymity, their name and other identifiable donation information is "protected." Utah Code Ann. § 63-2-304(37).

Vehicle Accident History: A law passed during the 2003 session allows for the disclosure of vehicle accident history in bulk form and authorizes the Department of Public Safety to create a fee based on the fair market value of the information.

VERMONT

In 1996 Vermont passed legislation that required only "actual costs" be charged for records. A 1998 survey found "that the General Assembly's intent to standardize charges for copies of the public record has largely been achieved. [...] Copying costs are generally lower than before Act 159 but the lower costs apparently have not increased demands for copies. There remain, however, some wide variations in charges for electronic media among municipal agencies."

The law. The Access to Public Records Law defines a public record as "all papers, documents, machine readable documents or any other written or recorded matters, regardless of physical form or characteristics." Vt. Stat. Ann. tit. 1, § 317(b) (Supp. 1997). It appears to compel agencies to produce copies if they have "photocopying or other mechanical copying facilities." However, if an agency has no such facilities, it is not required to make records available for copying, although it must permit inspection of public records. § 316. Standard forms for records include paper printouts of computer records and for copies in electronic form, the format in which the record is maintained. If records are maintained in an electronic format, they must be available in both an electronic and paper form. § 316.

If an agency maintains public records in an electronic format, the requester may choose to receive the copies in either electronic format or paper format. 1 V.S.A. § 316(i). An agency may, but is not required to, convert paper public records to electronic format. Id.

There is no statutory authority for the re-

quester to obtain a customized search of computer databases to fit particular needs.

Another statute authorizes the state Department of General Services to "maintain and operate a central computer facility for the state government" and, "as resources permit and consistent with confidentiality requirements, offer such data to persons and organizations outside state government." Vt. Stat. Ann. tit. 29 § 1701 (Supp. 1993). A provision limits disclosure of data identifying individuals. The center's annual plans must include policies and practices relating to public access, fees and restrictions on use of reproduction of the information. Vt. Stat. Ann. tit. 10, §§ 121 to 125 (1997).

Cases & opinions. The statute permits agencies to allow requesters to make copies of records on microfilm, but requires only that the agency furnish "copies" of the requested documents in a format of its choosing. The opinion seems to say that requests for information on computer tapes can be satisfied by providing printouts. 87 Vt. Op. Att'y Gen. 20 (1987).

The Vermont Task Force on Information and Technology issued a report recommending changes in government information access laws. It recommended that all state and local government computer records be managed to clearly divide confidential and non-confidential information, the establishment of a statewide computer network to share information with the public, and setting up a statewide voter registration database if privacy protections are adopted. The report recommended developing a procedure to regularly review the open meeting and public records laws to bring them up to speed with changes in information technologies. Computer information should be presumptively open to all citizens and available in computer formats, which would not be considered as creating a new record. The report recommended the goal of establishing full Internet access for all Vermont citizens and encouraging schools and libraries to run low cost training sessions. Using New Information Technology to Enhance Democracy, Vt. Comm'n on Democracy, Report of the Task Force on Information & Technology (Jan. 1994).

Fees. Fees for electronic records are assessed in the same manner as fees for paper records: The agency may collect the actual cost of providing the copy, as well as any costs associated with mailing or transmitting the record by facsimile or other electronic means. 1 V.S.A. § 316(b). In addition, the agency may under certain circumstances collect the cost of staff time associated with complying with a request for a public record. 1 V.S.A. § 316(c). The law does not provide for any search fees. If an agency uses its equipment to copy public records, it may not charge more than "the actual cost of providing the copy." "Actual costs" shall reflect the cost of the paper or the electronic media onto which the record is copied, a prorated charge for the maintenance and replacement of the copying equipment and utility costs. If another statute sets a fee for the copy, the agency may charge only that fee. The agency may also charge and collect fees to recover costs associated with the mailing and transmission of the record by facsimile or other means. Vt. Stat. Ann. tit. 1, § 316 (1997). An agency may also charge for staff time associated with complying with a request if the task requires more than 30 minutes of staff time, if the agency agrees to create a public record or if the agency agrees to provide the record in a nonstandard format and if complying with the request for a changed format would require more than 30 min-

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utes. A written request and prepayment of fees may also be required. A schedule of public records charges shall be posted in prominent locations in town offices. § 316.

