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Recommended Citation

Henry H. Perritt Jr., *Electronic Freedom of Information*, 50 Admin. L. Rev. 391 (1998).

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ELECTRONIC FREEDOM OF INFORMATION

HENRY H. PERRITT, JR.*

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INTRODUCTION

The United States Freedom of Information Act (FOIA)¹ is a model for governmental transparency throughout the world. Amendments made in 1996 (EFOIA Amendments) ensure appropriate application of the FOIA to government information represented in electronic formats.² The EFOIA Amendments are a model for how law can ensure that information from public institutions is a part of the information superhighway.³ This Article

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1. 5 U.S.C. § 552 (1994).

2. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, §§ 1-12, 110 Stat. 3048, secs. 1-12 (1996) (to be codified at 5 U.S.C. § 552).

3. See generally HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY (1996) (analyzing legal issues arising from use of global computer and information networks exemplified by Internet) [hereinafter PERRITT, INFORMATION SUPERHIGHWAY].

reviews the genesis and meaning of the 1996 amendments to the FOIA, evaluates initial agency implementations, and criticizes some recent district court case law inconsistent with the letter and/or spirit of the amended act.

This Article emphasizes three themes. First, FOIA is a model for governmental transparency. Second, FOIA is a model for how law can ensure that information from public institutions is part of the information superhighway. Third, proprietary control of agency records disrupts three of the FOIA's purposes, which include the widespread dissemination of government information to increase public access, a decrease in the cost of agency information, and the facilitation of an information system that can adapt to changing, diverse markets for value added information products.

I. TEXT AND LEGISLATIVE HISTORY OF THE EFOIA AMENDMENTS

The Freedom of Information Act is a dissemination and ad-hoc access statute. It requires that agencies act affirmatively to publish certain information and imposes a duty upon agencies to release other information upon request.⁴ The Act's dissemination provisions are supplemented by the Paperwork Reduction Act Amendments of 1995.⁵

A. FOIA's Structure and Basic Concepts

FOIA has a bipartite structure. Subsection (a) imposes a duty on government agencies to publish certain information⁶ and grants a right of access to other information.⁷ Subsection (b) enumerates exceptions to the duty to disclose imposed in subsection (a).⁸

The scope of the affirmative obligation to make information available is circumscribed by the definition of agency record. Agency is defined broadly, although it does not include Congress or the courts.⁹ Covered agencies need not create records, but only provide access to existing ones.¹⁰ Anyone has standing to request agency records without showing any par-

4. 5 U.S.C. § 552(a)(1)-(3) (1994).

5. Pub. L. No. 104-13, 109 Stat. 163 (1995) (to be codified at 44 U.S.C. §§ 3501-3520).

6. 5 U.S.C. § 552(a)(1)-(2) (1994) (obligating agencies to publish information about their organization).

7. *Id.* § 552(a)(3) (granting residual right to access other types of agency records on request).

8. *Id.* § 552(b). *See also infra* notes 18-26 and accompanying text.

9. *Id.* § 552(f). "[A]gency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.*

10. *McDonnell v. United States*, 4 F.3d 1227, 1244 (3d Cir. 1993).

ticular interest.¹¹

Under the EFOIA Amendments, "record" unambiguously includes electronic formats.¹² Additionally, the affirmative obligation to publish information extends to records requested on an ad hoc basis "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records"¹³ Agencies must make available within one year records created on or after November 1, 1996, by computer telecommunications or other electronic means.¹⁴ In addition, agencies must make a general index of such records available by computer telecommunications by December 31, 1999.¹⁵ Agencies must honor format requests if the record is readily reproducible by the agency in that form, specifically including electronic formats.¹⁶

Public access law everywhere recognizes that the state may have a legitimate interest in denying access to certain classes of information.¹⁷ The United States Freedom of Information Act is no exception. Subsection (b) contains nine enumerated exceptions to disclosure: 1) information that is correctly classified as secret for national security or foreign policy purposes,¹⁸ 2) internal agency personnel rules and practices,¹⁹ 3) information that would invade personal privacy,²⁰ 4) information that would compromise commercial secrets,²¹ 5) information clothed in executive or deliberative privilege, the disclosure of which would chill candid internal deliberation and advice giving,²² 6) information explicitly protected from disclosure

11. This was one of the major innovations when the FOIA was first enacted in 1966. See Henry H. Perritt, Jr. and James A. Wilkinson, *Open Advisory Committees and the Public Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 738 (1975) (explaining FOIA's history).

12. 5 U.S.C.S. § 552(f)(2) (Law. Co-op. Supp. 1998).

13. *Id.* § 552(a)(2)(D).

14. *Id.* § 552(a)(2)(E).

15. *Id.* § 552(a)(2)(E)(6).

16. *Id.* § 552(a)(3)(B)-(C).

17. See, e.g., Swedish Freedom of the Press Act, chap. 2, art. 2 (authorizing restrictions on access necessary to protect security of realm, central finance policy, control of public authorities, criminal prosecution, public economic interest, protection of privacy, preservation of species).

18. 5 U.S.C. § 552(b)(1) (1994).

19. *Id.* § 552(b)(2).

20. *Id.* § 552(b)(6).

21. *Id.* § 552(b)(4).

22. *Id.* § 552(b)(5). See also *Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1458 (1st Cir. 1992) (referring to 5 U.S.C. § 552(b) as "deliberative process privilege").

by other statutes,²³ 7) information that would compromise criminal investigations and prosecutions,²⁴ 8) information on the condition of financial institutions,²⁵ and 9) certain geological and geophysical information.²⁶

Under federal law, the exceptions are construed strictly. There is a presumption in favor of disclosure, and agencies resisting disclosure bear the burden of establishing that the information is covered by one of the enumerated exceptions.²⁷ Under some state laws, those seeking access to government information must demonstrate a legitimate interest in accessing the information.²⁸ Some states deny access when the interest is purely commercial.²⁹ Such limitations place a significant burden on requesters³⁰ and represent a barrier to press access and access by those who seek to extend the reach of public information by republishing it.³¹

Another potential limitation under some state laws would limit access to information that reveals the operations of government.³² In addition, it would deny access as a matter-of-right to commercial information.³³ The problem with this distinction is that much of the information that represents government output, such as court decisions and legislative enactments, has commercial value.³⁴ Furthermore, other information that appears to be a commercial product produced by government, such as maps, charts, and land records, is necessary in order for citizens to participate meaningfully in governmental proceedings. Examples of this are zoning and other land

23. 5 U.S.C. § 552(b)(3) (1994).

24. *Id.* § 552(b)(7).

25. *Id.* § 552(b)(8).

26. *Id.* § 552(b)(9).

27. "The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *See United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). *See also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (denying access to law enforcement records under general principle).

28. *See John Doe Agency*, 493 U.S. at 152 (recognizing that FOIA requests could possibly harm governmental or private interests).

29. *See id.* at 153 (citing balance Congress struck in Act's broad provisions).

30. *See generally* Sean E. Andrussier, *The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the People*, 1991 DUKE L.J. 753 (1991) (criticizing drift in lower court decisions to weigh public interest in favor of disclosure in evaluating some FOIA requests; Act contemplates categorical (unconditional) disclosure of certain categories of information).

31. *See generally* Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL OF RIGHTS J. 179 (1995).

32. *Id.* *See also supra* note 31 and *infra* notes 33-40.

33. *See generally* PERRITT, *INFORMATION SUPERHIGHWAY*, *supra* note 3, at ch. 11 (1996) (analyzing interpretations of state FOIA statutes).

