

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 14
Issue 4 *Journal of Computer & Information Law*
- Summer 1996

Article 10

Summer 1996

Revising the Freedom of Information Act for the Information Age: The Electronic Freedom of Information Act, 14 J. Marshall J. Computer & Info. L. 817 (1996)

Jeffrey Norgle

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Jeffrey Norgle, *Revising the Freedom of Information Act for the Information Age: The Electronic Freedom of Information Act*, 14 J. Marshall J. Computer & Info. L. 817 (1996)

<https://repository.law.uic.edu/jitpl/vol14/iss4/10>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

REVISING THE FREEDOM OF INFORMATION ACT FOR THE INFORMATION AGE: THE ELECTRONIC FREEDOM OF INFORMATION ACT

I. INTRODUCTION

The non-profit Environmental Working Group (“EWG”), faced a disconcerting legal obstacle when attempting to obtain information from an entity of the largest single producer and collector of information in the country; the United States Government.¹ The EWG requested data in electronic form² from the Food and Drug Administration (“FDA”) under the Federal Freedom of Information Act (“FOIA”).³ The EWG intended to analyze⁴ the variance between levels of toxins that are inherent in

1. *U.S. Pesticide Exports and the Circle of Poison, 1994: Hearings Before the Subcomm. on Economic Policy, Trade and the Environment of the House Comm. on Agricultural Affairs*, 103d Cong., 2nd Sess. (1994) [hereinafter *U.S. Pesticide*] (statement of Richard Wiles, Director, Agricultural Pollution Prevention at the Environmental Working Group). Wiles testified on pesticides in imported food and explained that toxicity levels have not been accurately analyzed by the Food and Drug Administration for infants and children as they previously have for adults. *Id.* at 65. Wiles addressed the issue of whether or not the Food and Drug Administration can assure the public that imported food meets U.S. pesticide safety standards in regard to the health of infants and children. *Id.* The Environmental Group’s analyses of the Food and Drug Administration’s pesticide residue monitoring data indicates that “these assurances cannot be made with reasonable confidence.” *Id.* “The solution is not more taxpayer money for a vastly enlarged federal testing program, but rather more information.” *Id.* at 83.

2. *U.S. Pesticide*, *supra* note 1, at 68. The Environmental Group requested FDA pesticide residue data in an “acceptable” form, an electronic form most accessible and easily manipulated for their purposes of determining accurate toxicity levels in infants in children. *Id.*

3. 5 U.S.C. § 552 (1988).

4. See *U.S. Pesticide*, *supra* note 1, at 30. Explaining that the report is intended to address the issue presented by the scientific community [which] “has spoken with unusual clarity and authority on the health risks of pesticides, and the failure of the current regulatory system to protect the public health, particularly the health of infants and children.”); see also *Review of the Registration and Reregistration Process of the Environmental Protection Agency Under the Federal Insecticide, Fungicide and Rodenticide Act: Hearings Before the Subcomm. on Department Operations and Nutrition of the House Committee on Agriculture*, 103d Cong., 1st Sess. (1993) (statement of Richard Wiles) [hereinafter *Review*]. Wiles

imported foods consumed by infants and children, as compared to adults.⁵ The FDA decided that information could be indispensable to thousands in the medical, pharmaceutical, and health industries, and of course, to the consuming public that rely on industry application of government research information. While the FOIA is designed to provide interested industries and the public access to federal agency statistics, such as the FDA's, this was not to be the case here. The FDA refused to disclose the data in electronic form to the EWG, exercising its option under the current FOIA to not disclose information in electronic form.⁶

The FDA did, however, release over 6,000 pages of pesticide monitoring results to the EWG in the unwieldy physical form of paper documents.⁷ These documents were cumbersome, confusing, and unorganized for the efficient statistical analysis necessary for quality scientific research. The FDA's decision left the EWG with no choice other than to bear the financial burden of paying a commercial scanning firm

testified that his research group analyzed the results of over 20,000 samples of food and their residual pesticide levels performed by the FDA and the United States Department of Agriculture ("USDA"). *Id.* at 152-153. Wiles' group documented, for the first time, the prevalence of multiple pesticides in fruits and vegetables eaten by children. *U.S. Pesticide, supra* note 1, at 64. The report showed that children routinely consume individual servings of fruit and vegetables with five or more pesticide residues. *Id.* Novel "analytical ground was broken" in pesticide studies, revealing that normal consumer protection of fresh fruits and vegetables does not remove or reduce the incidence of multiple pesticides present when the food is consumed. *Id.* Wiles later testified:

These findings are particularly troubling since the Environmental Protection Agency regulates pesticides as if people are exposed to them one at a time. Moreover, tolerances are based on the food consumption of a mythical average person in the population, a process that ignores the relatively high food consumption of young children when compared to adults. *Pesticides in Children's Food*, for example, found that up to 35 percent of lifetime exposure to some carcinogenic pesticides occurs by age five. The result of this heavy exposure early in life is that for the average child, the Environmental Protection Agency's 'acceptable' lifetime level of cancer risk from combined average exposure to eight pesticides is exceeded by age one.

Federal Document Clearing House, Pesticides and FIFRA, 1994: Hearings Before the Subcomm. on Department Operations and Nutrition of the House Committee on Agricultural Affairs, 103d Cong. 2nd Sess., at 2, (statement of Richard Wiles).

5. *See Review, supra* note 4, at 22.

6. *See U.S. Pesticide, supra* note 1, at 68. Director Wiles testified that acceptable electronic format would constitute a format for FDA data that could be easily analyzed by his environmental research group. *Id.* This electronic form would list, among other variables, the estimated pounds of imported commodity for fiscal years 1990-92, the number of samples tested, the number of samples tested using single residue detection methods ("SRMs"), and the average number of pounds per SRM. *Id.*

7. *U.S. Pesticide, supra* note 1, at 68. The data were helpful, but nevertheless "essentially useless," because the original hard copy data (a two foot high stack of computer printouts could not be interpreted in any meaningful way.) *Id.* After appeals and conversations with the FDA, it became obvious that the data would not be disclosed in the requested electronic form without a lengthy struggle. *Id.*

to input the pesticide data.⁸ Then, the EWG had to go through the labor intensive chore of converting the data into suitable electronic format⁹—the very format that the FDA maintained all along.¹⁰

The scenario involving the EWG hinges on the obsolete FOIA, which in fact, requires federal agencies to disclose information, but does not provide that information must be disclosed in the form requested.¹¹ Indeed, the form disclosed often falls short of the requester's needs.¹²

The FOIA should clearly require agencies to honor requests for electronic information when the agency already maintains the information in electronic form. Such a requirement would serve an unambiguous two-fold purpose: 1) to increase the efficient disclosure of immense volumes of information generated and held by the government;¹³ and, 2) to take overdue steps to alleviate delays in processing requests for Gov-

8. *U.S. Pesticide*, *supra* note 1, at 68. The data contained the pesticide residue levels measured for 25 billion pounds of 22 fruits and vegetables that entered the U.S. *Id.* at 74. This data had to be electronically scanned to begin the process of entering the information into a more useable form. *Id.* at 68. Despite receiving the data, the Environmental Group contended that the FDA understated their interpretation of the pesticide data for fiscal years 1990-92 because the pesticide levels were related to adult tolerances, and did not account for the lower tolerance levels of infants and children. *Id.*

9. *U.S. Pesticide*, *supra* note 1, at 68 (explaining that the FDA failed to release public residue data in acceptable electronic form).

