I. INTRODUCTION

The information age is upon us. Current computer technology is making more information available to more people more quickly than ever before. This information bonanza presents both extraordinary opportunities and difficult challenges in the area of open records and meetings. Arkansas, like the federal government, guarantees access to government records and meetings by statute. More and more frequently, both state and federal government agencies are relying on computer technologies to compile and store records and, arguably, conduct meetings.

The opportunities provided by technological advances are obvious. Information is more easily accessed, analyzed and disseminated through the use of computer technology. For example, sorting and classifying information held in large government databases can be

---

* Law Clerk for the Honorable Richard Sheppard Arnold, Chief Judge of the United States Court of Appeals for the Eighth Circuit; J.D. with high honors, University of Arkansas School of Law, 1994. The author wishes to express special thanks to Professor John J. Watkins of the University of Arkansas School of Law for the invaluable advice, editing, and guidance that made this article possible.

3. For example, in 1966 when the federal Freedom Of Information Act was adopted, federal agencies were using some 3,000 mainframe computers and no micro-computers. Jamie A. Grodsky, The Freedom of Information Act in the Electronic Age: The Statute is Not User Friendly, 31 JURIMETRICS J. 17, 18 (1990). Twenty short years later nearly 25,000 mainframes and more than 125,000 microcomputers were in use and 97 of the 134 agencies or components that responded to an Office of Technology Assessment study were using e-mail services. Id.

Likewise, one may infer a dramatic increase in computer use by government agencies in Arkansas by surveying requests made of the Attorney General's office. For example, in June 1993, Twelfth Judicial District Prosecuting Attorney Ron Fields requested an opinion regarding licensed abstractor's access to computerized assessor's records, Op. Att'y Gen. 120 (1993), and State Auditor Julia Hughes Jones requested an opinion concerning access to computerized voter registration lists, Op. Att'y Gen. 405 (1994). The magnitude of such lists is enormous and representative of the sort of computerized data created by the State of Arkansas and various local governments.

4. In part II F., infra, a hypothetical meeting will be considered. At present, it appears that no case has specifically addressed this issue. However, if the equivalent of a "meeting" may be conducted over the internet, the cases will soon follow.
accomplished with a few keystrokes rather than by the hours of painstaking reading, listing and charting performed manually. Likewise, meetings once “open” only to those with the resources and time to physically attend, may be accessible to anyone with a personal computer and an online service.

On the other hand, the challenges facing both accessors and government officials charged with providing access are considerable. To begin with, the various pieces of legislation that provide access were written in the 1960s and 1970s. As a result, technology has passed them by. Courts are left with the difficult task of determining which records and meetings fall under the ambit of the legislation. Moreover, many groups and individuals who wish to gain access to government records and meetings contend that government agencies and officials are using computer technology, coupled with the outdated legislation to frustrate the purposes of the legislation.

The purpose of this article is to focus attention on the impact computer technology has on the Arkansas Freedom of Information Act (FOIA). This purpose will be accomplished, where possible, by


7. Throughout this article “FOIA” is referred to rather than “an F.O.I.A.” This approach is grammatically correct. In access to information circles, the term FOIA is pronounced “FOY-YAH.” Moreover, a set of terms is evolving in conjunction with FOIA practice. You will notice many of them in this article such as “redact,” “compact,” and “disclosure avoidance technique.” Finally, “FOIA” is generally a noun which refers to the piece of legislation that mandates access to government records (native Southerners would call it a “nickname”). However, “FOIA” can also be a verb referring to the act of requesting access. Thus, one may “FOIA” the County Clerk, who will then state that he has been “FOIA’d.” This new “language” surrounding the FOIA might be called “FOIA-speak.”

The issues discussed in the following pages have been addressed in the context of the federal FOIA. Four previous works are heavily relied upon. Grodsky, supra note 3; Bunker et al., supra note 6; Henry H. Perritt, Jr., Electronic Acquisition and Release of Federal Agency Information: Analysis of Recommendations Adopted by the Administrative Conference of the United States, 41 Admin. L. Rev. 253 (1989) (hereinafter Electronic Acquisition and Release); Henry H. Perritt, Jr., Federal Electronic Information Policy, 63 Temp. L. Rev. 201 (1990) (hereinafter Federal Electronic Information Policy). The interested reader will want to review these articles as well as the others cited.
applying either the FOIA or the cases interpreting the FOIA to the issues which are generally considered to be the most important in this area. However, cases from other jurisdictions, principally those construing the federal FOIA, will also be used because the Arkansas cases provide only limited assistance.

This analysis leads to the conclusion that legislative action is appropriate. Therefore, three separate proposals will be examined and analyzed. None of these proposals is perfect; however, if the General Assembly is finally prepared to accept Professor John J. Watkins' invitation and begin fixing the flaws in the FOIA, these proposals provide an excellent starting point for the issues posed by computer technology.

II. DEFINING THE ISSUES

A. Is Computerized Information a Record?

The great weight of authority indicates that computerized information is a record for FOIA purposes. In Arkansas, the plain language of the FOIA combined with Blaylock v. Staley should leave no question about this issue.

The Arkansas FOIA defines records as, among other things, "... data compilations in any form, ... which constitute a record of the performance or lack of performance of official functions ..." This definition is clearly broad enough to include computer records. Such records are a "compilation" of "data" in a particular, i.e., electronic, "form." Thus, so long as the content of a record addresses the performance or lack of performance of official functions, computer records meet this definition.

The Supreme Court of Arkansas appears to accept this reasoning. In Blaylock v. Staley, Len Blaylock, the Chairman of the Republican Party of Arkansas, requested access to the Pulaski County voter registration list on computer tape. The county clerk gave Blaylock a printed list of approximately 180,000 names but denied access

11. JOHN J. WATKINS, ARKANSAS FREEDOM OF INFORMATION ACT 69 (2d ed. 1994).
to the computer tape. Blaylock then brought suit under the Arkansas FOIA in the Circuit Court of Pulaski County asking that the clerk be compelled to release the computer tape. The clerk and Datafacts, Inc., the private computer firm that maintained the list for the county, contended that they did not have the equipment necessary to copy the list onto another disk or tape. As a result, the tape, or data module, would have to be taken elsewhere for copying. The circuit court found that such a request amounted to a request for "equipment" rather than for a "record" and denied Blaylock access.

Blaylock appealed to the Supreme Court of Arkansas, once again contending that the data module was a record that could be copied at Datafacts, Inc.'s office. The court agreed with Blaylock that the computerized form of the list was a record for FOIA purposes. However, working under the assumption that the data module would have to be removed from the Datafacts, Inc.'s offices in order to be copied, the court denied access. According to the court, it was impossible to determine from the trial record whether the request was for "information" or for "equipment."

To say that Blaylock is confusing is an understatement. On the one hand, the court stated that it "need not look beyond the language of our own Freedom of Information Act" in order to determine that a computer tape is a record under the FOIA. The definition of records, which includes "recorded sounds, films, tapes, or data compilations in any form," along with the historically liberal interpretation given the FOIA, brings within its ambit computerized records. These factors "provide[] all the guidance necessary."