34. Both Westlaw and Lexis sold recently for several billion dollars each. A significant part of both enterprises' assets is in the form of information available under the FOIA.

use decisions. The FOIA's legislative history reveals that the basic rights of FOIA are complemented by agency obligations under the Paperwork Reduction Act not to restrict redissemination and to promote a diversity of sources and channels for dissemination of government information.³⁵

B. EFOIA Amendments

The EFOIA Amendments express the following findings:

(1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose; (2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates; (3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government; (4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards; (5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and (6) Government agencies should use new technology to enhance public access to agency records and information.³⁶

The purposes of the EFOIA Amendments are to: "(1) foster democracy by ensuring public access to agency records and information; (2) improve public access to agency records and information; (3) ensure agency compliance with statutory time limits; and (4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government."³⁷ Under the EFOIA Amendments, "record" unambiguously includes electronic formats.³⁸

In regard to the Amendments, the House Report states that Section 3, "articulates the existing general policy under the FOIA that all Government records are subject to the Act, regardless of the form in which they are stored by the agency. The Department of Justice agrees that computer da-

35. A good example of a commitment to a policy of diversity is expressed in the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, §§ 1-4, 109 Stat. 163 (1995) (to be codified at 44 U.S.C. §§ 3506 (1994)).

36. Electronic Freedom of Information Act Amendments of 1996, § 2(a), 110 Stat. 3048, 3048 (1996).

37. *Id.* § 2(b), 110 Stat. at 3048-49.

38. 5 U.S.C.A. § 552(f)(2) (Law. Co-op. Supp. 1998). "[R]ecord' and any other term used in this section in reference to information includes 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." *Id.*

tabase records are agency records subject to the FOIA."³⁹ The House Report emphasizes the intended breadth of the Amendment's definitions. It expresses the intent that right to access should turn on information content and not on the format of the information, whether now available or later developed.⁴⁰ It explicitly rejects the analysis of *SDC Development Corporation v. Mathews*.⁴¹ The House Report also rejects the idea that information can become inaccessible under FOIA merely because it is part of a dissemination system such as the National Library of Medicine.⁴²

The EFOIA Amendments expand affirmative agency electronic publishing obligations. It says:

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and (E) a general index of the records referred to under subparagraph (D); (6) ... Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999.; and (7) ... For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.⁴³

Under the EFOIA Amendments and the Government Printing Office Electronic Information Access Enhancement Act of 1993,⁴⁴ agencies must publish through electronic channels information covered by the FOIA section 552(a)(1), such as descriptions of agency organization.⁴⁵ They must also publish information covered by section 552(a)(2), such as agency orders and opinions,⁴⁶ and information covered by section 552(a)(3), which have been requested on an ad hoc basis and "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records"⁴⁷ According to the legislative history, if agencies are unable to make these materials available on-line (i.e. through the Internet), they must make them available in some other computer-readable format such as a

39. H.R. REP. NO. 104-795 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3462.

40. *Id.*

41. 542 F.2d 1116 (9th Cir. 1976) (holding that agency-created computer database was library material and not agency record in accordance with Records Disposal Act).

42. H.R. REP. NO. 104-795 at 20.

43. Electronic Freedom of Information Act Amendments of 1996, § 4, 110 Stat. 3048, 3049 (1996).

44. 44 U.S.C. § 4101 (1994).

45. 5 U.S.C. § 552(a)(1)(A) (1994) (referring to organization details).

46. *Id.* § 552(a)(2)(A).

47. 5 U.S.C.S. § 552(a)(2)(D) (Law. Co-op. Supp. 1998).

CDROM or disk.⁴⁸ These new electronic publishing obligations extend to subsection (a)(2)(D) materials created on or after November 1, 1996.⁴⁹ Previously released records on a popular topic are not only treated as subsection (a)(2)(D) records, but they must also be listed in an index made available on-line by December 31, 1999.⁵⁰ This will facilitate future access to such records and reduce the burden placed on agencies as a result of repetitive requests.

Under the EFOIA Amendments, agencies must honor format requests by requesters if the record is readily reproducible by the agency in that form.⁵¹ This includes electronic forms or formats.⁵² This requirement states:

(B) In making any record available to a person ... an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section. (C) In responding ... to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system. (D) [T]he term 'search' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.⁵³

The legislative history of the EFOIA Amendments reveals that the intent of Section 5 is to overrule *Dismukes v. Department of the Interior*.⁵⁴ It is also intended to preempt the argument that the computer manipulation necessary to retrieve records amounts to creation of a new record and is therefore outside FOIA obligations.⁵⁵ Rather, the obligation to release electronic formats, when the requester desires that, includes an obligation to do routine amounts of agency database manipulation.⁵⁶ Section 2 requires that information subject to release under the Act must be made available "for any public or private use."⁵⁷ The legislative history makes it clear that federal policy favors access by non-governmental publishers to information

48. H.R. REP. NO. 104-795, at 20 (1996).

49. 5 U.S.C.S. § 552(a)(2) (Law. Co-op. Supp. 1998).

50. *Id.*

51. *Id.* § 552(a)(3)(B).

52. *Id.* § 552(a)(3)(C).

53. Electronic Freedom of Information Act Amendments of 1996, § 5, 110 Stat. 3048, 3050 (1996) (amending 5 U.S.C. § 552(a)(3)).

54. H.R. REP. NO. 104-795, at 21 (1996) (citing *Dismukes v. Department of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984) (holding that agency is not required to accommodate plaintiff's format preference under FOIA)).

55. H.R. REP. NO. 104-795 at 22.

56. *Id.*

57. Electronic Freedom of Information Act Amendments of 1996, § 2(a)(1), 110 Stat. 3048, 3048.

held by government agencies.⁵⁸

II. PRECURSORS

The EFOIA Amendments did not break new policy ground. They consolidated and codified a consensus that emerged over nearly ten years regarding the relationship between FOIA and information technology. The first steps in the development of that consensus were taken in conjunction with a report prepared for the Administrative Conference of the United States (ACUS) in 1987-1988, leading to the adoption of ACUS Recommendation 88-10.⁵⁹ The consensus crystallized further with the aid of a Benton Foundation conference in 1989,⁶⁰ the American Bar Association (ABA) recommendations adopted in 1990 and 1991,⁶¹ and the release of revised OMB Circular A-130 at the beginning of the Clinton administration.⁶² The basic concepts of the consensus were merged with a growing interest in the Internet and the World Wide Web in a report prepared for the Clinton administration in late 1993 and early 1994.⁶³ The author of this Article was the principal drafter of many of these materials. The precursors consistently support the following principles:

58. The legislative history states,

The Paperwork Reduction Act of 1995 ... acknowledges that private, non-governmental information providers perform an essential public service in expanding the availability of information to the public. Government agencies cannot be expected to match the dynamism and creativity of information providers in transforming Government information into valuable consumer information products, especially given the robust nature of information technology developments. Consequently, nongovernment information distributors play a valuable role in advancing information policy objectives.... Making more information available to the public can divert simple requests away from FOIA. This will enable agencies to more efficiently use their limited resources to complete requests on time.

H.R. REP. NO. 104-795 at 12-13.

59. Federal Agency Use of Computers in Acquiring and Releasing Information, 1 C.F.R. § 305.88-10 (1989) [hereinafter ACUS Recommendation 88-10].

60. See Henry H. PERRITT, JR., ELECTRONIC PUBLIC INFORMATION AND THE PUBLIC'S RIGHT TO KNOW, 1 (1990) [hereinafter PERRITT, PUBLIC'S RIGHT TO KNOW].