Online. A 1998 report to the General Assembly explained the results of a survey of state agencies after changes to the law to implement that they charge "actual costs" for records. The report also addressed online distribution of information: "The impact of posting records on World Wide Web sites was raised in the surveys. The one state agency that reported experience with such postings noted that on-line access to the records eliminated requests for the documents on disk. Our own experience is that our Web site, posted in April of 1996, made no appreciable difference during its first year, but that a significant number of people found their requests for forms and information satisfied on-line during 1997. This suggests that some of the concerns raised in our survey about the labor costs for providing copies of public records may be reduced as more records become available online."

GIS. A separate law passed in 1994 reauthorized the Vermont Center for Geographic Information, including language applying the public records law to geographic information system data.

VIRGINIA

 In the past several years, Virginia has amended its Freedom of Information Act to allow requesters to obtain data in a requested format, has required state agencies to keep a catalog of their databases, has posted court information online and has created a FOI Advisory Council to issue nonbinding opinions. The General Assembly also has created various committees to spearhead the issues associated with electronic public records.

However, when it comes to the practical application of the state FOIA, reporters are frustrated by inconsistencies, the many (87) exemptions to the law and what often are steep charges for records.

The law. Last updated in 2002, Virginia FOIA considers public records to be all "writings and recordings . . . however stored, regardless of physical form or characteristics" held by government employees while transacting public business. Va Code Ann. § 2.2-3701. In order to "encourage and facilitate" FOIA compliance, Virginia amended the Virginia code in 2000 to create a FOI Advisory Council. §§ 2.1-346.2 - 346.5.

Every government agency is required to maintain a catalog of all databases created since 1997. § 2.1-342. Some reporters call the catalog the "precursor to getting electronic records," though they note that some agencies merely record databases created after 1997 while they continue to regularly use older databases.

The state created a Joint Subcommittee Studying the Protection of Court Records in 2002 and extended the study two years in February 2003 (HJ 631). While court information was largely online, including land records, the 2003 General Assembly limited personal information posted online beginning in 2004 with a July 2005 sunset provision.

Information may be available on a fee-based subscription basis under a system developed by the Department of Technology Planning with the input of circuit court clerks, court adminis-

trators and the public. The system would also ask for the requester's "purpose of access."

While the statute says that agencies are not required to produce records in an electronic format "not regularly used" by the agency, agencies should make "reasonable efforts" to offer the electronic records in the medium requested "including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address." Va. Code Ann § 2.2-3704.

When both exempt and nonexempt information are contained in requested records of an electronic or other database, the agency may release the exempt information if not otherwise proscribed. While the agency does not have to offer the exempt data, the agency must provide access to the nonexempt records. The deletion of exempt information or the use of a different medium is not considered the "creation, preparation or compilation" of a new public record. Agencies may deny access if work entails creating a new record. Va. Code Ann § 2.2-3705

Cases & opinions. In Virginia, the Freedom of Information Advisory Council issues advisory opinions on public records access.

Circuit court clerks have the "statutory duty to provide copies of digital databases of all records requested" unless the records are otherwise prohibited from disclosure. Va. Op. Att'y Gen. 02-095 (Dec. 19, 2002). While an agency may deny a FOIA request because the request requires the creation of a new record (i.e. the combining of two databases), the requester is entitled to the raw data to recreate the initial request on their own. FOI Advisory Council Adv. Op. 11-00 (Dec. 12, 2000).

Record custodians may create new records at their discretion but may not charge for the new record without prior notification. FOI Advisory Council Adv. Op. 49-01 (Dec. 17, 2001).