On the other hand, the court ruled that a request for a computer "record" can become a request for computer "equipment" if the tape has to be removed before it can be copied. According to the court, "the FOIA requires no such measures." Professor Watkins interprets this reasoning to mean that if the ability to copy the tape

12. Blaylock, 293 Ark. at 27, 732 S.W.2d at 153.
13. WATKINS, supra note 11, at 69.
14. Blaylock, 293 Ark. at 27, 732 S.W.2d at 153.
15. Id.
16. Id.
17. Id. at 28-29, 732 S.W.2d at 154.
18. Id. at 29, 732 S.W.2d at 154.
19. Id. at 27, 732 S.W.2d at 153.
21. Blaylock, 293 Ark. at 27, 732 S.W.2d at 153 (citing Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968)).
22. Id.
23. Id. at 29, 732 S.W.2d at 154.
exists with the agency, then the copy must be made.\textsuperscript{24} It should be noted, however, that the confused language in \textit{Blaylock} leaves at least a shadow of a doubt on this conclusion. Certainly there is room within the \textit{Blaylock} opinion for the court to reverse ground and rule that all computerized records are mere equipment and thus outside the FOIA.

The most recent federal case to address this area relied heavily on a similar statutory definition of "records." \textit{Armstrong v. Executive Office of the President} (the PROFS Case)\textsuperscript{25} discussed whether preserving hardcopy versions of e-mail messages discharged an agency's obligations under the Federal Records Act (FRA).\textsuperscript{26} The District of Columbia Circuit Court of Appeals held that it did not.\textsuperscript{27}

The PROFS Case began on the final day of the Reagan Presidency.\textsuperscript{28} On January 19, 1989, the National Security Archive filed several FOIA requests "for all the material stored on the [Executive Office of the President] and [National Security Council] electronic communications systems from their installation in the mid-1980s up to that time."\textsuperscript{29} At the same time, the PROFS plaintiffs sought a declaration that the "electronic documents" contained on those systems, as well as their back-up tapes were "federal and presidential records" under the FRA and the Presidential Records Act (PRA), respectively, thus precluding their destruction.\textsuperscript{30}

The United States Court of Appeals for the District of Columbia agreed with the federal district court's ruling that the electronic communications, or e-mail messages, as well as the backup tapes, were records under the FRA. Central to the court's reasoning was the fact that the hardcopy printouts did not include vital information such as who sent the message and when. Only the e-mail messages themselves contained that information.\textsuperscript{31} Thus, in order to meet the requirements of the FRA, the e-mail messages must be preserved. Merely printing the message will not suffice because the additional information would be lost.\textsuperscript{32}

\textsuperscript{25} \textit{Armstrong}, 1 F.3d at 1274 (1993). PROFS is the name of the computer system which was in use at the beginning of this litigation. \textit{Id.} at 1279 n.2.
\textsuperscript{27} \textit{Armstrong}, 1 F.3d at 1284.
\textsuperscript{28} \textit{Id.} at 1280.
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
The FRA contains a definition of "records" which is similar to the Arkansas FOIA definition. It includes "... all machine readable materials, ... regardless of physical form or characteristics ..."33 The court interpreted this portion of the definition to include computerized records.34 This language is very similar to the "data compilation in any form" language of the Arkansas FOIA. It should come as no surprise, then, that both the United States Court of Appeals for the District of Columbia and the Arkansas Supreme Court came to the conclusion that computer records were "records" under the respective pieces of legislation.35

Thus, it is probably safe to conclude that computer records survive this threshold inquiry.36 The clear language of the Arkansas

34. Armstrong, I F.3d at 1278. Specifically, the court wrote as follows: "machine readable, [i.e., electronic], materials ...." Id.
35. Interestingly, the argument was made that e-mail is not a record at all. Armstrong v. Executive Office of the President, 810 F. Supp. 335 (D.D.C. 1993), aff'd 1 F.3d 1274 (D.C. Cir. 1993). That argument is clearly at odds with the FRA, the federal FOIA, and the clear language of the Arkansas FOIA. Moreover, the argument defies the policy of the FOIA. First, even if e-mail is more analogous to a telephone conversation than a record, that fact is somewhat irrelevant. In either case, the "occurrence" should be open under the FOIA as either a meeting or a record. Any rule of law to the contrary is merely an effort to circumvent the intentions of the FOIA.
Second, even if the actual e-mail transmission is a "conversation," its subsequent memorialization makes it a record. An analogy to a tape-recorded telephone call is useful. If a telephone conversation occurs and one of the parties to the conversation tape-records it, that recording becomes a record for FOIA purposes. Likewise, if an e-mail conversation occurs and is memorialized in the form of a recorded message, that too should be a record under the FOIA. Any attempt to avoid disclosure should depend on the FOIA exemptions, not on the format of the conversation.
Finally, the notion that e-mail, by its very character, is exempt from disclosure offends the spirit of open government underlying the FOIA. The FOIA was enacted to guarantee an informed electorate. If the contents of an e-mail message meet that goal, then the contents should be disclosed, unless disclosure would violate some overriding interest, such as personal privacy. In any event, the exemption should be decided on a narrow, case-by-case basis, not broadly as advocated here.
36. Federal FOIA cases are in accord with the above discussion and the PROFS Case in holding that information stored in government computers is a record for FOIA purposes. Dismukes v. Dep't of Interior, 603 F. Supp. 760 (D.D.C. 1984); Long v. United States Internal Revenue Serv., 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980). In Long, the requesters sought access to "all the information the IRS has compiled in the Taxpayer Compliance Measurement Program (TCMP)," which is a continuing series of statistical studies by the IRS "to measure the level of compliance with federal tax laws." Id. at 364. In particular, the Longs sought access to the data tapes which were the "underlying documents from which TCMP statistics and conclusions are derived." Id. In addition, the Longs requested that all "identifying information" be deleted from the tapes. Id.
FOIA, combined with \textit{Blaylock} and analogous language from the PROFS Case, leaves no other logical conclusion. Therefore, other, more complex issues must be addressed. These, as should become apparent, are somewhat more difficult and unsettled.

B. Must the Agency Release the Computer Record if Requested?

One such issue is whether a request for computer records must be met when the records also exist in another form. \textit{Blaylock} arguably decides this point by inference in Arkansas. As previously stated, the requester in that case sought access to computer tapes as opposed to printed voter registration lists. The Arkansas Supreme Court indicated that the record was available in computer form. The court, however, never analyzed whether a requester has the right to request a particular format. The logical inference, though certainly not the only inference,\footnote{37} is that when records exist in more than one format in Arkansas, the requester may demand a particular format.

However, the Arkansas Supreme Court should do more than just allow access to particular records if that is indeed what it intended to do. It should clearly articulate the policies behind its ruling. The federal courts have done just that. The Arkansas Supreme Court, however, reached the opposite conclusion. \textit{Dismukes v. Department of the Interior}\footnote{38} dealt primarily with this issue. In \textit{Dismukes}, the requester, Philip Dismukes, sought a copy of a Department of Interior computer tape which listed the participants in all six Bureau of Land Management Simultaneous Oil and Gas Leasing bimonthly lotteries for 1982 by name and address.\footnote{39} The Department of Interior made the list available to

\footnote{The district court had concluded that “the term ‘records,’ as used in the [FOIA], does not include computer tapes.” \textit{Id.} at 365.}

\footnote{Then-Circuit Judge Anthony M. Kennedy rejected this conclusion. Important to his reasoning was that “[i]n view of the common, widespread use of computers by government agencies for information storage and processing, any interpretation of the FOIA which limits its application to conventional written documents contradicts the ‘general philosophy of full agency disclosure’ which Congress intended to establish.” \textit{Id.} (quoting and citing S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965)). Thus, “the FOIA applies to computer tapes to the same extent it applies to any other documents.” \textit{Id.}}