61. Electronic FOIA guidelines were adopted by the ABA Board of Governors in its winter 1990 meeting. Electronic dissemination guidelines were drafted for the ABA Section on Administrative Law and Regulatory Practice, approved by the Section's Council at its mid-winter 1991 meeting, and adopted by the House of Delegates of the ABA in August 1991. Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79, 105 n.77 (1992).

62. Management of Federal Information Resources, 58 Fed. Reg. 36,068 (1993).

63. See generally Henry H. Perritt, Jr., *Public Information in the National Information Infrastructure: Report to the Regulatory Information Service Center, General Services Administration, and to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget* (1994) [hereinafter 1994 Report].

1. FOIA covers electronic information and formats.
2. The government should encourage the electronic dissemination of information.
3. The government should encourage a diversity of information sources.
4. The government should discourage exclusive arrangements.

The precursors progressed from theoretical and abstract recommendations to more specific recommendations that engage technology and administrative issues. They culminated in the very specific and detailed Paperwork Reduction Act of 1995,⁶⁴ and then the EFOIA Amendments.

A. ACUS

In 1988, the ACUS issued Recommendation 88-10.⁶⁵ The Recommendation encouraged agencies to apply the FOIA to electronic formats and recommended greater use of information technology to disseminate agency information, aiming to make agency offerings complement private sector offerings.⁶⁶ The Recommendation discouraged exclusive arrangements for disseminating public information. It supported agency experimentation with electronic means of providing public participation and rulemaking, adjudication, and other administrative proceedings.⁶⁷

B. ABA

In 1991, the ABA adopted a policy statement encouraging agencies to adopt affirmative programs of electronic public information dissemination.⁶⁸ The policy includes making appropriate information formats and record structures available in order to make information widely accessible, and to discourage exclusive arrangements.⁶⁹ The ABA policy statement also encourages the development of a multiplicity of information products serving the same market and an appropriate balance between public and private initiatives.⁷⁰ In addition, the policy statement encourages agencies to provide electronic publications to depository libraries.⁷¹ A 1990 ABA policy statement expressed the view that the FOIA applies to electronic

64. Pub. L. No. 104-13, 109 Stat. 163 (1995).

65. See ACUS Recommendation 88-10, *supra* note 59.

66. *Id.*

67. *Id.*

68. ABA Recommendation No. 109C, adopted by the ABA House of Delegates (Aug. 1991) (stating guidelines for federal and state agency dissemination of public information in electronic form).

69. *Id.*

70. *Id.*

71. *Id.*

formats and that FOIA requesters should be entitled to specify which of several available formats possessed by an agency should be made available to them.⁷²

C. Benton Foundation

A conference on public access to electronic public information was held in October 1989, under the sponsorship of the Benton Foundation and the Bauman Family Foundation.⁷³ The conferees agreed that the FOIA covers electronic information, that software might be needed to provide meaningful access to electronic information, and that requesters are entitled to choose among existing formats.⁷⁴ In regard to dissemination, the conferees agreed that the government should take an affirmative role and encourage a diversity of information sources and that it is appropriate in some cases for the government to "retail value-added features."⁷⁵ They also agreed that "[s]ome central authority should articulate policy guidelines for electronic dissemination rather than leaving matters entirely to individual agencies."⁷⁶

D. OMB Circular A-130

Issued on July 2, 1993, OMB Circular A-130 contains the most comprehensive statement of executive branch information policy.⁷⁷ One can trace the emerging consensus over federal dissemination policy from early OMB pronouncements on the subject⁷⁸ to the present OMB Circular A-130.⁷⁹

72. ABA Recommendation No. 102, adopted by the ABA House of Delegates (Aug. 1990) (stating guidelines for applying FOIA to electronic formats).

73. See PERRITT, PUBLIC'S RIGHT TO KNOW, *supra* note 60, at 39 (showing areas of agreement and disagreement on electronic dissemination policy).

74. *Id.* at 39-41 (summarizing areas of possible agreement and disagreement among conferees).

75. *Id.* at 44.

76. *Id.* at 45.

77. Management of Federal Information Resources, 58 Fed. Reg. 36,068 (1993).

78. See Advance Notice of Further Policy Development on Dissemination of Information, 54 Fed. Reg. 214 (1989) (emphasizing deference to private sector information resellers); Second Advance Notice of Further Policy Development on Dissemination of Information, 54 Fed. Reg. 25,554 (1989) (responding to comments on OMB's January 4, 1989 notice expressing greater willingness for government to add value to electronic information).

79. See generally HOUSE COMM. ON GOV'T OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFO. BY FED. AGENCIES; A POLICY OVERVIEW, H.R. REP. NO. 99-560, at 2 (1986) (criticizing exclusive arrangements preventing access to government information in electronic form - report's principal author was Robert Gellman, Counsel to the Subcommittee on Information); ACUS Recommendation 88-10, 1 C.F.R. § 305.88-10 (1989); Henry H. Perritt, Jr., *Electronic Acquisition and Release of Federal Agency Information; An Analysis*

The breadth of agencies covered in the Circular demonstrates its comprehensiveness. The Circular covers executive departments, military departments, government corporations, government-controlled corporations, other establishments in the executive branch of the federal government, and independent regulatory agencies. Ironically, within the Executive Office of the President, the Circular only includes OMB and the Office of Administration.⁸⁰ In addition, the Circular recognizes that government information is a valuable national resource and a commodity in the marketplace.⁸¹ It further recognizes that the free flow of information between government and the public is essential to a democratic society,⁸² and that a diversity of disseminators is beneficial.⁸³

In recognizing that agencies have a responsibility to provide information to the public consistent with their missions,⁸⁴ the Circular provides that agencies should consider the availability of information dissemination products from other sources equivalent to potential agency products, establish inventories and other finding aids, and provide notice and opportunities for consultation with respect to changes in information disseminator product offerings.⁸⁵ In addition, agencies must take advantage of public and private channels in discharging their dissemination responsibilities.⁸⁶ In line with the commitment to a diverse dissemination process, the Circular expressly encourages the use of electronic methods of dissemination.

The Circular discourages exclusive arrangements by or on behalf of the agency, including restrictions and the imposition of fees on reuse or redissemination of federal information.⁸⁷ Moreover, agencies should charge for information dissemination products only at a level sufficient to recover the

of ACUS Recommendations, 41 ADMIN. L. REV. 253 (1989) (explaining Recommendation 88-10); Henry H. Perritt, Jr., *Federal Electronic Information Policy*, 63 TEMPLE L. REV. 201, 202 (1990) (elaborating on FOIA concepts developed in ACUS Recommendation 88-10).

80. Management of Federal Information Resources, 58 Fed. Reg. 36,068, § 6(a), at 36,070 (defining "agency" under the Circular).

81. *Id.* § 7(b), at 36,071.

82. *Id.* § 7(c).

83. *Id.* § 7(e).

84. *Id.* § 8(a)(5), at 36,072.

85. 58 Fed. Reg. 36,068, § 8(a)(6), at 36,072.

86. *Id.* § 8(a)(5)(d)(iii).