Fees. Government agencies may make "reasonable charges for its actual cost of accessing, duplicating, supplying or searching" for the records. The agency may not charge extra fees to recoup the cost of maintaining and creating records. Va Code Ann. § 2.2-3704F

However, on the issue of record fees, many reporters find the statute application spotty at best. In one instance, *Virginian-Pilot* reporter David Gulliver requested a year's worth of data in five counties from the Department of Motor Vehicles, information that would have been free in Ohio where he worked previously. The agency billed the newspaper \$18,000 for the data. While he managed to negotiate the price down to \$800 and later to "practically nothing," he said fees vary by cities and agencies, due to the unspecific law. When Gulliver requested data from one city, it charged \$500, whereas another city billed merely the price of the CD for similar information.

Software. Software developed by a private vendor as well as software created by or for a "state agency, state-supported institution of higher education or political subdivision of the Commonwealth" is exempt from Virginia FOIA. Va Code Ann § 2.2-3705

E-mail. E-mail between government employees related to public business is a public record. However, messages from government agency e-mail, regardless of subject, do not necessarily make them public records. FOI Advisory Council Adv. Op. 1-00 (Sept. 29, 2000).

Resources. Virginia Freedom of Information Council dls.state.va.us/foiacouncil.htm

WASHINGTON



Washington's public records law, while good on paper, may lack the same ambition in practice. Several Washington reporters have struggled with continuing privacy issues and strictly defined laws or law exemptions. A 2001 records audit showed that general compliance with the law was a "sometime thing."

Reporters Tom Boyer and Justin Mayo of *The Seattle Times* said privacy concerns are increasingly becoming a reason to deny records. Although Mayo routinely received county and state payroll information, including birth dates, both have recently denied the request, claiming that birthdates are considered "private" information.

The Washington Department of Licensing and the court system, not covered by statute, have also been hurdles to accessing information. The reporters say improvements have been made in electronic records access after working with the courts for two years, but Seattle Municipal Court repeatedly denies access and the licensing department very strictly interprets the Driver Privacy Act.

"The biggest problem I see is that many mid-level bureaucrats don't know the law and make decisions arbitrarily," Mayo said. "We usually win the appeal, but it takes time and money to fight these battles."

The law. The Public Disclosure Act governs inspection and copying of public records and applies to all state and local agencies. Wash. Rev. Code §§ 42.17.250 - .341. The definition of records provided by statute includes electronic records, specifically "discs . . . diskettes . . . including data compilations from which information may be obtained or translated." § 42.17.020(42).

Agencies must keep a public records index and provide it upon request, and furnish records or deny the request within five business days or approximate when the records will be available. §§ 42.17.260, .320. When an entire database is requested, the agency may redact exempt information from the database.

The PDA lists 56 types of documents that records custodians are not required to disclose, but may per their discretion, according to a 2003 report by the Washington Coalition for Open Government.

Cases & opinions. Agencies do not have to explain documents or create new records. *Smith v. Okanogan County*, 100 Wn. App. 7, 12-14 (Wash. 2000). An agency may not deny access to records because a requester has other means of obtaining the record. *Limstrom v. Ladenburg* 136 Wn.2d 595, 615 (Wash. 1998). The purpose of a request, besides use of records of commercial purposes, is irrelevant when filling a request. *Dawson v. Daly*, 120 Wn.2d 782, 845 P. 2d 995 (Wash. 1993).

In the state attorney general's Open Meetings & Open Records Deskbook, updated in April 1998, the following interpretations of statutes are provided: If a computer program can produce a record with "little or no change to the agency's method of producing data," it is not considered a "new" record. Also, examination of computer records "appears to imply" viewing records on a terminal or requesting hard copies. Deskbook 3.1(c).

Fees. Inspection of records in agency offices is free and copy fees must not exceed \$0.15 per page. While the agency may charge for providing copies including paper costs, use of copying equipment, staff time for the copying and mailing of records, the agency may not charge for the locat-

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ing of the records. Wash. Rev. Code § 42.17.260.

Agencies tend to overstate costs of copying electronic records, the WCOG report said. It also noted that some agencies provide a certain number copies at no charge, while others allow use of a copier in the office and requesters may also ask that the fees be waived altogether.