\footnote{37. Another reading of the case is that even if the requester can demand a particular format, \textit{Blaylock} still loses because his request is for equipment as opposed to records. This reading is somewhat more narrow and would be a major setback for access advocates. However, it would be more consistent with the federal cases, as the following textual discussion indicates.}

\footnote{38. 603 F. Supp. 760 (D.D.C. 1984).}

\footnote{39. \textit{Id.} at 760-61.}
Dismukes in microfiche form, but refused his request for the computer file.\textsuperscript{40}

As the court noted in its opinion, \textit{Dismukes} is a somewhat atypical case.\textsuperscript{41} As a general rule, an agency usually resists disclosure on two grounds. First, it will challenge the "'agency record' status of the document."\textsuperscript{42} In addition, the agency will contend that one of the enumerated exemptions to the FOIA applies.\textsuperscript{43} In this case, the agency did neither. It merely contended that it had complied with the request when it released the microfiche records.\textsuperscript{44}

In denying Dismukes' request and upholding the Department's action, the District of Columbia District Court held that an agency could meet its FOIA requirements by providing access to records equivalent to those actually requested. In order to prevail in his request for a particular type of record, Dismukes would have to demonstrate that the variation in format would affect the "quantum of information" made available.\textsuperscript{45}

This holding was dictated by the court's view of the "fundamental purpose" of the FOIA. According to the court, that purpose is "to open the doors of government" so that the electorate will be informed.\textsuperscript{46} Thus, courts have focused on the "informational content" of records when interpreting their status under the FOIA.\textsuperscript{47} The format of the record is only relevant when the format affects the content of the information. Because the information contained on the microfiche did not vary "in any way" from that in the computer tape,\textsuperscript{48} Dismukes had no right to specify one format over another.\textsuperscript{49}

The court did, however, provide an example of a variation in content arising from the format of the record. An audio tape could be required, as opposed to a transcript of the recording, because the "transcription removes nuances of inflection which give words added meaning beyond that reproducible on paper."\textsuperscript{50} Conversely,
the computer records requested by Dismukes did not vary “in any way” from the microfiche.\textsuperscript{51}

This argument is potentially very useful. The Arkansas Supreme Court has held, for example, that the privacy interest in a tape recording is greater than the privacy interest in a transcript of that recording.\textsuperscript{52} This holding is tantamount to stating that the quantum of information contained in a tape recording is different from the quantum of information contained in a transcript. Thus, it is logical to assume that the Arkansas courts will accept the quantum of information argument even if a requester does not have the absolute right to one format over another.

The district court also rejected Dismukes’ contention that the failure to release the computer record would “unreasonably hamper” his access to information.\textsuperscript{53} In effect, the court ruled that the fact that the requester would find a microfiche copy less convenient was irrelevant. Whether the “quantum of information” contained by the two formats was equivalent was the only relevant question.\textsuperscript{54}

The Supreme Court of Ohio, conversely, has held that one such policy underlying the decision to release the information in its computer form is the added value of that form. In \textit{Ohio ex rel. Margolius v. City of Cleveland},\textsuperscript{55} that court required the government agency to release information in the requested computer format. The “greater ease of public access,” said the court, created “added value” which was “inherently” part of the record.\textsuperscript{56} Moreover, this added value demonstrated that release of the information in the paper form would be “insufficient or impracticable.”\textsuperscript{57} As a result, the records must be disclosed in their computer form.

The PROFS Case, likewise, could be read to say that a computer record, by its very nature, is a type of record which may be specifically requested.\textsuperscript{58} This reading is possible because the PROFS court ruled that the printed versions of the e-mail messages would be insufficient to preserve the records.\textsuperscript{59} In other words, the computer

\begin{footnotes}
\begin{enumerate}
  \item Dismukes, 603 F. Supp. at 762.
  \item Young v. Rice, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992).
  \item Dismukes, 603 F. Supp. at 762. The Department countered this argument by stating the information was more readily accessible to more people in microfiche form because no sophisticated computer equipment was needed. Id. at 762-63.
  \item See also SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) (holding an agency’s database computer tapes were not within the scope of FOIA).
  \item 584 N.E.2d 665 (Ohio 1992).
  \item Id. at 669.
  \item Id.
  \item See discussion supra Part II.A.
  \item Armstrong, 1 F.3d. at 1281, 1296.
\end{enumerate}
\end{footnotes}
record may be requested because it has separate and distinct information. Two problems exist with this reading: First, the case is not a FOIA case but an FRA case. The FOIA issue is still unresolved.

Second, and more importantly, that reading is far too broad. The case is more realistically read as stating that the computer record is distinct only when a computer record contains separate information which is essential to its defining or informing on a government function or activity. The PROFS court specifically stated that the paper documents alone would be of "quite limited utility to researchers and investigators studying the formulation and dissemination of significant policy initiatives at the highest reaches of our government." Thus, the electronic record must also be preserved.

This reading is more consistent with the purposes of the FOIA to disclose "what [the] government is up to." It is also more consistent with the language used in Dismukes indicating that when the computer record contains a different quantum of information, it must be disclosed. In other words, the computer records in the form of e-mail messages had a different quantum of information because they contained information relevant to government activity which was absent from the hardcopy versions.

A simple analogy helps to make this point. If a government employee is creating a government document, for instance a memorandum, on WordPerfect and wishes to underline a word, he will press the "F8" key. When that key is pressed, it puts information into the computer form of the memorandum which does not exist in the paper version: the codes which create the underlining. In a literal sense, the computer document contains a different "quantum of information" than its paper version. This information, however, has nothing whatsoever to do with the functioning of government. Thus, it should not be the basis for a rule requiring release of the computer document.

We are left, then, with something of a dilemma. Nothing in the Arkansas FOIA gives a requester the right to demand a record in a particular format. Blaylock could be seen as authority for the proposition that a requester may demand the computer record.

---

60. Id. at 1285.
62. See discussion supra Part II.A.
63. See discussion supra Part II.A.
However, the case does not explicitly so hold. Moreover, that interpretation is at odds with the cases interpreting the federal FOIA. A definitive legislative answer to this problem is needed.

C. When is a New Record Created?

A central issue in this debate is: when does a request amount to a request for a new record? This problem arises principally from the fact that both the federal and the Arkansas acts were written for a paper era rather than a computer era. The heart of this question is whether a new record is "created" by merely imputing data which may be reproduced in many forms by a series of keystrokes or by actually sorting and using that data in a particular format.

Generally, an agency has no obligation to "create" a new record from existing records in order to fulfill a particular request. For example, if a record lists all voters, an agency is not required to extract from that master list a list of all female voters in order to fulfill a FOIA request. This policy was formulated when records existed primarily in a paper form. The question today is whether it has continuing viability when applied to computer records.