87. *Id.* § 8(a)(7)(a)-(b). The commentary to section 8(a)(7) in Appendix IV strongly discourages agencies from attempts to limit or exert control over redissemination or allowing contractors to limit redissemination. *Id.* at 36,084. When the integrity of redisseminated data is of concern, the same commentary suggests possible use of agency trademarks. *Id.* Then, a redisseminator wishing to use the trademark may be required to adopt procedures to assure integrity of the data. *Id.* On the other hand, a redisseminator wishing to avoid the requirements need not use the trademark. *Id.*

cost of dissemination. This excludes the costs of original collection and processing, subject to two important exceptions: 1) when an information product is designed to benefit a specific identifiable group,⁸⁸ and 2) when agency mission responsibilities suggest that it should charge less than the cost of dissemination to reach members of the public.⁸⁹

The commentary to these requirements recognizes the central legal role the FOIA plays. First, the FOIA articulates a policy in favor of free access to government information. It effectively prohibits exclusive arrangements and establishes a fee structure that limits what agencies can charge for federal information.⁹⁰ Second, the commentary to the Circular provides that computer and network technology should be used to improve dissemination of agency information.⁹¹ Finally, it establishes a presumption that value-added enhancements developed for internal agency use should be made available to the public.⁹²

The Circular was well received by affected interests. The library community, however, was concerned about two points. The first was whether the Circular will be read to authorize undue deference to costly private sector sources. Second, there was concern about the Circular's failure to require that depository libraries be provided with all electronic dissemination products regardless of cost to the agencies.

E. 1994 Report to OMB

The purpose of the 1994 Report to the OMB was to recommend a strategy for ensuring that information resources held by the federal government were put on the "Information Superhighway."⁹³ The result was a report that is unique because it describes a detailed plan about how to implement the recommendations set out in the previously discussed policy statements.

The 1994 Report observed that the "National Information Infrastructure" can be an electronic market for information created by millions of persons and entities.⁹⁴

In that market, government information is an important commodity for end users. It is also important as input for producers of secondary information products. For this

88. *Id.* § 8(a)(7)(c), at 36,073. This exception is intended to be used sparingly, such as when the Census Bureau accedes to a request by a particular industry to collect data that it would not otherwise collect on the condition that the industry to benefit contributes to the cost of collection and/or special processing.

89. *Id.*

90. 58 Fed. Reg. 36,068, 36,084 (discussing § 8(a)(7)).

91. *Id.*

92. *Id.* (discussing § 8(a)(8)).

93. See generally 1994 Report, *supra* note 63.

94. *Id.* at 1.

market to realize its potential, government information policy must encourage a diversity of information products and channels, and permit the disaggregation of production so that a variety of product bundles can be offered and assembled through the electronic market.⁹⁵

To stimulate government participation in these changes, the Report urged the Clinton administration to ensure "that government information contributes to making this market a reality by giving attention to basic technology, economic, legal, and policy questions making up government information policy."⁹⁶

The 1994 Report addressed certain technological issues, including "whether the market is best realized through connections to the Internet, through dialup access to electronic bulletin boards, or through other means of electronic transfer"⁹⁷ It also addressed the issue of "what degree of standardization is desirable, at what level, and on what protocols and formats"⁹⁸ Furthermore, it addressed

[W]hether the government should sponsor one or more one-stop shopping centers⁹⁹ ... how electronic marketplaces can provide for billing and collection of fees charged by private and public providers;¹⁰⁰ and what the Internet concept looks like in a broader infrastructure that is built on broadband switched networks with digital connections to the desktop or den.¹⁰¹

It concluded that:

- A policy commitment to the Internet should be articulated, but agencies should not be forced away from dialup bulletin board systems.
- A Government Information Locator System (GILS) should be launched, based on Z39.50-compliant Internet servers, but making maximum use of existing data structures, and ensuring the availability of GILS user interfaces based on Gopher and related Internet techniques on top of Z39.50.
- The Executive Branch should work with the Legislative and Judicial branches to develop a legal document citation system that is nonproprietary and is as suited for electronic as paper formats.
- The federal government should demonstrate the feasibility of low-transaction-cost billing and collection systems as a part of federal information servers.¹⁰²

95. *Id.*

96. *Id.*

97. *Id.*

98. 1994 Report, *supra* note 63, at 1.

99. *Id.* One-stop shopping centers are gateways through which users can obtain access to information possessed and controlled by agencies. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1-2.

The 1994 Report acknowledged certain other technological issues that "were less clear and required further evaluation."¹⁰³ These include:

- How to make databases remotely accessible through standards or conventions that enable linkages between data from different agencies.
- How best to link agency-generated information content to a government-wide locator system.
- How best to make today's dialup electronic bulletin boards fully accessible through the Internet.
- What approaches are best suited to bring information technology into agency rulemaking and adjudication.¹⁰⁴

The 1994 Report noted that "[s]ome economic questions are easier to answer than others."¹⁰⁵ Diversity of information products and channels can exist only if agencies do not establish exclusive arrangements.¹⁰⁶ When agencies offer information products that contain significant value-added elements, they must not deprive potentially competing resellers from "upstream" access to more basic elements, such as raw content.¹⁰⁷ Agencies should price their information products at levels no greater than the marginal costs of dissemination, and not set prices to recover investment made in features for internal agency use.¹⁰⁸

It is reasonably clear that some subsidy¹⁰⁹ is appropriate for unsophisticated and poor consumers of information. It is less clear whether this subsidy should be oriented toward the supply of information products and network access, or whether it should be a demand-side subsidy. It is also not

103. 1994 Report, *supra* note 63, at 2.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 1994 Report, *supra* note 63, at 2.

109. 'Subsidy' is a term that evokes strong feelings. Several times in discussions about the subject of the report, interest groups have objected to the use of the term subsidy as applied to publicly funded information resources made available to their interest groups. They fear that use of the term implies that providing the information resource is questionable policy or that the recipients of the information resource do not perform a socially useful purpose. Neither implication is correct. Subsidy as used in this paper simply means that public funds are used to pay for something. The dictionary definition of subsidy supports this use. See Webster's New World Dictionary (2d Coll. Ed. 1984) ('subsidy:' (b) a government grant to a private enterprise considered a benefit to the public.'). Occasionally, the term is used to refer to the support that public funds provide to an element of cost incurred by a federal agency, signifying that when the federal agency competes with a private sector provider of the same or a similar information product, the agency need not generate as much revenue from prices charged to consumers, because some of its costs have been 'subsidized' in this sense. *Id.* at 2-3 n.2.

clear how a subsidy can be prevented from "leaking" so that it becomes a source of unfair competition with private sector resellers who have to price to recover investment.¹¹⁰

"[O]ne of the main differences between dialup bulletin boards and the Internet as means of implementing the electronic marketplace is that the Internet appears to be free because network access is often paid for by educational, research and other institutions on behalf of their constituencies and by other intermediaries"¹¹¹ The consumer usually pays for dialup connections.¹¹² "This perception may distort expressed preferences between the Internet and other wide-area networking and remote access techniques."¹¹³

The 1994 Report observed that:

The legal environment is primarily shaped by access rights under the [FOIA] and by copyright and other intellectual property policies. FOIA, properly applied, entitles citizens to access agency records in electronic form and thus tends to undermine any efforts to set up exclusive arrangements or to deny access to basic information elements. Copyright and intellectual property held by the government, on the other hand, undermine the open marketplace by making exclusivity enforceable and locking potential competitors out. Federal information policy must be vigilant to ensure appropriate application of FOIA to electronic records and to prevent assertion of copyright by government entities. Implementing such a policy requires conforming formal legal advice to agencies and consistent positions in government litigation.¹¹⁴

Finally, the 1994 Report enumerated certain policy propositions on which there is a reasonable consensus.

[T]here should be a diversity of information sources and channels; exclusive arrangements should be discouraged; the Freedom of Information Act applies to electronic formats; it is permissible for the government to make added value available, and it presumptively should do so if it already has paid for the added value features for its own internal activities.¹¹⁵

It reported the following conclusions as also seeming apparent:

- Agencies should not act so as to exclude or discourage non-governmental dissemination activities.
- Agencies should use centrality to their missions as the most appropriate guide to value-adding activities.
- Value added information elements pertaining to core missions or supporting inter-

110. *Id.* at 2-3.