"Many are cooperative and some are nightmares," Boyer said. Smaller jurisdictions and state agencies tend to be more "open-records-minded," while King County and Seattle are more difficult to deal with, he said.

Software. "Information regarding the infrastructure and security of computer and telecommunications networks ... [and] access codes for secure software programs," are exempt from disclosure. Wash. Rev. Code § 42.17.310(ddd).

Special cases. Vital Records. Certified copies of vital statistics "may" be furnished by the state registrar. There is an \$8 search fee and an \$11 charge for certified copies of "records for research, statistical, or administrative purposes," according to the report.

Resources. Washington Coalition for Open Government: www.washingtoncog.org

WEST VIRGINIA



Reporter Ken Ward Jr., who coordinates *The Charleston Gazette* computer-assisted reporting program, says the problem in accessing West Virginia's electronic records isn't always a question of the willingness of custodians to disclose, so much as the lack of computer know-how on the agencies' part to pull the data.

Ward said access varies by agency, and he sometimes has to write to an agency outlining the state's law on electronic records or explain how to pull the records in a particular format in order to get the data. Generally, he said, West Virginia should up the ante on computer skills for their records custodians and "learn how to more easily provide [public information] to the public and the press."

The law. In amending the existing Freedom of Information Act in 1992, West Virginia added language to include electronic records in the law. Records custodians are required to fill or deny the request within five business days. W. Va. Code §29B-1-3(4).

If the records exist in "magnetic, electronic or computer form," the custodian should provide the records in that format if so requested. §29B-1-3(3).

Cases & opinions. West Virginia FOIA does not require the creation of public records. *Forsham v. Harris*, 445 U.S. 169 (1980). Just because a public agency has a statutory right to copy records retained by a private entity does not automatically make the records public under FOIA. *Affiliated Construction Trades Foundation v. Regional Jail and Correctional Facility Authority*, 490 S.E.2d 708 (W.Va. 1997).

Fees. The agency may "establish" fees "reasonably calculated to reimburse" the actual cost of copying the records. W. Va. Code §29B-1-3(5).

Special Cases. Legislative databases. W. Va. Code §4-3-5 exempted some information contained in legislative databases.

Resources. West Virginia Press Association: www.wvpress.org

WISCONSIN



With an explicit public records law in Wisconsin, access to electronic records occurs on equal footing with access to paper

records, said *Wisconsin State Journal* reporter Andy Hall. As a practical matter, Hall said, reporters often fail to request electronic records or file a request at all and "aren't fully exploiting the fact that electronic records tend to be more economical and can be analyzed more efficiently than their paper counterparts."

In the larger arena of public records, a special legislative committee in 2003 introduced a bill combating the 1996 state supreme court *Woznicki* decision and subsequent rulings that limited access to records on individuals in light of privacy interests and that the Wisconsin Press Association says "have seriously damaged Wisconsin's once-great Open Records Law."

The law. Wisconsin Act 27 amended the public records law in 1995 and charged the Department of Administration with creating procedures to transfer and maintain public records on optical disk or electronic format. Wis. Stat. § 16.61(2)(a). Administrative Rule 12, effective May 2001, outlines standards and requirements for electronic records management.

Electronic records follow the same guidelines outlined in the state's public records law. Public records include "optical disks, electronically formatted documents or other documentary materials, regardless of physical form or characteristics." § 16.61(b).

Requesters may receive records in any format so long as the agency may provide it. *Monte Couch v. Sun Prairie Area School Dist.* (July 26, 1993) (Docket information not available)

Records custodians are not required to extract information from current records and assemble the data in a new format. § 19.35(L). Administrative Rule 12 stipulates that custodians should "utilize systems that allow records to be masked to exclude confidential or exempt information."