10. *U.S. Pesticide*, *supra* note 1, at 68. The FDA maintained the pesticide data in electronic format, however, when the data was finally released to the Environmental Group, it was edited, and in summary form. *Id.* The process of converting the data into a suitable format for the Environmental Group's analyses involved considerable expense. *Id.* They employed two proofreaders to verify the accuracy of over 20,000 records of information. *Id.* The Environmental Group considered this procedure as entirely unnecessary because the exact same data were previously released in the 6,000 page paper form. *Id.* As a consequence, the FDA's response to the Environmental Group's FOIA request did not permit the type of thorough evaluation and statistical analyses necessary for its pesticide report. *Id.*

11. *See U.S. Pesticide*, *supra* note 1, at 67-74. The requested electronic format lists tables, such as the percent change of per capita consumption of each of the twenty-two fruits and vegetables from 1970 to the present. *Id.* There are also three other major tables listed in this electronic format: (1) the number of pounds of imported commodity; (2) residue methods and tests used; and, (3) single residue tests and imported commodity. *Id.*

12. *See, e.g., Hahn v. IRS*, No. 90 Civ. 2782 (D.D.C. Jan. 10, 1992) (holding IRS need not provide records in form "comprehensible to a layperson"); *see also Tax Data Corp. v. Hutt*, 826 P.2d 353 (Colo. Ct. App. 1991) (holding that a paper printout constitutes a record, the agency allows requesters hands-on use of computer terminals); *Chapin v. Freedom of Information Commission*, 577 A.2d 300 (Conn. App. Ct. 1990) (holding state law allows the agency to provide only paper copy of requested information and does not need to provide computer disk).

13. *See GRODSKY, OFFICE OF TECHNOLOGY ASSESSMENT, INFORMING THE NATION: FEDERAL INFORMATION DISSEMINATION IN AN ELECTRONIC AGE 32-33 (OTA-CIT-396) (Oct. 1988) [hereinafter OTA]*. Agency spending for research, development, and testing for electronic information technologies within the agencies has undergone remarkable growth, paralleling the information revolution. *Id.* Information collected and developed by the Federal Government to fulfill its functions and agency missions includes, but is not limited to: "sta-

ernment records.¹⁴ In particular, the FOIA must be updated with specific reference to electronic form disclosure. Most importantly, the FOIA should take into account the rapid expansion of computer technology and the ease with which a requester can use information in electronic form, as opposed to the unwieldy paper form.¹⁵

Recently, legislation¹⁶ was proposed to further the purpose¹⁷ of the thirty year old FOIA.¹⁸ This Comment shows that there is authority supporting the amendment of the FOIA and demonstrates that the current FOIA is incapable of meeting the increasing demands of the public and technology. Section II describes the history and purpose of the current FOIA and case law illustrating the present problem of FOIA requests for information in electronic form. Current caselaw is confusing and ambiguous at best. Section III argues that certain key terms used in the FOIA need clarification. This examination includes the request "form" and request "content" dichotomy¹⁹ of "agency"²⁰ "records."²¹ Sec-

tistical data and computer models, reports, periodicals, and directories, rules, regulations, and circulars, maps, charts, and photographs." *Id.* at 28-29.

14. See 141 CONG. REC. S10888-02 (daily ed. July 28, 1995) (statement of Sen. Leahy) (explaining the purpose of the Electronic Freedom of Information Improvement Act.)

15. See *High Tech Sunshine*, PORTLAND OREGONIAN, Aug. 15, 1994, (1994 WL 4550715, at *1) [hereinafter *High Tech*] (describing the ease that electronic format information provides the user). Such release of government information in electronic form "would mean people asking for information would not have to put up with delays or unnecessary expense while electronic information is printed out on paper if it could instead, be copied onto a disc or relayed electronically in some other fashion." *Id.* Maria Cantwell, a past author of legislation in the U.S. House of Representatives to require electronic records be disclosed, when available, has "estimated the federal government was using fewer than 100 computers when the FOIA was conceived in the 1950's . . . [using] hundreds of thousands of them now." *Id.*

16. S. 1090, 104th Cong., 1st Sess. (1995) (stating that "The Electronic Freedom of Information Improvement Act would contribute to . . . information flow by increasing online access to Government information, including agency regulations, opinions, and policy statements, and FOIA-released records that are the subject of repeated requesters"). Senator Leahy's bill in the U.S. Senate aligned closely with past legislation in the U.S. House of Representatives which was led by the cosponsorship of Representative Maria Cantwell of Washington state. *High Tech*, *supra* note 15, at *1; see also 140 CONG. REC. E1676-01 (introducing the House version of the Electronic Freedom of Information Act); see also 142 CONG. REC. D374 (tracking the bills recent mark-up in the Senate Judiciary Committee).

17. See SENATE, *infra* note 27, at 4. The purpose of the FOIA is for the press and public to have access to government information. *Id.* See also *Retired Officers Ass'n v. Dep't of the Navy*, 744 F. Supp. 1 (D.D.C. 1990). When evaluating the public's interest in disclosure for FOIA purposes, the court examines the nature of the requested document and the document's relationship to the basic purpose of the FOIA which is to open federal agency action to the light of public scrutiny. *Id.*

18. See 5 U.S.C. § 552 (1988). Although this statute, commonly referred to as the FOIA, has been amended, the original enactment dates back to 1966. *Id.*

19. See, e.g., *Forsham v. Harris*, 445 U.S. 169, 177 (1980) (illustrating the judicial guidance advanced in interpreting the terms "records," "content," and "form").

tion III also argues for the implementation of the Electronic Freedom of Information Improvement Act.²² In particular, this section examines whether the Improvement Act addresses these concerns. The comment concludes that the FOIA must be revised, most importantly, to make better use of Government information, to enhance all citizens' right to access.

II. BACKGROUND

Currently, the FOIA and its interpretive case law does not adequately allow the public to receive information from federal agencies. This section explains the fundamental purpose of the current FOIA. Paradoxically, the changes which occurred in the 1970s in reaction to a glut of requests in paper form, contributed to the present delays for records in paper form.²³ Notably, agency obligations under the current FOIA²⁴ and case law dealing with requests for information in electronic form brought attention to this area of information law.

A. THE CURRENT FREEDOM OF INFORMATION ACT

1. *The Fundamental Purpose of the Act*

The Freedom of Information Act provides a right to access government records.²⁵ The 1966 enactment of the FOIA²⁶ created a right for the press and public to access government information, making that

20. 5 U.S.C. § 552(f) (1988) (including the definition of "agency" as "an 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"); *see also* *Armstrong v. Executive Office of the President*, 877 F. Supp. 690, 699 (D.D.C. 1995) (holding that for an entity to be an "agency," and be subject to the FOIA, the entity must satisfy the two-pronged analysis of an "establishment in [the] executive branch" and must exercise "substantial independent authority" to the extent that its role is not limited solely to giving advice and assistance to the President).

21. *See, e.g., Forsham*, 445 U.S. at 170. The *Forsham* case held that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants were not "agency records." *Id.* Within the meaning of the FOIA, when copies of those data have not been obtained by a federal agency subject to the FOIA the data do not constitute "agency records." *Id.* at 171.

22. S. 1090, 104th Cong., 1st Sess. (1995). The 1995 rendition of the Electronic Freedom of Information Improvement Act, in the Senate Judiciary Committee proposed to amend 5 U.S.C. § 552 "to provide for public access to federal agency information in electronic form, and for other purposes." *Id.*

23. *See* *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

24. 5 U.S.C. § 552(b)(1)-(9) (1988). Along with agency obligations there is a nine part section of the FOIA which outlines the statutory exemptions to a federal agency's obligation to disclose records. *Id.*

25. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

right judicially enforceable.²⁷ Specifically, the FOIA provides access to federal agency records and “ensure[s] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption; holding governors accountable to the governed.”²⁸ However, the goal of an informed citizenry and open government is often at odds with other public interests. For example, there are the interests of maintaining an efficient and effective government; in responsible use of limited resources; and in the preservation of the confidentiality of sensitive information.²⁹ Thus, the FOIA seeks to accomplish “disclosure as the predominant objective,”³⁰ while protecting the other important interests. The FOIA shifts the burden of proof from the public to the agency when records are withheld from public scrutiny.³¹ Moreover, the purpose of the FOIA is to establish “a general philosophy of full agency disclosure unless information is exempt under delineated language” and to provide a court procedure “by which citizens and the press may obtain

26. Freedom of Information Act of 1966, Pub. L. No. 89-487; and Pub. L. No. 90-23 (codified as amended at 5 U.S.C. § 552 (1988)).