111. *Id.* at 3.

112. *Id.*

113. *1994 Report, supra* note 63, at 3.

114. *Id.* at 3.

115. *Id.* at 4.

nal agency functions, paid for with tax dollars, should presumptively be made available to the public.

- Agency electronic information products should be unbundled; various levels of value that are efficient starting points for other public and private sector redisseminators should be made available.
- Value added features necessary to permit basic citizen access to basic information should be made available if the information is not already available at prices affordable by that audience.
- Pre-existing intellectual property in products delivered under a government contract should be withheld¹¹⁶ by a government agency possessing such property, but when government funds are used for software development, the contract should require that such software be placed in the public domain to facilitate low-cost access and private sector activity to use government-funded software as a starting point for further development and commercialization.
- While agencies should consider whether information products from non-federal sources reduce or eliminate the need for additional value-adding activities, the availability of non-federal sources should not eliminate the duty to make basic information available to the public and to intermediaries.
- The government should continue to develop more than one "one stop shopping" point of access to agency information, representing a mix of dial-up bulletin board and Internet approaches, with an ongoing evaluation of the impact on private markets and availability of government information to end users and redisseminators.
- The National Archives should establish an Internet server for archiving agency materials made available on the Internet, recognizing that any library — or anyone else — who wants to set up its own archives can do so simply by setting up a specialized server on the Internet for creating and maintaining archives. The National Archives also should begin developing software to automate some of the records screening activities necessary to an efficient archival collection.
- The Administration should endorse and fund several pilot programs under which libraries establish connections to the Internet and develop Gopher, World Wide Web/Mosaic or other client interfaces for public access. These pilots should explicitly evaluate the competitive impact on private sector dissemination activities. Demonstration programs should explicitly encourage value-added library products to test the proposition that library constituency-oriented features may help limit the market-disrupting effects of publicly supported value added activities by libraries.
- Agencies should concentrate on making their information resources available through the Internet rather than on making major investments in user interfaces.
- Agencies should give attention to developing effective approaches for facilitating access to agency databases, and in implementing demonstration programs to explore database access across agency lines.¹¹⁷

116. Only the intellectual property should be withheld. *Id.* at 4 n.3.

117. *Id.* at 4-5.

In the past, shortcomings in accessibility of government information created entrepreneurial opportunities.¹¹⁸ Therefore, even the most basic agency efforts to improve citizen access to public information threaten existing commercial activities.¹¹⁹ On the other hand, "there always is one more file that could be placed on an Internet server, some improvement in the user-friendliness of interface software, one more standard to be adhered to, one more citizen who finds present channels and products too expensive."¹²⁰ Some risks of under-dissemination and threats to private markets are inevitable as new technologies are explored.¹²¹

III. DISSEMINATION POLICY: PAPERWORK REDUCTION ACT AMENDMENTS

In 1995, Congress enacted a dissemination policy into the Paperwork Reduction Act.¹²² The policy's language reflects a consensus that had been developing over a number of years, as reflected in ABA policy statements, and in OMB circulars. The relevant language states:

[W]ith respect to information dissemination, each agency shall — (1) ensure that the public has timely and equitable access to the agency's public information, including ensuring such access through — (A) encouraging a diversity of public and private sources for information based on government public information; (B) in cases in which the agency provides public information maintained in electronic format, providing timely and equitable access to the underlying data (in whole or in part); and (C) agency dissemination of public information in an efficient, effective, and economical manner; (2) regularly solicit and consider public input on the agency's information dissemination activities; (3) provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products; and (4) not, except where specifically authorized by statute — (A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public; (B) restrict or regulate the use, resale, or redissemination of public information by the public; (C) charge fees or royalties for resale or redissemination of public information; or (D) establish user fees for public information that exceed the cost of dissemination.¹²³

The figure below shows how these principles operate when an agency decides to offer its own complete bundle of value-added information.¹²⁴ Rather than cutting off access to discrete elements of its content, as point 1, or to its added value, as points 2, 3, and 4, the diversity principle requires

118. *Id.* at 5.

119. *1994 Report*, *supra* note 63, at 5.

120. *Id.*

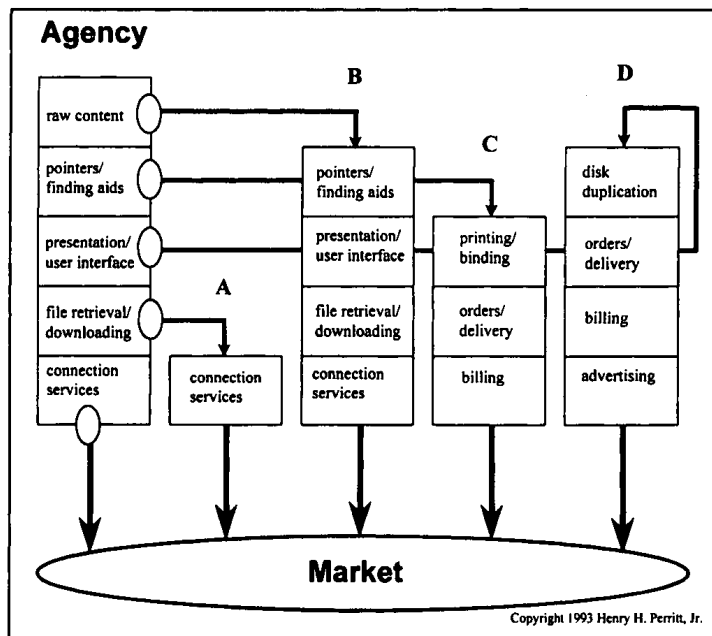
121. *Id.* at 6.

122. 44 U.S.C.S. § 3506(d) (Law. Co-op. Supp. 1998).

123. *Id.* (amended by Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995)).

124. *1994 Report*, *supra* note 63, at 68-69.

the agency to make access available so that competing sources and channels, shown as A, B, C, and D can get pre-existing taxpayer-funded information in a form that meets their product concepts and production needs.¹²⁵



125. *Id.*

A. The Information Infrastructure Envisioned

The EFOIA Amendments and the related statutory framework addressed in the preceding section are all aimed at assuring a particular vision of government transparency. Obviously, a part of that vision includes individual rights to access particular items of information on an ad-hoc basis. Less obvious, but even more important to the vision, is a broadly inclusive information infrastructure, with information from public institutions at its core. The Internet has opened up new possibilities in this regard.

When raw governmental information is accessible to all producers of value-added products through the "National Information Infrastructure," the economics of publishing change dramatically from the traditional print publishing baseline to a more competitive marketplace with lower barriers to entry. With Internet technology, a potential publisher needs only enough capital to establish a server that adds a particular type of value. The publisher can accomplish this without owning the content and all the other types of value, or providing a full range of subject matter.¹²⁶ The Internet thus provides demand economies of scope.¹²⁷ A good example of the attractiveness of Internet technology is the "Thomas" system, established by the Library of Congress to make congressional materials available in full text.¹²⁸ Thomas, contrasted with the Government Printing Office's circumscribed dial-up access service that took years to establish, uses Web technology on the Internet and was established in a matter of weeks. In addition, it is free.¹²⁹

126. The elements of value in an information product include content, formatting such as headings and page numbers, internal and external cross references, copy production, mechanisms for dissemination, billing procedures, and integrity assurance. *See generally* Perritt, *Federal Electronic Information Policy*, *supra* note 79 (setting forth hierarchy of information elements).