Cases & opinions. Several state supreme court decisions since the mid-1990s allow for custodians to balance public and private interests when deciding to release personal records, not exempt under statute. The person whose personal information is contained in the records may seek circuit court review if records are released. *Woznicki v. Erickson*, 549 N.W.2d 699 (Wis. 1996) and *Milwaukee Teacher's Education Association v. Milwaukee Board of School Directors*, 596 N.W.2d 403 (Wis. 1999). Requesters cannot use their own equipment to copy records without the custodian's permission. Also, the custodian determines how the record will be copied. *Grebner v. Schiebel*, 240 Wis. 2d 551, 624 N.W.2d 892 (2001 WI App.).

Fees. Record fees may not exceed "the actual, necessary and direct cost of reproduction and transcription of the record." The records custodian may also provide the records free or at a reduced price if custodian deems it to be in the public interest. Wis. Stat. §§ 19.35(L), 19.35(3). Custodians may also charge a locating fee, §19.35(3)c, but may not charge for a computer run (though printout charges may apply). Wis. Op. Att'y Gen. 68.

Software. A computer program, defined as "processes for the treatment and verbalization of data," is not subject to disclosure. Wis. Stat. §§ 22.034(c)(1), 19.36(4). However, material "used as input" or "produced" by the program is open for inspection and copying. § 19.36(4). A former attorney general opined that computer programs developed by the state are available to the public. Wis. Op. Att'y Gen. (Aug. 17, 1970).

Resources. Wisconsin Newspaper Association: www.wnanews.com

WYOMING



In a forward-looking effort to keep up with public records in the modern age, Wyoming access advocates amended the

Wyoming Public Records Act (WPRA) to include electronic records. While the measure passed through the legislature "without much convincing," according to Wyoming Press Association Executive Director Jim Angell, several bills in the 2003 General Session were intended to limit accessible information, including masking the identities of legal predator hunters and amending WPRA as a security measure.

The law. Effective July 1, 2002, electronic records are included in the WPRA and are accessible under the same guidelines outlined in the original law. Public records include "original and copies of paper, correspondence, form, book, photostat, film, microfilm, sound recording, map drawing or other document, regardless of physical form or characteristics ..." Wyo. Stat. Ann. § 16-4-201(v).

The WPRA lists 17 exemptions from disclosure. Some documents may be denied if the records custodian feels that disclosure would be "contrary to the public interest." The custodian may apply for a district court order to deny access to the requested records. § 16-4-203(b)(g).

Government agencies must provide an electronic record in "alternative formats" unless to do so would be "impractical or impossible." § 16-4-203(ii).

If an agency believes that compiling and extracting data as well as creating a new record interferes with its "ability to discharge its duties," the agency is not required to comply with the electronic records request. § 16-4-203 (iii).

Cases & opinions. The Wyoming Supreme Court ruled in 1983 that WPRA should be interpreted liberally and the exemptions construed narrowly. The ruling has been cited several times by the court in WPRA cases. *Sheridan Newspapers Inc. v. City of Sheridan*, 660 P.2d 794 (Wyo. 1983). Public officials may not deny access to an entire class of records, absent a compelling state interest. *Houghton v. Franscell*, 870 P.2d 1050, 1053 (Wyo. 1994).

Fees. Agencies may recover the cost of producing and constructing the record, including programming and computer services costs. The statute states that all charges for records "shall first be authorized by duly enacted or adopted statute, rule, resolution, ordinance, executive order or other like authority" after July 1, 2003. Wyo. Stat. Ann. § 16-4-204c.

Software. While software is briefly addressed in WPRA, it is noted that an agency may deny inspection and copying of records if that "would jeopardize or compromise the security and integrity" of the original record or proprietary software. Wyo. Stat. Ann. § 16-4-202(iv).

Special cases. The Wyoming Natural Diversity Database at the University of Wyoming: The custodian may charge a fee to search and prepare a report, which may not contain "recommendations for restrictions on any public or private land." The requester may only inspect database records at a "level of spatial precision equal to the township, but at no more precise level." Private-funded research reports prepared by the database are exempt from disclosure, as well as records on private land without the landowner's written consent. Wyo. Stat. § 16-4-203 (h).

Resources. Wyoming Press Association: www.wyopress.org