Notably, no Arkansas case has yet addressed this particular issue. Thus, one must look to the federal cases for guidance. In Yeager v. DEA, Matthew Yeager was denied access to the Drug Enforcement Agency's Narcotics and Dangerous Drugs Information System (NADDIS) because it contained exempt and nonexempt information. Subsequently, Yeager contended that the DEA had a

---

64. The issue may also be stated in terms of whether searching or programming is required by the FOIA. See, e.g., Bunker et al., supra note 6, at 574-79; Sean E. Andruisser, The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the Public, 1991 DUKE L. J. 753, 790-93 (1991); Grodsky, supra note 3, at 25-31. See generally Perritt, Federal Electronic Information Policy, supra note 7, at 230-32; Perritt, Electronic Acquisition and Release, supra note 7. Computer records exist in the form of electronic impulses rather than what we normally think of as "records in being." Grodsky, supra note 3, at 24; Perritt, Electronic Acquisition and Release, supra note 7, at 230. Thus, some sort of coding or programming is necessary in order to view the "record" in a form that is understandable. This fact fostered concern over whether computerized records were "records" under the federal FOIA. Grodsky, supra note 3, at 24-25. This concern is probably avoided in Arkansas given the statutory definition of records and Blaylock. See discussion supra Part II.A. Moreover, even in the federal context, computerized records are generally thought to be subject to the FOIA. Perritt, Federal Electronic Information Policy, supra note 7, at 224-26. Each of the articles cited above includes a discussion, in varying degrees of depth, of the new records issue.

65. Cf. Bunker et al., supra note 6, at 574-76; Grodsky, supra note 3, at 26.
67. 678 F.2d 315 (D.C. Cir. 1982).
68. Id. at 317-18.
duty to use its "computer capabilities" to segregate the nonexempt portions. 69

The process Yeager requested is described as a "disclosure-avoidance technique," or "compacting," because it releases only the nonexempt information when a record contains both exempt and nonexempt information.70 This process is, arguably, consistent with the general duty to redact exempt information which is "reasonably segregable" in order to make a record disclosable.71 On the other hand, an agency is not required to create a new record from previously existing records in order to meet a request.72 Yeager's particular request, the court held, was a "hybrid of both concepts."74

Analogizing an agency's responsibility with respect to "manual retrieval systems," the court denied Yeager's request. According to the court, "[t]he FOIA does not contemplate imposing a greater segregation duty upon agencies that choose to store records in computers ... ."75 Indeed, the court noted that the Senate Report on the 1974 amendments, in its "sole reference" to computerized records, stated that "the term 'search' would include services functionally analogous to searches of records maintained in conventional form."76

In other words, the court ruled that Yeager's request would be more similar to the written report about a record than to redacting. In so doing, it focused on the "reasonableness" of the segregation equation. In deciding whether information is reasonably segregable, the focus is on whether an intelligible record is produced as well

---

69. Id. at 319.
70. Id. at 319 n.9.
71. 5 U.S.C. § 552b (1988). "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Id. This process is commonly known as redaction.

The Arkansas FOIA does not specifically require redaction and the Arkansas Supreme Court has not squarely addressed the issue. However, the court has shown support for the idea of redaction. See, e.g., Young v. Rice, 308 Ark. 593, 826 S.W.2d 252 (1992); accord Op. Att'y Gen. 002, 106 (1993), 132 (1992).

72. See Department of the Air Force v. Rose, 425 U.S. 352, 373-76 (1976); see also Bunker et al., supra note 6, at 576-79 (discussing the similarity between redacting and compacting).
74. Yeager, 678 F.2d at 322.
75. Id.
76. The term "search" is used by the court to connote the process of locating information. It could just as easily have referred to sorting, programming, or record creation.
77. Id. at 321 (quoting S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974)).
as the "burden" placed on the agency. This analysis, combined with the fact that Congress placed no greater burden on agencies using electronic storage systems, led to the rejection of Yeager's request. The request, according to the court, was the "functional equivalent" of creating a new record and, thus, not required by the FOIA.

The court did, however, show some sympathy for requesters in Yeager's position. First, in an interesting footnote, the court stated that "computerized recordkeeping" could have an impact on FOIA analysis in some circumstances. By way of example, the court noted that an agency's "'burden in segregating' nonexempt information" may be lessened. As a result, the analysis of the "extent of the effort expended or the costs involved" could be affected. Under the intelligibility plus burden analysis, this decreased burden could have a major effect.

Additionally, the court noted that Yeager's interpretation of the FOIA burden to compact data "may be desirable in terms of full disclosure policy." However, purely as a matter of Congressional intent, it had to be denied. For that reason, "[a] requester must take the agency records as he finds them."

This reasoning is unfortunate. Given the historically liberal construction of the FOIA, the court could easily have applied the same analytical framework and arrived at the opposite conclusion. Clearly an intelligible document would be produced by meeting the request. Only identifying characteristics would be deleted. Therefore, the gravamen of the case in Yeager is the burden on the government. That burden is dramatically reduced with computer databases. Once again, the FOIA was drafted for a paper era. If Yeager had made an analogous request prior to the advent of computer databases, it would clearly have been unreasonable. Such a request amounts to asking an agency to search all of its files and compile a new report consisting only of the requested information, a requirement that

78. Id. at 322 n.16.
79. Id. at 320-23.
80. Id. at 322 n.17.
81. Id.
82. Id.
83. Id. at 323.
84. Id.
would be an extreme burden for the agency charged with meeting the request.\(^7\)

On the other hand, computer technology relieves a major portion of the burden on the agency. If the software is correctly programmed, an agency can "create" this new record with a few keystrokes.\(^8\)

The computer, rather than the agency personnel, performs the majority of the task. This fact undercuts much of the reasoning behind the "no new record" rule.

Moreover, the court appears to presume the existence of the burden based on cases interpreting the duty of an agency where paper records were at issue. That presumption is inappropriate where computer records are concerned. Therefore, the government should bear the burden of establishing the existence of a burden that is onerous enough to overwhelm the policy of full agency disclosure.\(^9\)

A lingering question after Yeager is how to draw the line between redacting and compacting.\(^9\)

Apparently, the fact that compacting was necessary was undisputed. Surely the fact that the process would be accomplished by computer rather than by hand is not the key. The best answer one can infer is that compacting calls for a total

---

87. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). In that case, the United States Supreme Court ruled that an agency had no duty to write an opinion based on a record or add explanatory material to a document in order to meet a request. \(\text{Id.}\) at 161-62.


\[\text{[T]he law governing an agency's search obligations has not kept up with advancing computer technology. Even the 1982 decision in Yeager ... is outdated. A traditional FOIA search could include physically retrieving 1,000 different paper forms or "records," each of which has been placed in a separate file, and each of which contains only one relevant paragraph. This would be analogous to (and much more difficult than) a computer "query search" for those paragraphs. If defendant has categorized its data by size of employer, for example, and the plaintiff's request can be retrieved by a single search or a simple series of searches, then the information exists in the form of parts of multiple "records." And those records are, in part, being improperly withheld unless the defendant can show the information is exempt or that the search is too onerous. This acknowledgment that an agency is required to conduct relatively simple computer searches is limited to retrieval of parts of existing records and does not require an agency to conduct analyses of existing records.}\]

\(\text{Id.}\) at 2.

90. Bunker et al., supra note 6, at 576-78.
re-ordering of data whereas redacting merely deletes certain facts.\textsuperscript{91}
The Yeager court, although reluctantly, held that agencies do not have to manipulate data in order to comply with a request. This holding is unfortunate, but probably necessary. It is unfortunate in that the public is deprived of information which could be made available relatively easily through computer technology. It is necessary because the federal FOIA, like the Arkansas FOIA, does not differentiate between the types of records which are compiled. Clearly, it would be too burdensome to undertake the type of task at issue in Yeager with paper records.\textsuperscript{92} As a result, the task is not allowed with respect to computer records.

Once again, no Arkansas case has yet raised this specific issue. Agencies in Arkansas, similar to federal agencies, should not be required to “create” a new record in the normal paper records case.\textsuperscript{93} However, as the discussion of Yeager indicates, the policy underlying that protection does not survive application to computer databases.\textsuperscript{94} Moreover, Blaylock indicates that the Arkansas Court may have some sympathy for those requesting access to computer records. Thus, it is time for the Arkansas General Assembly to consider this issue. The existing legislation is simply inadequate for dealing with the question.

