

**PUBLIC INFORMATION**  
**US Freedom of Information Act**  
**&**  
**Open Records Laws of the States**

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**“Sunlight is said to be the best of  
disinfectants.”**  
Louis D. Brandeis

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**11.1 INTRO** (Perritt)  
Equal access must be the centerpiece of an information policy at all levels of government.  
Idea reflected in various ways including:  
1. Freedom of Information Acts  
- fed and state  
2. Paperwork Reduction Act -encourages diversity of sources.  
OMB Circulars: A-130 encourages affirmative dissemination

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3. Intellectual property law not applicable to public information

4. First Amendment invalidation of most competitive publishing restrictions imposed by government

5. Antitrust law is suspicious of state monopolies.

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Tricky balance

- gov't monopolies and restrictions on dissemination restrict access to the raw materials of government

VERSUS

- if gov't gives away public information below cost, undermines market opportunities for private sector vendors of public information

This framing of issues results in circular arguments - (i.e. not good basis for policy making)

Note: Government cost to publish is now extremely low (Internet) but also don't want government as sole publisher

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The best public information policy is one that promotes:

1. A diversity of channels and sources of public information.
2. Public information availability in electronic formats when used in this form by government.
3. Healthy competition in the information marketplace.

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State Monopolies in Public Information  
(local, state, federal gov't)

- prohibit private sector competition
- government revenues from secondary use of information (permutation - sometimes share revenues with private partners)

Monopolies block participation in a variety of diverse markets for information products .... extend into downstream markets

Public decision makers not better than consumers & entrepreneurs in choosing technologies and product designs

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Perrott's View

Framework for access to public information - begin with two policy propositions

- Gov't must make electronic formats available when they exist.
- Gov't must allow and promote diversity of channels and sources of public information
  - no one supplier can design information systems to meet all user needs

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"To deny public access to electronic formats denies the public the benefits of public record formats paid for with public funds, and also significantly impairs public accessibility to public information by increasing the cost of search and retrieval"

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**SECTION 11.2 - Dissemination Duties**

1995 Paperwork Reduction Act.

- policy for the dissemination of electronic information created and maintained by Federal Agencies

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- requires federal Agencies

- to provide timely and equitable access to public information,
- to encourage a diversity of information sources (both private and public),
- to obtain public input when changing dissemination systems or activities, and
- in general prohibits exclusive and restrictive policies with respect to the release of public information.

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**SECTION 11.3 - Freedom of Information Acts**

A. Grant Private Individuals and Electronic Publishers Access to Government Records

B. Provide Most Important Protection against Government Maintaining Monopoly over Records Gathered by Government Agencies

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The Freedom of Information Act 5 U.S.C. § 552, As Amended By Public Law No. 104-231, 110 Stat. 3048

(2) Each agency, ..., shall make available for public inspection and copying--

(D) copies of all records, regardless of form or format, which have been released to any person ...

... unless the materials are promptly published and copies offered for sale.

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For records created on or after November 1, 1996, each agency shall make such records available ... by ... electronic means.

To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details

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(B) In making any record available to a person under this paragraph, 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.

.... agency shall make reasonable efforts to search for the records in electronic form or format

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Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review.

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**THE NINE EXCEPTIONS**

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept **secret in the interest of national defense or foreign policy** ...

(2) related solely to the **internal personnel rules and practices** of an agency;

(3) specifically exempted from disclosure by **statute** ...

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(4) **trade secrets** and **commercial** or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency **memorandums** or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) **personnel and medical files** and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

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(7) records or information compiled for law enforcement purposes ...

(8) related to examination ... or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

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**SECTION 11.4 - Federal FOIA**

A. Right to Access Extends to Virtually All Federal Records and All Federal Agencies.

Issues:  
What is a federal government record?

- 1) Is a government contractor a government agency for purposes of the act?  
- gov't control over record or database?
- 2) If gov contractor adds proprietary features (copyright), does access or copyright prevail? [Tax Analysts v. US Dept of Justice]

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B. Right to Access extends to all individuals and entities regardless of reason for request  
[US Dept of Justice v. Tax Analysts, 492 U.S. 136 (1989)]

C. Government Required to provide Electronic Copy even if Paper Document Available. [Id.]

- review and printing/copying of electronic records not "creation" of a new record

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Result:

FOIA not only requires the government to provide access to government databases and information about private individuals who request it, but **facilitates commerce** by granting access to business entities requesting information for commercial purposes and in a form conducive to electronic manipulation

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**A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records**

<http://thomas.loc.gov/cgi-bin/cpquery/z?cp106:hr50.106>.

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**SECTION 11.5 - State Freedom of Information Law**

A. Differences between state freedom of information laws and the federal FOIA include:

1. State public records law is not identical to FOIA; and
2. State court interpretation of similar language in the law may be different from federal court interpretation.

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B. In spite of the differences there are basic similarities among states and with the federal government with respect to freedom of information law.

These similarities include the following elements:

1. Electronic formats are covered in virtually all states.
2. Requestors, in most states, are free to specify the format when paper and electronic formats are available.

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3. Most state statutes, like FOIA, do not allow taking the purpose of the Requester into account.

A few courts, e.g. Michigan and New Jersey, have persisted in downgrading the legitimacy of FOI requests by electronic publishers, for example *Kestenbaum v. Michigan State University*.

4. Many states recognize common-law entitlement to electronic records.

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Athens County Property Appraisers, Ohio Court of Appeals

The basic tenet ... is that a person does not come - like a serf - hat in hand seeking permission of the lord to have access to public records. Access to public records is a matter of right. ... Can a government agency, which is obligated to supply government records, impede those who oppose its policies by denying the value-added benefit of computerization?

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**Maine Freedom of Information Coalition**  
<http://www.mfoic.org/>

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