27. SENATE COMMITTEE ON THE JUDICIARY, 93d Cong., 2d Sess. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCE BOOK, Sen. Doc. No. 93-82, (Comm. Print 1974) [hereinafter SENATE] (comparing then existing FOIA and the new text, cited in FOIA § (c): “the district court of the United States . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant”).

28. See *Robbins Tire*, 437 U.S. at 242 (1978).

29. 5 U.S.C. § 552(b)(1)-(9) (1988). The preservation of certain, classified or sensitive, governmental categories of information are also important public interests that are provided for under the FOIA’s nine exemptions to a federal agency’s obligation to disclose. *Id.*

30. See SENATE, *supra* note 27, at 38 (citing S. REP. NO. 813, 89th Cong., 1st Sess. (1965)). Although these tensions are routine in a democratic society, the balance “is not an impossibility,” where an early FOIA Senate Committee report on the FOIA reasoned that: “[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure.” *Id.*

31. See 5 U.S.C. § 1002 (1964) (amended 1966). The FOIA replaced the Administrative Procedure Act (“APA”) § 3. *Id.* The FOIA emerged after nearly ten years of legislative debate, revising the public disclosure section of the APA. *Id.* See SENATE, *supra* note 27, at 38 (citing S. REP. NO. 813, 89th Cong., 1st Sess. (1965)). The 89th Congress, Committee on the Judiciary recognized that the APA fell short of disclosure goals, the APA came to be looked upon as more of a withholding statute than a disclosure statute. *Id.* New statutory provisions were necessary, in the form of the FOIA, to safeguard disclosure as a right to access federal agency information, effectively forcing the balance of interests slightly more to the public interest of open government. *Id.* The intention of § 3 of the APA, while part of an effort to open government activities to the public, had phrases that served as loopholes for withholding of governmental information. *Id.* Section 3 allowed federal agencies to withhold records if secrecy was “in the public interest” or if records related “solely to the internal management of the agency.” *Id.* The government was permitted to withhold information if it had “good cause” to do so. *Id.* In the absence of “good cause,” records would be disclosed only to those persons “properly and directly concerned.” *Id.* at 39. Most importantly, the APA allowed no judicial remedy for persons “wrongfully denied information.” *Id.* at 38.

information.”³²

However, to remain true to its disclosure requirements, the FOIA changed less than a decade after enactment by extending time limits for agency compliance during an onset of requests for records in paper form.³³

2. *More Time Needed for Paper Form Requests*

Because they were inundated by FOIA requests for records in paper form, some agencies could not keep pace with demand, and as a result, important time extension provisions were granted.³⁴ The time for agency compliance was extended in the case of *Open America v. Watergate Special Prosecution Force*.³⁵

The plaintiffs requested the Attorney General and the Director of the Federal Bureau of Investigation (“FBI”) to produce for inspection all documents related to the role of the former Acting Director of the FBI, in relation to the “Watergate Affair.”³⁶ The Circuit Court for District of Columbia held that an agency must exercise good faith in processing all FOIA requests on a “first in, first out” standard.³⁷ In addition, the FOIA requester maintains a right³⁸ to have his request processed ahead of prior FOIA requesters only by a specific showing of need or urgency.³⁹

32. *FOIA Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure*, 88th Cong., 1st Sess. (1964).

33. 5 U.S.C. § 552(a)(6)(C) (1988).

34. *See* *Cohen v. FBI*, 831 F. Supp. 850, 854 (S.D. Fla. 1993). The court “cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of [paper form] requests within the time constraints imposed by the FOIA.” *Id.*

35. *See Open America*, 547 F.2d 605. The Circuit Court of Appeals for the District of Columbia held that “exceptional circumstances” may exist when an agency can show, as the court stated “it is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of the FOIA’s subsection (6)(A).” *Id.* at 616.

36. *Id.* at 607.

37. *Id.* at 616.

38. *Id.*

39. *See, e.g., Cleaver v. Kelley*, 427 F. Supp. 80, 81 (D.D.C. 1976) (explaining that need or urgency exists in cases where the requester’s life or personal safety, or, substantial due process rights, would be jeopardized by failure to process a request immediately). The plaintiff, facing multiple criminal charges carrying possible death penalty in state court, retained an expedited review of his FOIA request out of the normal first in, first out sequence. *Id.* *See also Freeman v. United States Dep’t of Justice*, No. CIV. A. 92-0557-LFO, 1994 WL 35871 at *1 (D.D.C. 1994). In *Freeman*, the court denied further expedited treatment of an FOIA request to conduct an additional “search with respect to the FBI’s confidential indices.” *Id.*

When a requester exhausts an administrative remedy, a court⁴⁰ may allow an agency more time to complete FOIA processing.⁴¹ For example, a court may allow an agency time to methodically examine stacks of records in paper form,⁴² by showing that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."⁴³

3. Agency Obligations

Under the FOIA, federal agencies have an obligation to release information falling into three categories. First, agencies must publish substantive rules, statements of general policy and information on agency organization and procedures in the Federal Register.⁴⁴ Second, agencies must make final adjudicatory opinions, statements of policy not published in the Federal Register, and administrative staff manuals and instructions available for inspection and copying.⁴⁵ Third, agencies must make available, other records not falling within the first two categories.⁴⁶ However, an agency may refuse access, disclosure, or dissemination in certain instances.⁴⁷

40. 5 U.S.C. § 552(a)(4)(B)-(C) (1988). Dissatisfied FOIA requesters are given a remedy in the United States District Courts, where judges determine the propriety of agency withholdings *de novo* and agencies must bear the burden of sustaining their nondisclosure actions. *Id.* See also *PHE, Inc. v. United States Dep't of Justice*, 983 F.2d 248 (D.C. Cir. 1993) (holding that under the FOIA, an agency that chooses to withhold requested information bears the burden of justifying that decision); *United States Dep't of State v. Ray*, 502 U.S. 164 (1991) (holding that there is a strong presumption in favor of disclosure of documents under FOIA that places the burden on an agency to justify withholding of any requested documents, and burden remains with the agency when it seeks to justify redaction of identifying information in particular document as well as when the agency seeks to withhold entire document); *Shafmaster Fishing Co. v. United States Coast Guard*, 814 F. Supp. 182 (D.N.H. 1993) (holding that the burden in a case to compel production of information under the FOIA is on administrative agency to show that withholding was proper).

41. See *Open America*, 547 F.2d at 616. This is the seminal case which construed the FOIA to permit agencies extra processing time after a large number of requests occurred as the result of the Watergate affair. *Id.*

42. *Id.* at 612 (illustrating application of the FOIA twenty years ago in a case that personified the overflow of paper form requests in which 58 million paper index cards of subjects and individuals searched by the FBI to reveal other files in which requested information may have been located, resulted in 38,000 pages to be reviewed, and 9,800 pages deemed directly relevant to the Watergate investigation).

43. 5 U.S.C. § 552(a)(6)(C) (1988).

44. See *id.* § 552(a)(1). Also, section 553 requires proposed rules to be published in the Federal Register to provide an opportunity for public comment. *Id.* § 553.

45. 5 U.S.C. § 552(a)(2) (1988).

46. *Id.* § 552(b).