D. Must Agencies Provide Programming Information?

The issue which arguably cries out the loudest for legislative action is whether programming must be provided to facilitate the use of computerized records. A simple hypothetical best illustrates the issue.

Assume that the County Clerk’s office in Sebastian County compiles and stores voter registration lists on computer. Further assume that the clerk’s office, either on its own or through an

\textsuperscript{91} Long v. United States Internal Revenue Serv., 596 F.2d 362 (9th Cir. 1979), \textit{cert. denied}, 446 U.S. 917 (1980). See also Bunker, et al., \textit{supra} note 6, at 576-77 (discussing the criteria for determining whether nonexempt material is reasonably segregable).

\textsuperscript{92} If the records were paper records, the request would be more akin to a request to sort through and analyze data contained in those records. That request would certainly be denied. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

\textsuperscript{93} Blaylock, 293 Ark. 26, 732 S.W.2d 152 (1987); see also Watkins, \textit{supra} note 11, at 71-72.

\textsuperscript{94} See also Perritt, Federal Electronic Information Policy, \textit{supra} note 7, at 232; Grodsky, \textit{supra} note 3, at 29-31.
outside vendor, has developed a special software program for creating that list. If a requester may obtain a copy of the computerized list, may the requester also obtain a copy of the program so that the list may be accessed and used? Therein lies the issue.

If the software is developed by a private vendor or individual, the copyright laws may protect the software from release because such a release may violate the copyright in the work. Also, unlike works created by the federal government, state and local governments may protect the copyrights in many of their works. While certain "official works" may not be copyrighted, the ability to copyright "non-official works" probably includes the ability to copyright software. Moreover, the "competitive advantage" exemption in the

95. Toby J. McIntosh, Federal Information in the Electronic Age: Policy Issues for the 1990s 102-03 (1990). See also John A. Kidwell, Open Records Laws and Copyright, 1989 Wis. L. Rev. 1021, 1028 (1989) ("even though a privately authored work becomes a public record . . . the owner's claim to copyright should not be forfeited and open records laws should be applied so as to preserve private copyrights.")

However, this issue is far from settled. The District of Columbia Circuit Court of Appeals has refused to exempt copyrighted records from disclosure under either exemption 3 or exemption 4 of the federal FOIA. Weisberg v. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980). But see In re Inslaw, Inc., 83 B.R. 89 (Bankr. D.D.C. 1988), aff'd, 113 B.R. 802 (D.D.C. 1989). These cases have been interpreted to say that both exemptions can apply in certain circumstances. Moreover, they can be interpreted as addressing only the access issue, not the copying issue. In other words, while a requester may be able to gain access under the FOIA, copying a record may still be precluded under the Copyright Act. See Perritt, Federal Electronic Information Policy, supra note 7, at 232-40.

96. No copyright protection is available for works of the federal government. 17 U.S.C. § 105 (1988). However, most government software programs are provided by independent contractors who may very well have an intellectual property interest in them. Andrußier, supra note 64, at 794-95; Perritt, Electronic Acquisition and Release, supra note 7, at 297. Under the federal FOIA, for a record to be an "agency record," and thus subject to the FOIA, it must be in the control of the government agency. Forsham v. Harris, 445 U.S. 169 (1980); Kissinger v. Reporters' Comm. for Freedom of the Press, 445 U.S. 136 (1980). Thus, an interesting legal question exists concerning whether an intellectual property interest in a record deprives the agency of control over the record. Andrußier, supra note 64, at 794-95. This issue probably does not exist in Arkansas because mere possession will suffice. See Watkins, supra note 11, at 72 (discussing City of Fayetteville v. Edmark, 304 Ark. 179, 801 S.W.2d 275 (1990)). An added complication is that, while the federal government may not copyright its own works, it may hold copyrights assigned to it by third parties. 17 U.S.C. § 105 (1988).


99. See Watkins, supra note 11, at 228 n.469.
Arkansas FOIA may also apply to government-created software, thus precluding disclosure. Thus, while the record (the list) is available, the ability to use it (the program) may not be.

The problem posed by this issue is considerable. Clearly, access to a record will be worthless without the ability to use that record. Compounding the problem in Arkansas is the fact that Blaylock may give the requester the right to demand the record in its computer form. This right is somewhat diminished if the requester cannot use the record once it is obtained.

Very little guidance on this issue is available. Federal agencies, relying on an exemption in the federal FOIA which has no counterpart in the Arkansas FOIA, have argued that computer software is no more an agency record than is a file folder or a rolodex. An Arkansas state agency, relying on the equipment-versus-records distinction in Blaylock, could make essentially the same argument. In other words, the need for additional software "tools" converts a records request into an equipment request.

Yeager, on the other hand, indicates that programming information may have to be released. The district court ruled that if the records requested by Yeager had been disclosable, then "the codes necessary to read and use the tapes" would likewise be available as agency records. The DEA argued that these codes were "proprietary information" under section 552(b)(2), and thus exempt. The circuit court did not rule on this question, leaving open the issue of whether programming information necessary to read or run a computer record is exempt as proprietary information.

This issue is actually two issues. The first question is whether private software vendors should lose their copyright protection when they sell to the government. That, in essence, would be the result if software were released under the FOIA. The down side of such a decision is clear: vendors will either charge a premium to the government or refuse to sell altogether. On the other hand, the

100. See Watkins, supra note 11, at 120-21.
102. McIntosh, supra note 95, at 102.
103. See McIntosh, supra note 95, at 102. See also Andrussier, supra note 64, at 794-95.
104. Yeager, 678 F.2d at 326.
105. Id.
overriding policy of government disclosure will be frustrated if the necessary programming information is unavailable. The General Assembly, unfortunately, can do little or nothing about this portion of the problem because it is governed by federal copyright law. Thus, any change or clarification must come from Congress.

The second issue, on the other hand, can be addressed on the state level. It concerns the status of government-produced programs. Whether they be state or federal, the policy choice with respect to these programs appears less bothersome. The government has less justification for protecting its own programming than it does private programming. The private programmer is, presumably, a profit-making entity with a valuable property interest in its copyrighted program. Release of that program through the FOIA could be devastating. Conversely, the overriding government interest, arguably, should be to inform the electorate. Therefore, it seems that any resistance to releasing government programs should be minimal.

The counter argument is that, at least in some situations, the government should have the ability to copyright and commercially exploit its works. The most compelling case for allowing the government to copyright its works occurs when a government agency creates a work which it would not have created in the normal performance of its duties. For example, consider the county clerk’s office in our hypothetical. In that case, the argument would be that allowing the government to claim a copyright advances the goals of the copyright laws because the subsequent exploitation by the author advances the goals of the copyright laws: benefitting the public by encouraging the creation and distribution of original works.

The best counter to this argument is that government officials are already charged with doing their utmost to benefit the public. Any costs associated with the creation of a work are already paid in the form of taxes. Therefore, the individual agencies should be encouraged to produce and release original works as a part of their service to the public without any additional fee.

Another argument which could be made in Arkansas is that programs alone are not records under the FOIA. This argument has some merit because a program is merely a set of instructions for the computer. Standing alone, it does not “constitute[] a record of

107. Perritt, Federal Electronic Information Policy, supra note 7, at 233; Perritt, Electronic Acquisition, supra note 7, at 295-96.
108. See Kidwell, supra note 95, at 1023.
109. WATKINS, supra note 11, at 163.
110. WATKINS, supra note 11, at 163.
the performance or lack of performance of official functions."