127. Economies of scope exist when a supplier provides a greater variety of unit types thereby lowering the individual per unit cost. Demand economies of scope exist when, from the purchaser's perspective, economies of scope exist. In other words, in traditional publishing, demand economies of scope exist for a bookstore that has a wide variety of materials because a user faces lower unit transaction cost. For example, instead of having to go to the one bookstore for the New York Times, another for the Washington Post, and another for Newsweek Magazine, all can be purchased at one location. *See* FREDERIC M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 100-102 (3d ed. 1990) (explaining economies of scope); *see generally* David J. Teece, *Economies of Scope and the Scope of the Enterprise*, 1 J. ECON. BEHAV. & ORG. 223 (1980) (explaining that enterprise scope is determined by transaction costs and realization of economies associated with simultaneous supply of inputs common to processes for producing distinct outputs); *see also* David J. Teece, *Towards an Economic Theory of the Multiproduct Firm*, 3 J. ECON. BEHAV. & ORG. 39 (1982) (exploring economies of scope for different inputs).

128. Thomas is located on the World Wide Web at <http://thomas.loc.gov/>.

129. *See generally* Gingrich *Inaugurates Thomas: Republicans Rethink Access to Gov-*

Government decisionmakers are, however, subject to temptations that tend to frustrate this technological possibility. Public information in electronic form is valuable. Government agencies charged with creating, collecting, and maintaining information such as statutes, judicial opinions, administrative agency decisions, land records and survey information face stringent budget constraints. In this economic context, public agency decisionmakers will naturally suppose that they can ease their budget pressures while serving their publics better by appropriating some of the revenue stream, potentially available from sale of their information, directly to the public or through "partnerships" entered into with private sector entities.

It is but a short step from aspirations to raise revenue through selling public information to imposing restrictions on other vendors and distribution channels. Most public agencies responsible for basic public information have either a natural or *de jure* monopoly on the information. Monopolists perceive that they can increase their total revenue stream by setting prices higher than they would be in a competitive market.¹³⁰ Monopolists are also tempted to extend their monopolies into downstream markets. Thus, public agency decisionmakers, behaving like rational monopolists in the private sector, implement their partnership aspirations by prohibiting private sector competition with their chosen partners. Consequently, a state monopoly is formed.¹³¹ Such an arrangement, however,

ernment Info, 5 ELECTRONIC PUB. INFO. NEWSLETTER, Jan 13, 1995 at 1-3 (describing Thomas system which runs on RISC-chip Unix platform and operates through T1 connection to internet). More recently the GPO electronic services have become much better. See <http://www.access.gpo.gov/su_docs>.

130. See EDWIN MANSFIELD, MICROECONOMICS: THEORY AND APPLICATION 270 (2d ed. 1975) (explaining that monopolist maximizes profit by setting price above marginal costs, and thus higher than competitive price).

131. Strategies for public finance that depend on selling franchises to perform public functions are not new. One of the main ways that King Charles I of Britain financed his government without seeking parliamentary approval of taxes was through franchises. See PAULINE GREGG, KING CHARLES I 215 (1981). Granting monopoly rights for production, sale, or management by King Charles in return for fee or rent had become scandal earlier, leading to Monopoly's Act of 1624 in King James' reign. The Monopoly's Act allowed many exceptions King Charles exploited in "an amazing series of projects." *Id.* Some of the revolutionary fervor both for the English revolution and the American one more than a century later came from reaction to perceived corruption associated with the grant of franchises. See generally T. H. BREEN, TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF REVOLUTION 84-203 (1985) (reviewing calls from Patrick Henry, George Washington, and others for planter class in southern colonies to reduce their need for luxuries, coupled in part on belief that merchant culture in England was corrupt).

The reaction to exclusive franchises in England preceding the execution of King Charles and the establishment of Cromwell's commonwealth was not so much based on a perception of corruption as it was on the exclusion of the parliament from public finance

limits economic and technology benefits otherwise available to a broad range of potential distributors of public information. Moreover, as the monopolies extend downstream by exclusive "partnerships," they block participation in a variety of rapidly changing and diverse markets for value-added information products.

While some monopolies may be efficient in the microeconomic sense,¹³² the incidence of such situations is low.¹³³ The pace of technological change and the fragmentation of the market¹³⁴ make it far more likely that the best market structure is one with many vendors specializing in products for particular market segments. There is no reason to suppose that public decisionmakers are better than consumers and entrepreneurs in picking technologies and product design; yet that is exactly what they must do when they set up exclusive arrangements. The best market structure is one in which everyone is allowed to follow his or her instincts in commercializing new technologies and developing markets. The best information policy is one with a diversity of channels and sources for geographic information. Fortunately, that information policy is one that coincides with legal entitlements to access.

When agencies concomitantly exercise their public functions and mo-

decisions. Theoretically, franchises fell into disfavor because they deprived the benefits of competition from the public. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 521 n.48 (1994) (citing ADAM SMITH, *THE WEALTH OF NATIONS*, 703, 712-16 (Edwin Cannan ed., The Modern Library 1937) (5th ed. 1789) (espousing south sea company as example of Parliamentary sponsored monopoly that should be replaced from independent free enterprise)); see also Neil Netanel, *Alienability, Restrictions and the Enhancement of Author Autonomy in United States and Copyright Law*, 12 CARDOZO ARTS & ENT. L. J. 1, 1 (1994) (characterizing Adam Smith as critical of monopoly privileges but approving temporary monopolies granted to authors and their assigns under Statute of Anne as efficient means of stimulating book production); see also Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 310-311 (1992) (explaining Adam Smith's approval of monopolies when necessary to stimulate book production).

132. See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991) (rejecting monopoly leveraging attack on computerized airline reservation system, court stated "antitrust law tolerates efficient and natural monopolies"); see also Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 304 (allowing efficient monopoly as a policy choice); see also Todd Marcus Young, Comment, *Unestablished Businesses and Treble Damage Recovery Under Section Four of the Clayton Act*, 49 U. CHI. L. REV. 107 (1982) (explaining that efficient monopolies are those that can set prices lower than they would be set in competitive markets).

133. See Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy*, 7 YALE J. ON REG. 65, 117 (1990) (identifying high transaction costs of efficient monopoly, especially because of the "moral hazard" of franchising agents eager to justify exclusive arrangements).

134. The fragmentation of the market is a natural result of the possibility of unbundling in new technological environments.

nopoly powers, they should do so with public revenue. Likewise, when agencies offer commercial services or sponsor others in doing so, they should be subject to the usual rules of the marketplace, including competition.

B. Implementation

FOIA is implemented in two formal ways: through agency rules and by judicial review of agency decisions under FOIA. Most agency rules implementing EFOIA are reasonably appropriate; however, some district court opinions under the Act before its 1996 amendment are troublesome.

EFOIA is less than two years old at the time of this writing. Presently, a number of agencies have expressed themselves officially on its implementation.¹³⁵ Those agencies are proceeding appropriately, although the Defense Department is giving insufficient emphasis to affirmative electronic publishing through the Internet.

The Equal Employment Opportunity Commission amended its regulations to refer to a new Web site and to provide for requests for particular formats.¹³⁶ The Federal Communications Commission (FCC) amended its regulations on October 3, 1997¹³⁷ to provide for requested formats, noting in its preamble the availability of FCC information on its Web site, and the permissibility of filing FOIA requests by fax or email.¹³⁸

On October 24, 1997, the Federal Mine Safety and Health Review Commission amended its regulations to the minimum extent necessary to comply, providing for release in requested formats,¹³⁹ but still requiring requests to be in writing,¹⁴⁰ and not mentioning a Web site.