47. *Id.* § 552(b)(1)-(9). The statutory exemptions to a federal agency's obligation to disclose records are:

- (1) classified materials concerning national defense or foreign policy,
- (2) internal personnel rules and practices,

In addition, evidence suggests that significant commitments might be made to the FOIA by the Executive Branch of the Federal Government to further federal agency adherence to the FOIA.⁴⁸ In a recent example, the 1993 statements by both President Clinton⁴⁹ and Attorney General Janet Reno⁵⁰ established a strong spirit of openness in government under the FOIA. In conjunction with President Clinton's call upon all agencies to follow "the spirit" as well as the letter of the Act,⁵¹ Attorney General Reno's Memorandum articulated the FOIA's "primary objective" of achieving "maximum responsible disclosure of government information."⁵²

-
- (3) materials prohibited from disclosure by non-FOIA statutory rules,
 - (4) trade secrets and related information,
 - (5) inter-agency or intra-agency correspondence not made available by law,
 - (6) information that would cause a clearly unwarranted invasion of personal privacy,
 - (7) certain investigatory records compiled for law enforcement purposes,
 - (8) regulatory materials relating to financial institutions, and
 - (9) geological and geophysical information pertaining to wells.

Id. Section 552(b)(9) is worth noting because it pertains to exempted information which affects the public water supply which could be easily tampered with, in the event of a threat to national security. For purposes of this section:

[T]he term "agency" 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.

5 U.S.C. § 552(f) (1988).

48. *Administration Tells Agencies to Tilt Toward FOIA Disclosure*, 62 U.S.L.W. 15, 20 (Oct. 26, 1993).

49. *Id.* President Clinton stated that "the more the American people know about their government the better they will be governed." *Id.* The president stressed enhancing public access through the use of electronic information systems. *Id.* A presidential assistant, John Podesta, emphasized that the administration continues to look at increasing access through FOIA to government documents in electronic formats and computer programming to meet specific requests. *Id.* While antagonists to the FOIA complain that some agencies decline to provide computer tapes rather than paper records, Podesta claimed the administration will determine if action to heighten electronic access can be taken administratively, or if legislation is required. *Id.*

50. *Id.* The Attorney General explained that the Justice Department "will no longer defend an agency's decision to withhold information merely because there's a substantial legal basis for doing so" *Id.* Reno also called for an administrative review of all pending FOIA cases by the assistant attorney general for the tax and civil divisions and by the U.S. attorneys; a complete review of the department's FOIA regulations, which have a strong influence on FOIA practices around the government; and an examination of FOIA form letters. *Id.*

51. *Id.* President Clinton stated that "[o]penness in government is essential to accountability and the [FOIA] has become an integral part of that process." *Id.*

52. *Id.* Janet Reno explained that while disclosure is crucial, the preservation of confidentiality must be maintained where necessary. *Id.*

B. CASELAW

A notable case addressing the primary issue analyzed in this comment, held that requesters do not have a right to designate the physical form as well as the substantive content of an agency record.⁵³ In *Dismukes v. Department of the Interior*, the Circuit Court for the District of Columbia ruled that an agency could make information available in a form the agency deemed most useful to the average requester.⁵⁴ The Interior Department stored the requested information concerning oil and gas leases on both computer tapes and microfiche but chose to make the information available only in the microfiche form. The court agreed with the agency's disclosure,⁵⁵ cautioning that the form in which an agency chooses to provide could neither "unreasonably hamper" the requester nor reduce the usefulness of the information.⁵⁶

The issue in *Dismukes*⁵⁷ was whether the computer tapes and microfiche were equivalent media for agency records, whereby disclosing the microfiche would satisfy a request for the computer tapes.⁵⁸ The court determined that the media were equivalent because the record showed that the information in the microfiche was virtually the same as that recorded on computer tape.⁵⁹

53. *Dismukes v. Dep't of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984) (holding that it is reasonable to interpret the FOIA as envisioning record requests being met by supplying paper documents). However, the court opined that as the computer became the rule rather than the exception in government record keeping, it became less obvious what constituted an adequate response to a FOIA request when records are potentially available in non-paper form. *Id.* at 761.

54. *Id.* at 763.

55. *Id.* at 762. In concluding, the *Dismukes* court stated that "neither plaintiff nor any document in the record suggests that the quantum of information contained in the microfiche varies in any way from that recorded on computer tape." *Id.*

56. *Id.* The court held that the Interior Department had no legal obligation to satisfy the request on computer tape, and could determine the format in which it would make its records available. *Id.* at 761. The court stated that a "[d]efendant has no obligation under the FOIA to accommodate plaintiff's preference. The agency need only provide responsive, nonexempt information in a reasonably accessible form." *Id.* at 763; *cf.* *Timken v. United States*, 659 F. Supp. 239, 242 (Ct. Int'l Trade 1987) (holding that computer printouts of requested files were unresponsive to a FOIA request because the printed files were not as useful to the requester as the information on computer tape).

57. *Dismukes*, 603 F. Supp. at 760.

58. *Id.* at 763.

59. *Id.* at 760. The court did allow that, in some cases formats would not be equivalent, as in the case of audiotapes, where written transcripts would not be able to provide the "nuances of inflection which give words added meaning beyond that reproducible on paper." *Id.* at 762. Notably, the court reasoned that the FOIA applies to information in the abstract rather than to tangible agency records, a distinction usually relied upon to argue for fuller disclosure. *Id.* The court reasoned that, a cause of action would not be stated unless the plaintiff contended that the defendant's decision to release the microfiche rather than the computer tape somehow affected access to agency information. *Id.* In *Dis-*

The same issue of equivalent media was addressed when a district court followed *Dismukes*⁶⁰ in 1989.⁶¹ In *Armstrong v. Bush*,⁶² the court cited *Dismukes*⁶³ in concluding that a paper printout was equivalent to a FOIA request for the same material on computer tape.⁶⁴ When the National Security Archive's Armstrong argued that the size of the printout made analysis impossible, the court ruled that the Central Intelligence Agency did not have to provide the information in database form after already providing the reasonably accessible computer printout form.⁶⁵

III. ANALYSIS

The form of the FOIA record requested may be the most basic barrier to access government records. For example, a paper copy of a public record may be the only meaningful form for a requester without access to a computer. Conversely, a requester with the technological capability to process an entire database would find a paper copy of that database less useful. Whether an agency maintaining records in an electronic form must provide copies of those records in that form is an issue that requires clarification.

First, this section argues that the current FOIA does not work for three reasons: the term "record" causes confusion in regard to requests for electronic information; the "reasonable search" is an ambiguous concept;⁶⁶ and, the form/content dichotomy is seldom addressed in the caselaw. Second, this section argues for the enactment of the Electronic Freedom of Information Improvement Act and suggests supplemental improvements to enhance the current FOIA.

A. THE CURRENT FOIA IS INSUFFICIENT AND UNCLEAR

1. Defining Agency "Record"

The term record is confusing, particularly in regard to how the FOIA treats electronic information. Congress undoubtedly sought to expand public rights of access to government information by enacting the FOIA,

mukes, the court found that the defendant's decision to release information in the form "most useful to the general public does not erect unreasonable barriers to [access] . . . information." *Id.* at 763.

60. *Id.* at 760.

61. *Armstrong v. Bush*, 721 F. Supp. 343 (D.D.C. 1989).

62. *Id.*

63. *Dismukes*, 603 F. Supp. 760.

64. *Armstrong*, 721 F. Supp. at 345.

65. *Id.* at 344.

66. See, e.g., Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health and Human Services, 844 F. Supp. 770, 776 (D.D.C. 1993). The court, in this case, addressed the issue of whether the requester has received all relevant materials within contemplation by assessment of the agency's reasonable search of the record system. *Id.*

but that expansion was a finite one.⁶⁷

Moreover, Congress limited access to "agency records."⁶⁸ By not providing a definition of "agency records" in the FOIA, Congress effectively caused confusion in the case law interpretation. Indeed, such confusion affects FOIA requesters of electronic information because without a clear definition of "agency records" the courts have difficulty determining whether electronic records are subject to the FOIA.