Thus, it is beyond the scope of the definition of records in the Arkansas FOIA.

This argument, however, ignores reality. Records which clearly are within the definition, our voter registration list for example, are useless without the programs which run them. Therefore, the better ruling would be to consider the record and the program as different parts of one record in the FOIA context. The best method for accomplishing this result is a legislative amendment to the FOIA.

A complicating factor in Arkansas is that our FOIA allows access to records held by private firms when those firms are supported in whole or in part by public funds. In that case, the argument for releasing even in-house programming loses much of its appeal. Private organizations presumably do not have the same duty of public service as public officials and agencies. They are merely performing a service for a customer that happens to be the government. Why, then, should a private agency be forced to turn over its computer programming as part of a FOIA request? Conversely, the government should not be allowed to frustrate access by shifting its workload and recordkeeping to a private firm.

This issue, with all of its subissues and complications, amounts to a series of policy choices. Does the software writer's interest prevail over the interest in an informed public? If so, to what extent? This policy is best determined by the democratically elected legislature, not the courts.

E. Personal Privacy

A problem lurking in many of these issues is privacy. The ability to pool and compile information from a database can create a privacy issue where none would otherwise exist. This problem is

112. Id.
113. Arguably, the private firm would receive protection from Federal Copyright Laws for its programs. 17 U.S.C. §§ 101-801 (1988); Watkins, supra note 11, at 163. Clearly, the intersection of Copyright and FOIA law is an interesting and controversial topic. E.g. Kidwell, supra note 95; Rabinowitz, supra note 106. Unfortunately, it is beyond the scope of this article.

Additionally, programming information owned by private firms who are subject to the FOIA may be protected by an exemption in the FOIA. "Files" which would provide an "advantage to competitors" (also known as the competitive advantage exception) are protected from disclosure. Ark. Code Ann. § 25-19-105(a)(9)(A) (Michie 1992). A private firm could certainly argue that a competitor would have an advantage if it gained access to the firm's software. Watkins, supra note 11, at 163.
similar to the rap sheets at issue in *United States Department of Justice v. Reporters' Committee for Freedom of the Press.*\(^{114}\) In that case, a request was made for the rap sheet compiled by the FBI on a reputed crime family in Pennsylvania.\(^ {115}\) A requester could, theoretically, have gathered all of the information available in the rap sheets from various government sources without implicating any privacy concerns. However, the existence of a single source (the rap sheets), which contained all of the information, made the rap sheets exempt from disclosure for privacy reasons.

Likewise, a databank, with the proper sorting or by virtue of its mere existence, may create a privacy problem where no single record or set of records created from it would. This issue is of particular concern because the right to disclosural or informational privacy stems from the United States Constitution as well as the various FOIA statutes.\(^ {116}\) Therefore, even if the FOIA allows release of a record, the privacy of the individual must nevertheless be protected.

Related to the privacy issue is the issue of whether the added usefulness of computer access should be considered. Many have argued that computer access should be allowed because the databases are easier to use.\(^ {117}\) The computer can sort and organize data much faster and more accurately than a person can. Therefore, the information in computer form is more valuable. On the other hand, the potential for abuse is much greater. Computer generated lists from government databases which show earning levels, spending habits, and other purely private information would be a very valuable marketing tool, but would provide little insight into the operation of government. Should the government be the source for such information?

Notably, privacy concerns could be largely avoided if agencies were required to engage in disclosure-avoidance techniques such as those at issue in *Yeager.* The principle concern is that the privacy of *individuals* will be invaded because the vast amount of data stored in a computer database will directly identify individuals with certain

---

117. This argument was the essence of the debate in *Yeager.* See also Bunker et al., *supra* note 6, at 589-93.
characteristics or facts.\textsuperscript{118} If agencies were willing, or required, to use reasonable compacting techniques, this danger would be alleviated to a large degree. With the proper programming, the information component can be released while the privacy component is "compacted" out of a computer document.

In the final analysis, these privacy issues must be evaluated with the purposes of the FOIA in mind. Certainly, it is not contended that the possibility of invading one's privacy should dominate the disclosure issue. Rather, it is contended that legislators and judges should be aware of the fact that computer databases may implicate privacy concerns in ways that paper records could not because of their enormous ability to store and sort data quickly and efficiently. As a result, new legislation must be crafted to protect privacy while still ensuring public access.

F. Meetings in the Computer Age

The following "meeting" is technologically possible.\textsuperscript{119} Members of an agency can access the internet through personal computers. They can exchange messages over the internet and even compose documents. They can propose and vote on agency action. This activity can occur simultaneously or over an extended period of time.

The advantage of this type of technology is obvious. Agencies may conduct meetings without each member of the agency actually being present in the "location" of the meeting. Moreover, the public can "attend" these meetings far more easily by logging on to the internet and monitoring the meeting rather than physically attending.

On the other hand, some interesting questions surface. Has a "meeting" occurred for FOIA purposes? Or is the event more like a record for FOIA purposes? Neither Arkansas nor federal courts have addressed these issues.

Arkansas has perhaps answered the first question by implication. In \textit{Rehab Hospital Services v. Delta-Hills Health Systems Agency},\textsuperscript{120} the Supreme Court of Arkansas held that a telephone poll of board

\textsuperscript{118} Disclosural, or informational, privacy protects the individual from having the "intimate details" of his life which would "subject the person to embarrassment, harassment, disgrace, or loss of employment" disclosed to the public in general. \textit{Brown v. FBI}, 658 F.2d 71, 75 (2d Cir. 1981); \textit{Young v. Rice}, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992). For a detailed discussion of the privacy interest, see Brian G. Brooks, Note, \textit{Young v. Rice: The Personnel Records Exemption to the Arkansas Freedom of Information Act}, 46 ARK. L. REV. 759, 773-75 (1993).

\textsuperscript{119} Greg Simon, Chief Domestic Policy Advisor to Vice President Al Gore, Speech at the University of Arkansas School of Law (March 4, 1994).

\textsuperscript{120} 285 Ark. 397, 687 S.W.2d 840 (1985).
members was a meeting subject to the FOIA. This telephone poll is similar to an internet meeting; voting board members communicate by electronic device rather than face-to-face. Thus, if it occurs in Arkansas and all of the other requirements of the FOIA are met, it should be a meeting subject to the FOIA.\textsuperscript{121}

The second question is somewhat more troublesome. If an agency meets by way of a telephone call, the action is a meeting. As previously stated, the hypothetical meeting is arguably no different. If the members of a committee, on the other hand, communicate by mail, there is no meeting. Rather, records are created. This situation would be analogous to sending an E-mail message which is stored in a computer's memory. A record has been created by "saving" the message. Then, arguably, no meeting has transpired at all. Or is the event more like a tape recording of a meeting, in which case a meeting has transpired and a record has been created? In other words, the essential question is whether the exchange is more like immediate communication as in a face-to-face meeting or delayed communication through the mail.

In reality, E-mail is neither a record nor a meeting in conventional terms. It is a completely new form of communication. As such it should be specifically considered and defined with the purposes of the FOIA in mind. By so doing, the difficult problems posed by analogical reasoning will be avoided.