On September 2, 1997, the Consumer Product Safety Commission published proposed final rules in the Federal Register to implement the EFOIA Amendments.¹⁴¹ The proposed rules define "record" to encompass electronic formats.¹⁴² The Commission posts copies of records released to any-

135. See 63 Fed. Reg. 5452 (1998) (amending 18 C.F.R. § 388) (implementing EFOIA at Federal Energy Regulatory Commission); 63 Fed. Reg. 2873 (1998) (amending 10 C.F.R. § 9) (implementing EFOIA at Nuclear Regulatory Commission); 63 Fed. Reg. 1926 (1998) (amending 37 C.F.R. 203) (implementing EFOIA at Library of Congress, Copyright Office).

136. 63 Fed. Reg. 1339 (1998) (amending 29 CFR § 1610) (referring to Commission's Web page and form and content of EFOIA responses).

137. 62 Fed. Reg. 51,795 (1997) (amending 47 C.F.R. §0).

138. *Id.* at 51,797.

139. 62 Fed. Reg. 55,332, 333 (1997) (amending 29 C.F.R. § 2702).

140. *Id.*

141. Procedures for Disclosure or Production of Information Under the Freedom of Information Act Amendments, 62 Fed. Reg. 46,192 (1997) (amending 16 C.F.R. § 1015).

142. *Id.* at 46,193 (amending 16 C.F.R. § 1015.1(a)).

one under FOIA which are likely to become the subject of subsequent request on the Commission's web site.¹⁴³ The agency justified the latter revision by noting that the statute envisions "an electronic reading room."¹⁴⁴ The language states that the "Consumer Product Safety Commission will maintain an 'electronic reading room' on the world wide web for those records which are required by 5 U.S.C. section 552(a)(2) to be available by 'computer telecommunications.'"¹⁴⁵

The Commodity Futures Trading Commission (CFTC) issued a final implementation rule on April 9, 1997.¹⁴⁶ It revised its definition of "record" to encompass electronic formats and to delete an exclusion of materials such as Federal Register notices and court filings available from other sources,¹⁴⁷ to conform to *United States Department of Justice v. Tax Analysts*.¹⁴⁸ It also allows requesters to specify the form or format desired.¹⁴⁹ The CFTC final implementation rule made no reference to publication of materials on the Web.

The Department of Defense (DOD) issued proposed department-wide rules on February 19, 1997.¹⁵⁰ The proposed rules define "agency records" as:

(1) The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in DOD's possession and control at the time the FOIA request is made.... (4) Hard copy or electronic records, which are subject to FOIA requests under 5 U.S.C. 552(a)(3), and which are available to the public through an established distribution system, or through the Federal Register, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, provide the requester with guidance on how to obtain the information. However, if

143. *Id.* (amending 16 C.F.R. § 1015.2 (c)).

144. *Id.*

145. *Id.*

146. 62 Fed. Reg. 17,068 (April 9, 1997) (amending 17 C.F.R. § 145).

147. *Id.* (amending 17 C.F.R. § 145.0).

148. 492 U.S. 136, 144-45, 149-54 (1989).

149. 62 Fed. Reg. 17,068 (amending 17 C.F.R. § 145.7). That section, as revised, reads: Requests for Commission records and copies thereof shall specify the preferred form or format (including electronic formats) of the response. The Commission will accommodate requesters as to form or format if the record is readily available in that form or format. When requesters do not specify the form or format of the response, the Commission will respond in the form or format in which the document is most accessible to the Commission.

Id. at 17,069.

150. Department of Defense Freedom of Information Program Regulation, 62 Fed. Reg. 7398 (1997) (proposing amendments to 32 C.F.R. § 286).

the requester insists that the request be processed under the FOIA, then process the FOIA request. If the information sought is not an agency record pursuant to the FOIA and this part, there is no obligation to process the request under the FOIA, and the requester shall be so notified.¹⁵¹

It defines special rules with respect to the absence of an obligation to create a new record:

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing data base is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creations of a record, programming, or particular format are questionable, components should apply a standard of reasonableness. In other words, if the capability exists to respond to the request and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant expenditure of resources in both time and manpower, which would cause a significant interference with the operation of the components' automated information system would not be a business as usual approach.¹⁵²

Electronic data is defined to include e-mail.¹⁵³ The proposed regulations, in referring to the new obligation to disclose records subject to frequent FOIA requests, does not have any explicit reference to electronic means of availability except for a general provision that DOD components may elect to make certain records "electronically available to the public."¹⁵⁴ DOD components are encouraged to allow submission of FOIA requests by "electronic means," presumably including e-mail.¹⁵⁵

The proposed DOD rules do not contain the word "web," the phrase "World Wide Web," or the word "Internet" except in the exclusion for publicly available records quoted above. It is fair to say that the DOD has minimally responded to the spirit of the mandate embodied in the statute. The Army, however, announced an "electronic reading room" on the Web.¹⁵⁶

Only one reported case to date has involved the EFOIA Amendments.¹⁵⁷ Involving little controversy over EFOIA itself, the court noted that EFOIA

151. *Id.* at 7400 (proposing amendments to 32 C.F.R. § 286.3).

152. *Id.* at 7402 (proposing amendments to 32 C.F.R. § 286.4(g)(2)).

153. *Id.* at 7400 (proposing amendments to 32 C.F.R. § 286.3).

154. 62 Fed. Reg. at 7404 (proposing amendments to 32 C.F.R. § 286.7(a)).

155. *Id.* at 7410 (proposing amendments to 32 C.F.R. § 286.22(b)).

156. 62 Fed. Reg. 51,089 (1997) (referring to <http://www.rmd.belvoir.army.mil/err.htm>).

157. *United Transp. Union v. Surface Transp. Bd.*, 132 F.3d 71 (D.C. Cir. 1998) (rejecting challenge to agency requirement for submission of pleadings on diskette; EFOIA Amendments required release of copies of diskettes, thereby mooting challenge to unavailability of electronic submissions).

requires release of material submitted on diskettes, in the form of copies of the diskettes.¹⁵⁸

Several recent decisions, though not applying the EFOIA Amendments, are troublesome in terms of realizing the legislation's goals. These decisions' most serious flaw is in failing to recognize the appropriateness of the FOIA as a vehicle for defeating agency sponsored monopolies over public information, thus contravening the "any public or private purpose"¹⁵⁹ concept in the EFOIA Amendments.

In *Tax Analysts v. United States Department of Justice*,¹⁶⁰ the plaintiff sought access under the FOIA to JURIS, a database containing federal court decisions, statutes, and agency materials.¹⁶¹ Only materials that are deemed to be "agency records" are subject to disclosure under the FOIA.¹⁶² "Agency records" are materials which are: "(1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request."¹⁶³ All parties agreed that the material in question was "created or obtained" by the Department of Justice (DOJ) at the time of the FIOA request.¹⁶⁴

The crucial question is whether the material was under the DOJ's control.¹⁶⁵ For the DOJ to be in control of the records, the records must be "subject to the free disposition of the agency."¹⁶⁶ The DOJ's contract with West prevented it from controlling the material.¹⁶⁷ Therefore, since the DOJ did not have control over the database, it was not required to disclose the material to the plaintiff.¹⁶⁸

The plaintiff further argued that the contract between the DOJ and West only covered the "proprietary" data, not "nonproprietary" data in the JURIS database.¹⁶⁹ The contract between the DOJ and West did differentiate between proprietary and nonproprietary data.¹⁷⁰ The contract's licensing provisions, however, applied to both the proprietary and nonproprietary

158. *Id.* at 75.

159. Electronic Freedom of Information Act Amendments of 1996, § 2(a), 110 Stat. 3048, 3048.

160. 913 F. Supp. 599 (D.D.C. 1996).