To flesh out the definition of the term "agency record," the Supreme Court in *Forsham v. Harris*⁶⁹ looked at the definition of "record"⁷⁰ in the Records Disposal Act ("RDA").⁷¹ The Court held⁷² that raw data⁷³ developed by a group of physicians and scientists were not "agency records" subject to disclosure⁷⁴ under the FOIA.⁷⁵ The Court stated that "the physical storage format of information has no bearing on whether the information is an 'agency record.'"⁷⁶ The court noted that electronic records obtained from a private organization, which had received funding from a federal agency,⁷⁷ were not "agency records"⁷⁸ available under

67. See *Forsham*, 445 U.S. at 176.

68. 5 U.S.C. § 552 (1988). In section 552(a)(3), Congress did not use the term "agency records." *Id.* The section provides that "each agency, upon any request for records . . . shall make the records promptly available to any person." *Id.* Since the enforcement provision of the FOIA, § 552(a)(4)(B), refers only to "agency records" it is inferred that the disclosure obligations imposed by § 555(a)(3) were intended to extend to agency records. *Id.*

69. *Forsham*, 445 U.S. at 169.

70. *Baizer v. United States Dep't of the Air Force*, 887 F. Supp. 225, 228 (N.D. Cal. 1995). This approach is bolstered by the fact that, because the FOIA does not define agency records, the Supreme Court has repeatedly referred to the definition of "records" contained in the Records Disposal Act, which was in effect when Congress passed the FOIA. *Id.*

71. 44 U.S.C. § 3301 (1943).

72. See *Forsham*, 445 U.S. at 171.

73. *Forsham*, 445 U.S. at 169. The raw data was derived from a long-term study of the effectiveness of certain diabetes treatment regimes. *Id.*

74. *Id.* After both the University Group Diabetes Program ("UDGP") and the Department of Health, Education and Welfare ("HEW") denied petitioners' request for access to the raw data underlying the UDGP's published reports, petitioners filed suit in Federal District Court to compel HEW to make the raw data available under FOIA. *Id.*

75. *Id.* at 169. Federal grants were awarded by the National Institute of Arthritis, Metabolism, and Digestive Diseases ("NIAMDD"). *Id.* Even though the group of physicians and scientists had received study grants from the HEW to conduct the studies, HEW nonetheless denied disclosure. *Id.*

76. *Forsham*, 445 U.S. at 183 (citing 44 U.S.C. § 3301 (1943)). The RDA provides: "As used in this chapter, 'records' includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics . . ." 44 U.S.C. § 3301 (1943). The court cited the RDA in its reasoning that electronic records are within the scope of the FOIA. 445 U.S. at 183.

77. 5 U.S.C. § 552 (1988). Under FOIA, the term "agency" encompasses "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the Government or any independent

the FOIA.⁷⁹

Although *Forsham*⁸⁰ did not directly concern computerized documents, the Supreme Court's adoption of the RDA definition indicated a willingness to view electronic records as subject to the FOIA only if such records are "made or received"⁸¹ by a federal agency.⁸²

The federal courts addressed computerized records in *Long v IRS*,⁸³ where an appellate court held that agency disclosure was appropriate for IRS computer tapes which measured taxpayer compliance. The trial court had determined earlier that "records" under the FOIA did not include computer tapes.⁸⁴ The appellate court's conclusion was that "to

regulatory agency." *Id.* § 552(f). Congress and the courts are specifically excluded from the definition of "agency." *Id.* § 551(1).

78. *Forsham*, 445 U.S. at 178.

79. *Id.* at 176. However, private organization status was essential because it found that Congress intended "agency" to be a modifier of the term "record." *Id.* The court also focused on the term "agency" in its holding and demonstrated that Congress contemplated some relationship between "agency" and the "record" requested under the FOIA. *Id.* The court stated:

With due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency, but which data has not at any time been obtained by the agency, are not 'agency records' accessible under the FOIA. We do not suggest, by use of these terms, that an organization receiving federal grant funds could never be found to be a federal agency.

Id. See also H.R. CONF. REP. NO. 93-1200, 93d Cong., 2nd Sess., at 14015 (1974). The FOIA's legislative history indicates that private organizations that receive federal financial assistance grants are not within the definition of "agency." *Id.* The House Report stated that the legislature did "not intend to include corporations which receive appropriated funds but are neither chartered by the federal Government nor controlled by it, such as the Corporation for Public Broadcasting." *Id.* See also Note, *A Control Test for Determining "Agency Record" Status Under The Freedom of Information Act*, 85 COLUM. L. REV. 611 (1985) (discussing the agency component of the term "agency").

80. 445 U.S. 169 (1980).

81. *Id.* at 182 (citing the Records Disposal Act 44 U.S.C. § 3301 (1943)).

82. *Id.* at 183. The court stated:

Although Congress has supplied no definition of 'agency records' in the FOIA, it has formulated a definition in other Acts . . . [t]he Records Disposal Act, in effect at the time Congress enacted the FOIA, providing a threshold requirement for agency records . . . regardless of physical form or characteristics made or received by an agency of the United States Government.

Id.

83. 596 F.2d 362 (9th Cir. 1979), *vacated on other grounds*, 108 U.S. 2839 (1988), *re-manded*, 891 F.2d 222 (9th Cir. 1989).

84. *Long v. IRS*, 596 F.2d 362, 364 (9th Cir. 1979). The Ninth Circuit "dispose[d] at the outset" the district court's contention that computer tapes are not generally within the realm of the FOIA. *Id.* at 364. The district court "apparently determined that 'records,' [under the FOIA], do not include computer tapes." *Id.* at 365. This conclusion, however, is "quite at odds with the purpose and history of the statute." *Id.* The court relied, *inter alia*, on the Senate Report accompanying the 1974 amendments to the FOIA, which addressed computer records in the context of search and copying fees, S. REP. NO. 854, 93d Cong., 2d

interpret the FOIA by only applying conventional written documents opposes the 'general philosophy of full agency disclosure.'⁸⁵

*Yeager v. Drug Enforcement Administration*⁸⁶ reaffirmed the applicability of FOIA to computer "records." The case concerned a request to the Drug Enforcement Administration ("DEA") to release computerized information and the use of computer-facilitated "disclosure avoidance techniques" to conceal exempted information.⁸⁷ After denying the appellant's request for concealing personal information, the court acknowledged the parallels between paper form storage and computer storage of agency records.⁸⁸

The FOIA "deals with 'agency records,' not information in the abstract."⁸⁹ This perception forces government agencies to distinguish between electronic records, which must be released, and electronic information, which does not have to be released.⁹⁰ However, the delineation drawn between records and information in the context of paper documents is "no longer valid."⁹¹

Sess. 12 (1974), and on the Treasury Department's FOIA regulations which "make explicit provisions for disclosure of . . . records maintained in computerized form." 31 C.F.R. §§ 1.5(f), 1.6(g)(3)(ii) (1977). The court also relied on a 1975 opinion by the United States District Court for the Northern District of California which affirmed the accessibility of motion pictures under the FOIA. *See Save the Dolphins v. United States Dep't of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975). In *Save the Dolphins*, the court held that computer enhanced motion picture film is a record and subject to FOIA disclosure. *Id.* at 413; *but see SDC v. Matthews*, 542 F.2d 1116 (9th Cir. 1976) (ruling that computer tapes of medical abstracts were not "agency records" disclosable under the FOIA because public policy requires that databases be self-supporting), cited with disapproval in COMMITTEE ON GOVERNMENT OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H.R. REP. NO. 560, 99th Cong., 2d Sess. 2 (1986).

85. *Long*, 596 F.2d at 364 (citing S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965)).

86. 678 F.2d 315 (D.C. Cir. 1982).

87. *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982).

88. *Id.* at 322. The *Yeager* court reasoned that, although it is apparent that Congress was aware of problems that could arise in the application of the FOIA to computer-stored records, the FOIA itself makes no distinction between records maintained in paper form (manually stored) and computer storage systems. *Id.* Nonetheless, it seems that computer-stored records, whether stored on magnetic tape or in some other form, are still "records" for the purposes of the FOIA. *Id.* *Yeager* held that "although accessing information from computers may involve a somewhat different process than locating and retrieving manually stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA." *Id.* at 324.