III. PROPOSED SOLUTIONS

What should be apparent from the previous discussion is that 1960s statutes combined with 1990s technology have placed the courts in a difficult position. Not one of the issues posed by the cases examined or by the hypothetical meeting is squarely addressed by the current legislation. Thus, the Arkansas General Assembly should step forward and affirmatively resolve these issues before the courts are forced to attempt to apply the antiquated FOIA. Fortunately,

\textsuperscript{121} On the federal level, the Sunshine Act provides the same analogy. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976). The legislative history of that Act indicates that a meeting occurs when there is a conference call involving the requisite number of members and the other definitional requirements are met. H.R. CONF. REP. No. 1441, 94th Cong., 2d Sess. 11 (1976), reprinted in 1976 U.S.C.C.A.N. 2246-47. On the other hand, the same legislative history appears to provide an out for federal agencies. Members of an agency may consider "individually business that is circulated to them sequentially in writing." \textit{Id.} In that situation, the occurrence is not a meeting for Sunshine Act purposes. This provision could be applied to E-mail in such a way that it circumvents the Sunshine Act.
if the General Assembly chooses to address these issues it will not be forced to write on a blank slate. It has the luxury of using other attempts to address these issues as guidance.

A. The Electronic Freedom of Information Improvement Act of 1994

Senator Patrick Leahy has proposed an amendment to the federal FOIA which addresses many of these issues.\textsuperscript{122} The Bill specifically recognizes the increased use of computer technology by the government and that such technology should be used "to enhance public access to agency records and information."\textsuperscript{123}

The first important provision under the Bill would require agencies to publish electronically by computer telecommunications all information required to be published by the Federal Register. Moreover, agencies would be required to include an index of all such information and a description of any new databases. This provision is important because it requires access to information through online databases. This fact alone makes the information more accessible because it may be obtained in a manner more readily available to the public. No longer would one be required to sort through the Federal Register in a law library. Access could, presumably, be accomplished at home or in the office.

Second, and perhaps most importantly, the Bill specifically defines records to include machine readable materials "regardless of physical form or characteristics . . . ."\textsuperscript{124} In other words, under the new definition of "records," everything from an E-mail message to a database to software appears to be a record. This definition is quite similar to the definition in the FRA.\textsuperscript{125}

Third, the Bill mandates that access to computer records should be allowed in most cases. If records are maintained in an electronic form and requested in that form, access must be given in that form. In other words, if the agency maintains electronic records, it must provide access to those records when so requested.\textsuperscript{126} Moreover, even

\begin{footnotesize}
\begin{itemize}
\item[122.] S. 1782, 103d Cong., 2d Sess. (1994), \textit{reprinted in} 140 \textit{Cong. Rec} S12726 (daily ed. September 12, 1994). This discussion is based on the Bill as it was originally introduced in the 103d Congress. It did not pass. However, Senator Leahy will re-introduce the bill in the 104th Congress with some changes.
\item[123.] \textit{Id.} § 2(a)(6).
\item[124.] \textit{Id.} § 8 (amending 5 U.S.C. § 552(f)).
\item[125.] \textit{See supra} note 33 and accompanying text.
\item[126.] S. 1782, \textit{supra} note 122, at § 5 (amending 5 U.S.C. § 552(a)(3)(C)).
\end{itemize}
\end{footnotesize}
if the records are not normally maintained in an electronic form, an agency must make "reasonable efforts" to comply with a request for them in electronic form.\(^\text{127}\)

Finally, the Bill defines "search" as either a "manual" or "automated" search for records.\(^\text{128}\) Therefore, it appears that an agency would be required to search a database for particular pieces of data contained in it. This mandate, because "data" are records, is somewhat broad.

The advantages of this proposed legislation are numerous. In particular, it forever solves the threshold question whether computer records are FOIA records under the federal act. Likewise, it overturns that portion of *Dismukes* which disallows the requester to demand the computer record. Those facts alone make the legislation attractive.

On the other hand, the Bill poses some serious questions. The first is whether it mandates that an agency must release all software to a requester. On its face, it appears that it does. However, as previously stated, the Copyright Act arguably supersedes the federal FOIA and the Arkansas FOIA.\(^\text{129}\) Moreover, if such a release is required, the Bill makes no explicit provision to compensate the private software manufacturer. This result is somewhat unfair to the manufacturer. Presumably, manufacturers would be left with charging a premium when the government is the user. A better solution to this problem is needed.

The second problem is that the Bill inadequately addresses the creating-a-new-record problem.\(^\text{130}\) Conceivably, the new definition of search combined with the fact that mere data are records could be construed as requiring agencies to employ disclosure avoidance techniques like those at issue in *Yeager*.\(^\text{131}\) Considering the court's reasoning in that case, such a construction is consistent. However, that would be a construction rather than a clear statutory mandate. A better approach would be to establish a standard for when compacting is allowed so the courts can follow it,\(^\text{132}\) rather than leaving to the courts the question whether the statute includes compacting at all.

By way of summary, Senator Leahy's Bill is a step in the right direction. It puts to rest many of the most important issues.


\(^{128}\) S. 1782, *supra* note 122, at § 8 (amending 5 U.S.C. § 552(f)(3)).

\(^{129}\) See *supra* notes 95-114 and accompanying text.

\(^{130}\) See *supra* part IIC.

\(^{131}\) See *supra* notes 67-84 and accompanying text.

\(^{132}\) For instance, the requirement articulated by Judge Oberdorfer, that the agency establish that the task is too onerous. See *supra* note 89.
Unfortunately, it leaves some equally important issues untouched. With some fine tuning, however, it is a good starting point.

B. Federal Agency Response

Recognizing the enormous impact of computer technology on access to government information, the Administrative Conference of the United States has drafted recommendations addressing many of the above issues. The recommendations "are intended to guide agencies in addressing the questions that will arise when an agency considers whether to acquire or release information in electronic form . . . ." They supplement Office of Management and Budget Circular A-130 which provides a "general framework for management of federal information resources."

Recommendation A deals specifically with FOIA questions. It recommends that agencies recognize "information maintained in electronic form" as records for FOIA purposes. Moreover, it recommends that agencies not deny access to these records on the basis that retrieval of "electronic information is equivalent to creation of a new record, or that programming is required for retrieval." In addition, agencies should provide electronic information in its electronic form or in any other form that can be "generated directly and with reasonable effort from existing databases with existing software." Reasonableness is the watchword for future questions such as those regarding the specificity of search terms and how much programming an agency must do in order to meet a request. The same reasonableness concept applied to searches for paper records should serve as a guide.

Finally, similar to the Leahy Bill, the recommendations urge agencies to electronically publish all data they are required to publish. Additionally, the recommendations provide the agency with an alternative. Agencies may allow others to publish the data. In other words, agencies may contract with private information distributors in order to accomplish this task. Moreover, the agencies are urged

133. 1 C.F.R. § 305.88-10 (1994) (Recommendation 88-10 was incorporated by reference into C.F.R. For text see 54 Fed. Reg. 5209 (1989)). See Perritt, Electronic Acquisition, supra note 7, for a detailed discussion of the recommendations.
135. Id. n.1.
136. Id. at 5210 (Recommendation A 1).
137. Id. (Recommendation A 2).
138. Id.
139. Id. (Recommendation A 3).
140. Id. (Recommendation C).
to provide electronic access to information which is not required to be released except through the FOIA. Once again, agencies may meet this requirement by providing the information to a private distributor.

These recommendations are somewhat similar to the Leahy Bill. Both identify electronic records as FOIA records, and both require data to be released in the electronic format when so stored and so requested. Likewise, both measures require release of the electronic version of a record not normally stored electronically when it is reasonable to do so.