161. *Id.* at 600.

162. *Id.* at 602.

163. *Id.*

164. *Id.*

165. *Tax Analysts*, 913 F. Supp. at 602.

166. *Id.* at 603.

167. *Id.* at 605.

168. *Id.*

169. *Id.*

170. *Tax Analysts*, 913 F. Supp. at 605.

data.¹⁷¹ Since the licensing provisions applied to both types of data, the DOJ did not have control over either the proprietary or nonproprietary data.¹⁷² Thus it was not required to disclose any of the database.¹⁷³

Even if the DOJ was deemed to be in control of the database, it still may not have needed to disclose the material because it is not the type of material that Congress intended to make available through the FOIA.¹⁷⁴ The purpose of the FOIA is to allow the public to gather information that will enable them to check the powers of government and hold government officials accountable.¹⁷⁵ The material involved in this case does not deal with that type of information.¹⁷⁶

Tax Analysts is particularly pernicious because it allows a would-be private monopolist to bar FOIA access to underline government data by carefully negotiating restrictions in its contract with an agency to deprive the agency of control over electronic formats for the information. This technique was attempted early in the EFOIA debate by Computaprint in its contract with the patent office. These provisions were analyzed in the report for the Administrative Conference leading up to the ACUS Recommendation 88-10, although a lawsuit challenging the restrictions never was adjudicated.¹⁷⁷

*Baizer v. United States Department of the Air Force*¹⁷⁸ implies that paper printouts may be an acceptable substitute for electronic databases. The plaintiff brought this action under the FOIA to compel the Navy to turn over computerized versions of Supreme Court decisions through 1975 located on the JURIS database.¹⁷⁹ Only materials that are deemed to be "agency records" are covered by the FOIA.¹⁸⁰ The database the plaintiff attempted to access is not an "agency record" for the purposes of the FOIA because it is used for research purposes only, and the same materials are available at public libraries and through Lexis and Westlaw services.¹⁸¹ A similar statute explicitly excludes from the definition of "records," materi-

171. *Id.* at 606.

172. *Id.* at 606-07.

173. *Id.*

174. *Id.* at 607.

175. *Tax Analysts*, 913 F. Supp. at 606.

176. *Id.*

177. HENRY H. PERRITT, JR., ELECTRONIC ACQUISITION AND RELEASE OF FED. AGENCY INFO. - REPORT PREPARED FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1988) (citing *International Computaprint Corp. v. United States Dep't of Commerce*, Civ. Action No. 97-1848, memorandum op. at 48 (D.D.C. Aug. 16, 1988)).

178. 887 F. Supp. 225 (N.D. Cal. 1995).

179. *Id.* at 226.

180. *Id.* at 227.

181. *Id.*

als that are possessed for research purposes only.¹⁸²

Even if the database was determined to be an "agency record," the defendant did not necessarily have to disclose it.¹⁸³ Since the same information that the plaintiff requested is available in different formats, the defendant was not required to turn over the computer database simply because it was the most convenient format for the plaintiff.¹⁸⁴

The plaintiff argued that the materials were "agency records" because the defendant was in possession of the materials.¹⁸⁵ Materials, however, are not considered to be "agency records" merely because the agency has possession of the materials.¹⁸⁶ For materials to be considered "agency records," the agency receiving the request must have both possession and control over the materials.¹⁸⁷

Baizer appears to fly in the face of the Supreme Court's *Tax Analysts* decision, by reasoning that availability of information from other sources vitiates an agency's FOIA obligations. Moreover, there is no reason that "agency records" should be exempt from FOIA merely because they are used for research purposes. The part of the holding that allows the agency to choose paper format has now been overridden by the EFOIA Amendments.¹⁸⁸

*DeLorme Publishing Co. v. National Oceanic*¹⁸⁹ deals with various exceptions to disclosure in the FOIA. The plaintiff, an electronic map publisher, sought disclosure of digitized nautical charts from the defendant under the FOIA.¹⁹⁰ Defendant claimed that three exemptions from the FOIA allow him to refuse disclosure.¹⁹¹

FOIA Exemption 3 allows an agency to withhold materials if the materials are exempt from disclosure by another statute other than the FOIA.¹⁹² Defendant argued that the Federal Technology Transfer Act (FTTA)¹⁹³ exempted him from disclosing the materials. The FTFTA prohibits an agency from disclosing any information that was the result of research and development on the part of a private company contracting to do work with the

182. *Id.* at 229 (discussing the Records Disposal Act, 44 U.S.C. § 3301 (1994)).

183. *Baizer*, 887 F. Supp. at 229.

184. *Id.*

185. *Id.* at 227.

186. *Id.*

187. *Id.*

188. 5 U.S.C.S. § 552 (a)(3)(B) (Law. Co-op. Supp. 1998).

189. 917 F. Supp. 867 (D. Me. 1996).

190. *Id.* at 870.

191. *Id.* (citing 5 U.S.C. § 552 (b)(2), (3), (5)(1994)).

192. *Id.*

193. 5 U.S.C. § 3710a (1994).

agency.¹⁹⁴ Also, the FTTA allows the agency to withhold information, for up to five years, that would be protected had it come from the private company, even though the information was produced by the agency.¹⁹⁵ The purpose of the exceptions to the FTTA is to encourage private companies to contract to do work with government agencies without the fear of having important commercial information disclosed.¹⁹⁶

The defendant was permitted to withhold all of the material for a period of five years.¹⁹⁷ Since none of the material plaintiff requested was produced solely by the private company, defendant did not qualify for permanent nondisclosure.¹⁹⁸ The material was produced by the agency and the company together, however, allowing them to withhold the materials for five years.¹⁹⁹

DeLorme is, perhaps, the worst of the three cases, because it identifies a statutory path for agencies who wish to create monopolies over their information. The district court went astray by allowing the incentive element of the FTTA to be satisfied by a purely prospective desire for economic gain arising solely out of a monopoly over public information. Given that monopolies over public information at the federal level contravene the FOIA, section 105 of the Copyright Act, the First Amendment and a widely agreed upon public information policy, they should be disqualified from satisfying this element of the FTTA.

CONCLUSION

The EFOIA amendments are a significant step forward in embracing Internet technology's potential for improving public access to government information. Some initial agency implementations do a good job in making use of the World Wide Web to fulfill the purpose of the 1996 Amendments and of the FOIA itself. The FCC Web site, in particular, is a good example of how agencies can use the Web to increase the availability of regulatory and adjudicatory information. The FCC also sets a good example by permitting FOIA requests to be submitted by e-mail. Other agencies, however, have been more grudging in their implementation, amending their rules to do only the minimum necessary to fulfill the literal statutory requirements.

Of even greater concern are a few of the district court opinions allowing

194. *DeLorme*, 917 F. Supp. at 872.

195. *Id.*

196. *Id.*

197. *Id.* at 874.

198. *Id.*

199. *DeLorme*, 917 F. Supp. at 874.

agencies to set up state monopolies for public information. This is a dangerous trend, inconsistent with the congressional and executive branch policy mandate to enhance the availability of public information by ensuring a diversity of channels and sources for information. Realizing this aspiration requires that agencies make their electronic information resources available in the forms requested. In other words, agencies should unbundle their information resources and allow access at all feasible points, much as local exchange carriers are required to do for their telecommunications services under the Telecommunications Act of 1996.²⁰⁰ The concept of an open national information infrastructure applies to all levels of conduit and content elements.

200. 47 U.S.C.S. § 251(c)(3) (Law. Co-op. Supp. 1998).