89. *Forsham*, 445 U.S. at 185.

90. *See OTA, supra* note 13. This major government report on information systems notes, that as computer-generated "intervening technologies" are necessary to read information, "there is technically no such thing" as a tangible record. *Id.* at 228.

91. *See OTA, supra* note 13, at 229; *see also Kele v. United States Parole Commission*, Civ. A. 85-4058 (D.D.C. 1986). In *Kele*, the Department of Justice argued that if a FOIA request requires an agency to exceed its existing capabilities for extracting electronic data

Agencies, with guidance from the courts, take the position that an electronic record is "information" in the form in which the information is extracted from the computer, and, non-paper form information does not have to be released to the public.⁹²

From an administrative perspective, the agencies' position has merit. Agencies are concerned that computer programming to satisfy FOIA requests "would transform the government into a giant computer

then a new record has to be created. *Id.* Therefore, in agreeing with the DOJ, the *Kele* court held that federal agencies are not required to create new records in order to satisfy a FOIA request. *Id.* See also *Public Citizen v. OSHA*, Civ. A. 86-07-05 (D.C. Cir. 1992). On a similar note, in *Public Citizen*, a public interest organization requested enforcement data on certain companies from an Occupational Safety and Health Administration ("OSHA") database. *Id.* OSHA denied the request which would have required new computer programming, and therefore involved record creation. *Id.* The parties eventually settled this aspect of the lawsuit after OSHA claimed it could retrieve the information without new programming by utilizing enhancements to its computer system. *Id.* The result in *Public Citizen* illustrates how technological developments often obviate an agency's defense during a FOIA lawsuit that they were unable to comply with the FOIA request. *Id.* Eventually, The court dismissed Public Citizen's request that the court enjoin OSHA from denying the applicability of the FOIA to agency records that require a new computer program in order to be retrieved. *Id.* See also *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 161 (1975) (holding that agencies are not required to create records to satisfy a FOIA request); *Krohn v. Dep't of Justice*, 628 F.2d 195 (D.C. Cir. 1980) (explaining that plaintiff's request was for data, not records, and agency has no obligation to create new records by compiling information from existing records).

Other agencies have taken positions supporting the Department of Justice and OSHA's assertion that new computer programming is equivalent to record creation, and the Office of Management and Budget FOIA Fee Guidelines state that FOIA searches performed by federal agencies can be performed manually or by "computer using existing programming." Uniform FOIA Fee Schedule and Guidelines, 52 FED. REG. 10,012, 10,017 (1987). The Fee schedule and Guidelines enable searches to be performed by computer and establishes fees for computerized searches. *Id.* See OTA, *supra* note 13, at 219 (citing *Clarke v. U.S. Dep't of the Treasury*, Civ. A. 84-1873 (E.D. Pa. 1986) (holding that writing a new program to extract information on bondholders is record creation even though the information resides in a Treasury Department database and plaintiff will pay the programming costs)); see also *Dep't of Defense Freedom of Information Act Program*, 32 C.F.R. § 286.5(b)(2)(vii) (1995). "Information stored within a computer for which there is no existing computer program for retrieval of the requested information" is not a record for FOIA purposes. *Id.* But see OTA, *supra* note 13, at 219 (explaining that the Department of Energy requires reprogramming of its software, under some circumstances, to accommodate FOIA requests); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, No. 16, 36 ELECTRONIC ACQUISITION AND RELEASE OF FEDERAL AGENCY INFORMATION (1988) (discussing that to facilitate the release of electronic manifests, the Customs Bureau developed its software with the capability to delete confidential information).

92. But see *Disabled Officer's Ass'n v. Rumsfeld*, 574 F. 2d. 636, 637 (D.C. Cir. 1978). Whether an agency would have to search numerous records and produce a document it did not previously possess is not dispositive of the question of record creation because the plaintiff only seeks a limited amount of information from existing records. *Id.* This decision was disapproved by *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989).

research firm.⁹³ Federal agencies hold the position that the FOIA only provides access to records possessed by the government.⁹⁴ Agencies are presently under no obligation to reformulate records into new records via computer programming or any other means.⁹⁵

The agencies find that the obligations of the FOIA, in regard to computer programming, are generally an unduly burdensome search.⁹⁶ However, under the terms of the statute, a FOIA request need only reasonably describe the desired records to implement agency obligation of disclosure of records.⁹⁷

2. "Reasonable" Search for Records

Determining if an agency has made a "reasonable effort" in searching for records is difficult.⁹⁸ What constitutes a reasonable search remains within the discretion of the agency, or if necessary the federal district courts.⁹⁹ Moreover, as shown in defining agency records, the "search" for records follows the test of reasonableness; that is, if new programming is required.¹⁰⁰

The retrieval of paper documents involves extensive effort for tracking and searching disparate files and substantial deletion, by hand, of exempted materials.¹⁰¹ The degree of effort needed to execute computer

93. OTA, *supra* note 13, at 219 (citing *Kele v. United States Parole Commission*, Civ. A. 85-4058 (D.D.C. 1986)).

94. *See NLRB*, 421 U.S. at 162.

95. *Yeager*, 678 F.2d at 323 (explaining that Congress did not intend that manipulation or restructuring of the substantive content of a record occur as part of deleting exempt material).

96. Uniform FOIA Fee Schedule and Guidelines, 52 FED. REG. 10,012, 10,017 (1987).

97. 5 U.S.C. § 552(a)(3) (1988).

98. H.R. REP. NO. 876, 93 Cong., 2d Sess. 6, U.S.C.A.A.N., 6267, 6271 (1974). The legislative history of the FOIA does not specifically refer to electronic information, nor does it consider the capabilities for manipulating information in an increasingly efficient manner via computer technology. *Id.*

99. *See, e.g., Cleary, Gottlieb, Steen & Hamilton*, 844 F. Supp. at 774. Under the FOIA, "the issue is not whether a requester has received all relevant materials within contemplation, but whether an agency has reasonably searched its record system." *Id.* The manufacturer of amino acids brought an action against government agencies and officials, seeking relief under the FOIA. *Id.* at 770. By conducting three separate searches for records relating to scientific study, one of the agencies that was brought into the action, the Centers for Disease Control ("CDC"), satisfied the required standard of reasonableness and adequacy. *Id.* at 776; *see also Long*, 596 F.2d at 362; *Yeager*, 678 F.2d at 315; *NLRB*, 421 U.S. at 132.

100. *See* Uniform FOIA Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,016 (1987) (discussing computer programming as burdensome).

101. Lilia L. Seal, Comment, *The Future of the Freedom of Information Act's Deliberative Process: Exemption and Disclosure of Computerized Federal Records After Petroleum Information Corp. v. United States Dep't of the Interior*, 71 DENV. U. L. REV. 719, 734 (1994).

searches can vary dramatically.¹⁰² For example, FOIA request may be easy to specify but difficult to run and require days of computer time.¹⁰³ Conversely, another request may require hours of programming time, but after creation, the search runs easily.¹⁰⁴

The courts have struggled with defining the nature and extent of computer searching under the FOIA.¹⁰⁵ For example, in *Long*,¹⁰⁶ the Ninth Circuit vacated a lower-court's decision to preclude editing in the form of computer deletions.¹⁰⁷ Moreover, the appellate court ruled that the IRS must delete specific personal information from tax compliance data.¹⁰⁸ The court concluded that the FOIA requested material was "reasonably segregable" from statutorily exempted information, the requested "editing here is not considered an unreasonable burden to place on an agency."¹⁰⁹ At the same time, the appellate court also rejected the IRS argument that segregating material would be prohibitively expensive, where the agencies must bear the financial burden of computerized editing to meet FOIA requests.¹¹⁰

In contrast, in *Yeager v. Drug Enforcement Administration*,¹¹¹ the court came to a different conclusion. The requester asked the DEA to use "disclosure avoidance techniques" to "collapse" or "compact" data electronically.¹¹² The court held that disclosure avoidance is not a necessary component of releasing "reasonably segregable," nonexempt portions of

102. *Id.* at 733.