Although somewhat similar, the measures differ significantly. The recommendations glaringly omit any discussion of the release of software. Once again, the importance of this issue cannot be overemphasized. Records in electronic form are useless without the appropriate software. Yet software developers have a significant property interest at stake. Any reform must address this issue.

On the other hand, the recommendations more adequately address the creating-a-new-record problem. Recommendation A specifically states that a "standard of reasonableness" should be employed to determine the extent of a "search" and "retrieval" of records as well as "in determining the extent to which FOIA requesters may ask the agency to produce data organized in formats other than those used by the agency in its regular course of business."\textsuperscript{141} This reasonableness standard is quite similar to the onerousness standard discussed previously.\textsuperscript{142} This approach seems adequate and should be given some serious consideration.

Finally, the recommendations raise the possibility of using private information vendors as an outlet for government information. The central debate surrounding this recommendation is cost to the public. Government agencies are allowed to charge only a reasonable amount in recouping the expense of complying with a FOIA request.\textsuperscript{143} Private information vendors, on the other hand, will expect to make a profit. Therefore, use of these vendors calls for an analysis of the possible costs to the public. One can anticipate that requestors will eventually contest the fee set by vendors as violative of the FOIA. In order to survive this challenge, the legislation drafted should specifically allow additional charges to offset the expense of electronic publication and provide a reasonable profit.

\textsuperscript{141} Id. (Recommendation A 2).
\textsuperscript{142} See supra note 89 and accompanying text.
Such legislation has been validated by the courts. In *SDC Development Corp. v. Mathews*, the Ninth Circuit Court of Appeals addressed a similar issue. SDC requested a copy of the Medical Literature Analysis and Retrieval System (MEDLARS) on magnetic tape. The system had been compiled by the National Library of Medicine by statutory mandate. The same statute authorized the library to charge the public for using its services and materials. The charge for a copy of the tape was $50,000. SDC contended that the tapes were available under the FOIA and offered $500 to cover the search and duplication.

Then-judge Anthony Kennedy found that SDC's request was properly denied. Central to his reasoning was the fact that the library was not trying to protect the information from public scrutiny. Rather, it was protecting its "system for delivering that information." Moreover, the agency had been directed by Congress to charge for access and nothing in the FOIA prevented that directive.

Similarly, the recommendations should call for a reasonable charge to be sanctioned by legislation. Anything less will run the risk of conflicting with the FOIA. On the other hand, one can argue that private vendors should not be allowed to profit from FOIA information. This information should be available to the public at the least possible cost. Presumably, access through the agency itself would be least expensive. Once again, this policy decision should be squarely addressed.

C. The California Solution

A final and quite interesting proposal has been presented in California. Assemblyman Tom Bates has introduced a bill which would mandate free computer access to all disclosable government information. The bill would require the creation of a "nonproprietary,  

144. 542.F.2d 1116 (9th Cir. 1976).  
145. Id. at 1117 (citing 42 U.S.C. § 276).  
146. Id. (citing 42 U.S.C. § 276(c)(2)).  
147. Id. at 1118.  
148. Id.  
149. Id. at 1120.  
150. The actual holding of the case was that the records were not "agency records" for FOIA purposes because of the specific Congressional mandate. Id. The reasoning, however, applies with equal force to the issue posed by the recommendations.  
nonprofit cooperative public computer network” providing access to all government data. The system would automatically redact “private and confidential information” and “protect all government owned or operated systems.”

The mandates of the bill would be accomplished by a task force created under the bill. The bill directs the Office of Information Technology in the Department of Finance to work with all state agencies and members of the public to create and implement a plan to accomplish the bill’s mandates. The plan should be completed by the year 2000, according to the bill.

Clearly, creating a public computer network from which one could access all public data is the most ambitious of the solutions examined. It avoids the majority of the issues by making the data contained in government databases directly available to the public. It also requires the protection of personal privacy and proprietary interests. Likewise, the cost issue is avoided by placing it on the taxpaying public in general. The question is determining whether it can be done.

Presumably, the government will be required to survey all information prior to placing it in the database to determine whether it is exempt under the FOIA. This task is quite difficult. For example, in the privacy area, the question is one of balance. The privacy concerns in the information are weighed against the public interest in disclosure in order to determine whether the information is exempt. Balancing prior to releasing information into a database will be difficult. Some notice to individuals presumably would be required so that reverse FOIA suits may be brought. In short, if this legislation passes, it will be interesting to follow the progress of the task force to see how much success it has.

IV. CONCLUSIONS

In 1992, Senator Patrick J. Leahy identified changes to the FOIA as one of the most pressing issues facing the Subcommittee on Technology and the Law. The same is true in Arkansas. The difficulty in applying a paper-era statute to computer technology demonstrates he is correct. The ultimate answers to each of these issues must be statutory. Legislatures must decide, on policy grounds,

152. Id. § 1.
153. See Brooks, supra note 118, at 778.
whether and to what extent access to computerized information will be allowed. As with any legislative action, policy should dictate the outcome.

The threshold question to be asked before any action concerning the Arkansas FOIA is taken is whether the action will advance the central purpose of the FOIA. In Arkansas, the legislative intent of the FOIA provides clear guidance:

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.155

Thus the act is directed at informing the public about government activity.156 The act does not currently allow, nor should it allow, the release of information merely because it exists in a government database. Therefore, legislative enactments addressing the release of computerized data should be designed to mandate the release of government data that advances this policy.

Computer technology can address this issue. Online databases relieve government employees of the onerous task of searching through files and paper records in order to meet requests. In addition, online services will make data accessible to members of the public who would otherwise be precluded. Likewise, both computer files and online services make information searching and management much more convenient for users. Finally, the ability to sort and search records in computer formats greatly increases the speed with which requests are met.

The converse of the above consideration is personal privacy. Government databases are perhaps the single greatest source of information about people. When this information does not serve the clear purpose of informing the public about their government, it quite often invades their privacy. Information dissemination is a large and growing industry.157 Government databases should not be

156. On the federal level, the United States Supreme Court has clearly enunciated a similar purpose. "This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' . . . focuses on the citizens' right to be informed about 'what their government is up to.'" United States Dept. of Justice v. Reporter's Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (citations omitted).
157. See McIntosh, supra note 95.
used to facilitate that industry at the expense of personal privacy. The ability to store, sort and compile information about private citizens is frightening. The Supreme Court of the United States has indicated and the Arkansas Supreme Court has squarely held that individuals have a fundamental right to disclosural, or informational, privacy. Computer technology is perhaps the single greatest threat to this right. Therefore, the fundamental rights of private citizens also dictate rapid disposition of these issues. Legislative measures must keep an eye toward the privacy of the individual.

Similarly, those who create the programs which drive computer technology have a substantial property interest in those programs. If government programs become available through the FOIA, that interest is in serious jeopardy. On the other hand, without programming, access is useless. This conflict presents the difficult question of whose interests should prevail. This article has put forth the view that private vendors should be protected but government-created programs should not. That conclusion, however, is subject to debate. Ultimately, this issue is one of policy. It should be dealt with by the state legislatures and Congress.

Computer technology is simultaneously wonderful and frightening. It can allow the public to become aware of what “government is up to” in ways never before imagined. This increased ability to expose the operations of government to the light of day has the potential to best accomplish the ultimate goal of the FOIA: an informed electorate. The General Assembly should step forward and address the issues posed by this technological wonder.