103. Robert J. Malone, Comment, *Computer Viruses: Legal Aspects*, 4 U. MIAMI BUS. L.J. 125, 132 (1994).

104. See, e.g., Brian Kibble Smith, Comment, *The Effect of the Information Age on Physician's Professional Liability*, 36 DEPAUL L. REV. 69, 84 (1986) (describing the development of the "MEDLINE" database that has made searching for professional medical information easier for the researcher).

105. See, e.g., *Long*, 596 F.2d at 362.

106. *Id.*

107. *Id.* at 363.

108. *Id.* at 366.

109. *Id.* at 363 (citing the FOIA, 5 U.S.C. § 552(b) (1988), which states that any "reasonably segregable" portion of a record shall be provided to any person requesting such record after deletion of exempted materials).

110. *Long*, 596 F.2d at 366 The court relied on the legislative history of the 1974 FOIA amendments which contained a statement indicating that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." S. REP. NO. 1200, 93d Cong., 2d Sess. (1974). The court further cited a Treasury Department regulation stating that "under no circumstances will a fee be charged for . . . deleting exempt matters." 31 C.F.R. § 1.6(a) (1977).

111. 678 F.2d 315 (D.C. Cir. 1982).

112. *Id.* at 319. Data compaction, or "disclosure avoidance techniques" are used to remove sensitive information from statistical materials, and involve the expression of specific information in more general terms. *Id.* at 319 n.10. Computers facilitate these types of data manipulations. *Id.* at 319.

records, and denied the request.¹¹³ According to *Yeager*,¹¹⁴ computer capabilities should not enlarge the scope of agency duties.¹¹⁵ The court determined that collapsing data would amount to an unreasonable restructuring of records which is beyond the scope of the FOIA.¹¹⁶

However, *Yeager* reiterated the lower court's forecast: "[a]s agencies begin to keep more of their records in computer form, the need to contour the FOIA to the computer will become increasingly necessary."¹¹⁷

3. *The Form/Content Dichotomy*

The FOIA is legally deficient, because it is concerned with the "content" of electronic information, not the "form" of electronic information.¹¹⁸

Dismukes held that even when computer tape is the least expensive, most convenient means of access, an agency defendant still has no obligation to accommodate the plaintiff's preferred form.¹¹⁹ The Supreme Court described the "reluctance to place the focus of the FOIA on the

113. *Id.* at 326 (concluding that the court's treatment of the use of disclosure avoidance techniques should not be viewed as disapproval of the use of such techniques by agencies). The court held that FOIA does not mandate their use in determining whether information is "reasonably segregable." *Id.* The FOIA does not prohibit an agency from releasing information that falls within any of the delineated exemptions. *Id.* "It only provides the agency the option of withholding the documents." *Id.* The court stated:

Agencies that store information in computerized retrieval systems have more flexibility in voluntarily releasing information and should be 'encourage[d] . . . to process requests for computerized information even if doing so involves performing services which the agencies are *not required to provide*'

Id. at 326-7 (citations omitted).

114. *Yeager*, 678 F.2d at 326-27.

115. *Id.* at 322. "The FOIA does not contemplate imposing a greater segregation duty upon agencies that choose to store records in computers than upon agencies that employ manual retrieval systems." *Id.*

116. *Id.* at 323. *Yeager* nonetheless made strong reference to the potential of increased disclosure offered by computers in its suggestion that agencies should be encouraged to "process requests for computerized information even if doing so involves performing services which the agencies are not required to provide . . ." *Id.* at 326-27 (citing S. REP. NO. 854, 93d Cong., 2d Sess. 12 (1974)).

117. 678 F.2d at 327 (citing the lower court's Memorandum Order at 6; App. at 44).

118. *Dismukes*, 603 F. Supp. at 762.

119. *Id.* at 761. The agency, in this case, the Department of the Interior, did not argue that the information was exempt, but it chose to fulfill the request by providing the information on microfiche cards. *Id.* The requester sought the information on computer tape because the information would be less expensive and more convenient. *Id.* at 762. The court dismissed the action, finding that the agency had no obligation under the FOIA to accommodate the plaintiff's preference. *Id.* at 763; see generally HOUSE COMM. ON GOVERNMENT OPERATIONS, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, H.R. Rep. No. 560, 99th Cong., 2d Sess. (1986).

'physical format of documents' rather than on their contents."¹²⁰ While information "content" is controlling,¹²¹ the FOIA requester cannot assert a withholding if the "content" is delivered and is the same as in the request.¹²² Though the plaintiff might want a more convenient alternative "form," that is more than the FOIA requires.¹²³

However, there is caselaw holding that the form of disclosure is directly linked to the content. The United States District Court for the District of Columbia has rejected the argument that paper printouts of electronic communication systems are acceptable substitutes for electronic records themselves.¹²⁴ In *Armstrong v. Executive Office of the President*,¹²⁵ the court found electronic records created by the staff of the Executive Office of the President and stored on National Security Council ("NSC") e-mail were records subject to the FOIA.¹²⁶ The court reasoned that electronic versions of the information disclosed were different in content than paper form because the electronic versions contained ad-

120. *Dismukes*, 603 F. Supp. at 762; see also *Baizer v. United States Dep't of the Air Force*, 887 F. Supp. 225 (N.D. Cal. 1995). The FOIA requester in *Baizer* sought to compel the Air Force to produce electronic copies of Supreme Court opinions maintained in the Air Force's computerized legal database. *Id.* The district court held that the computer database was "library material" and not an agency record "within the meaning of the FOIA." *Id.* at 226. Even if the Court concluded that computerized copies of Supreme Court opinions were agency records, therefore, the Air Force would not be required to produce them in precisely the format the plaintiff has demanded. 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 4.04, (2d ed. 1990).

121. See generally 5 U.S.C. § 552(d)(1)-(4) (1988). Section 552(d)(1) states:

Each agency that maintains a system of records shall, upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's request in the accompanying person's presence.

122. *Id.* See also 5 U.S.C. § 552(d)(3) (1988), which states:

[Agencies shall] permit the individual [requester] who disagrees with the refusal of the agency to amend his record to request such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30 day period; and, if after his review, the reviewing official also refuses to disclose the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section.

123. *Dismukes*, 603 F. Supp. at 763.

124. *Armstrong v. Executive Office of the President*, 877 F. Supp. 690 (D.D.C. 1995).

125. *Id.* at 696.

126. *Id.* at 697 (ruling that electronic versions were not merely extra copies of paper versions because electronic records contain certain supplemental information).

ditional data.¹²⁷ Because of such inconsistent interpretations, the FOIA needs new guidance, clarification, and revamping.

B. IMPROVING THE FOIA FOR THE INFORMATION AGE

As previously discussed, the legal deficiency of FOIA, or more precisely, the lack of clarity to explain agency obligations to disclose electronic information, is largely due to inherent statutory confusion in terms. Also, the FOIA drafters did not anticipate the potential of computer technology and the resultant ease with which FOIA requesters can decipher immense volumes of information when the information is in electronic form.¹²⁸

While the FOIA establishes the public's right to access the "content" of an agency's information, the FOIA also denies the requesters' right to specify the "form" of content, or, even to refer to electronic information.¹²⁹

1. *Electronic Freedom of Information Improvement Act*

The proposed Electronic Freedom of Information Improvement Act

127. *Id.* See also *Bureaucracy Watch Computer Program*, L.A. TIMES, July 8, 1992, at B6. The Editorial Writer's Desk stated:

Congress did not anticipate issues would arise as the Computer Age revolutionized record-keeping. Federal Agencies were given discretion to provide data in whatever form they chose. Now, the Census Bureau and some other agencies routinely make available records on computer tape, a format that allows requesters to analyze information easily and with the least cost. But still other agencies have denied or delayed requests for information in electronic form even when that data is readily available, insisting that the Freedom of Information Act applies only to documents in paper or 'hard copy' form.

A bill currently before the Senate Judiciary Committee would amend the FOIA to establish a uniform federal policy that, in most cases, requesters must be provided with computerized federal records if they want them. Such an amendment makes sense.

Id.

128. *Id.*

129. 141 CONG. REC. S10876, 104th Cong., 1st Sess. (1995). Senator Leahy spoke to the Senate Judiciary Committee and introduced Senate Bill 1090, a bill to amend section 552 of Title 5, United States Code (commonly known as the FOIA) to provide for public access to information in an electronic format. *Id.* Leahy also stated:

This bill makes an important contribution to the President's plan for the national information infrastructure. That plan envisions the development of interconnected computer networks and databases that can put vast amounts of information at users' fingertips. . . . New FOIA guidelines are needed to address new issues arising with the increased use of computers. While FOIA covers all Government information in any format, this bill redefines agency records to make that clear, requires an assessment of agency computer capability, and requires agencies to provide requested formats when possible.

139 CONG. REC. S17056, 103d Cong., 1st Sess. (1993) (statement of Sen. Leahy).

("EFIIA")¹³⁰ should be passed to clarify that the government has an obligation to respond to FOIA requests for information maintained electronically. This legislation, authored by Senator Patrick Leahy and recently introduced to the Senate Judiciary Committee,¹³¹ provides for public access to information in an electronic format. This electronic information bill is a step forward in using technology to make government more accessible and accountable to its citizens.¹³²

Federal agencies, and the public at-large, have become increasingly dependent upon computers to store, generate, and retrieve records electronically.¹³³ The EFIIA bill would "ensure that these electronic records are available, in a timely manner, to requesters on the same basis as paper records."¹³⁴ "Specifically, the bill clarifies that the FOIA covers all agency information in any format and requires agencies to release requested formats when possible."¹³⁵

The efficient operation of the FOIA requires that its provisions be sufficiently clear so that the form of an agency record constitutes no impediment to the public's access to requested information.¹³⁶ Furthermore, the electronic information technology used by the government

130. See Julius J. Marke, *Public Access to Computerized Government Information*, 92 N.Y. L.J. 3, January 28, 1992. Some earlier notable renditions of the EFIIA were presented to Congress as H.R. 2773 in 1989, as S. 1940 in 1991, and, as S. 1782 in 1993 to "bring the Federal Government into the Computer Age." *Id.* at 5.

131. See CONG. REC. S10876, *supra* note 129, at 1.

132. 139 CONG. REC. S17055, 103d Cong., 1st Sess. (1993). In 1993, Senator Leahy explained the reliance on computer technology and recognized that Government must take advantage of the benefits of new technologies to provide easier and broader dissemination of information. *Id.* One provision of the EFIIA bill now, and as it was introduced in the last Congress, requires agencies to publish certain information in an electronic form in the Federal Register. 141 CONG. REC. S10878, 104th Cong., 1st Sess. (1995). Congress "recognized the importance of such electronic access when it passed a law requiring that people have online access to Government publications such as the Federal Register, the Congressional Record, and other documents put out by the Government Printing Office." *Id.* "Earlier this year, House Speaker Newt Gingrich unveiled "Thomas," an electronic archive available on the Internet that contains bills and congressional speeches." *Id.* "In his National Performance Review, the Vice-President described his vision of the electronic Government of the future, where information technology will enable people to have access to public information and services when and where they want them." *Id.*

133. 141 CONG. REC. S10878, 104th Cong., 1st Sess. (1995).

134. *Id.* The EFIIA would contribute to information flow by increasing online access to Government information, including agency regulations, opinions, and policy statements, and FOIA-released requests. *Id.*

135. 141 CONG. REC. S10876, S10889, 104th Cong., 1st Sess. (1995).

136. See generally Ramsey Clark, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 195 (June, 1967). The memorandum cites the official statement by President Johnson upon signing Public Law 89-487 on July 4, 1966:

This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Na-

should be applied in such a manner that promotes efficiency in responding to FOIA requests. This objective includes using technology to provide requesters with information in the most useful form.¹³⁷

In particular, the FOIA would be amended by the EFIIA's § 5 by adding the following subparagraph pertaining to honoring format requests:

- (B) An agency shall, as requested by any person, provide records in any form in which such records are maintained by that agency.
- (C) An agency shall make reasonable efforts to search for records in the form or format requested by any person, including in an electronic form or format, even where such records are not usually maintained but are available in such form or format.¹³⁸

This section of the EFIIA requires agencies to assist requesters by providing information in the form requested, if the agency has the information available in that form.¹³⁹ In other words, requests for the electronic format of records, which are usually not maintained or stored in electronic form, should be honored when records nevertheless exist and are available in such form.¹⁴⁰

Inclusion of Section 5 of the EFIIA would effectively overrule *Dis-mukes v. Department of the Interior*,¹⁴¹ which held that an agency "has no obligation under the FOIA to accommodate plaintiff's preference. [The agency] need only provide responsive, nonexempt information in a reasonably accessible form."¹⁴² The EFIIA requires that if the requester's format of choice exists, when a record is available on paper and in computer form, the requester can demand the computer form rather than the paper form from the agency. Also, if the record does not exist in electronic form, the agency should make reasonable efforts to provide the electronic form.¹⁴³

Section 6 of the EFIIA attempts to decrease the long delays experienced by FOIA requests, particularly since *Open America*,¹⁴⁴ by clarify-

tion permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

140 CONG. REC. E1676-01, 103d Cong., 2d Sess. (1994).

137. 140 CONG. REC. E1676-01, 103d Cong., 2d Sess. (1994) (explaining to the United States House of Representatives that efficiency in federal agency dealings with the public will be enhanced with passage of the EFIIA).

138. See S. 1090, 104th Cong., 1st Sess. § 5 (1995) (amending § 552(a) (3) of Title 5, United States Code, so as to provide that agencies must honor format requests for records in any form or format).

139. *Id.*

140. *Id.*

141. 603 F. Supp. at 763.

142. *Id.*

143. See generally 141 CONG. REC. S10876-02, 104th Cong., 1st Sess. (1995).

144. *Open America*, 547 F.2d 605.

ing¹⁴⁵ that routine agency backlogs do not constitute exceptional circumstances for purposes of the FOIA.¹⁴⁶ The EFIIA gives an incentive to comply with time limits by allowing agencies in compliance to retain half of their fees,¹⁴⁷ instead of submitting those fees to the general treasury as is currently the case.¹⁴⁸

Section 3 requires agencies to publish a complete list of the statutes which the agency relies upon as authority to withhold information under the FOIA.¹⁴⁹ This provision serves to inform and notify the public regarding agency withholdings.¹⁵⁰ Also, this section requires publishing, in the Federal Register, to be available "by computer telecommunica-

145. *Id.* The EFIIA would clarify *Open America*, which held that an unforeseen 3,000 percent increase in FOIA requests in one year, created a massive backlog in an agency with insufficient resources to process those requests in a timely manner, can constitute "exceptional circumstances." *Id.* at 616.

146. The current FOIA provides that in "exceptional circumstances," the statutory time limits can be extended, but does not define what these circumstances can be. 5 U.S.C. § 552(a)(6)(c). Demonstrated circumstances for delay would require agencies that are not in compliance with the statutory time limits to demonstrate "that the delay is warranted under the circumstances." *Id.* The EFIIA would clarify the only circumstances that excuse compliance with the time limits are those unusual or exceptional circumstances set forth in paragraphs 6(B) and (C) of the FOIA's Section (a). *Id.*

147. See S. 1090, 104th Cong., 1st Sess. § 6 (1995) for the following description of a new clause regarding agency delays in responding to FOIA requests:

If at an agency's request, the Comptroller General determines that the agency annually has either provided responsible documents or denied requests in substantial compliance with the requirements of fees assessed, one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources.

148. S. 1090, 104th Cong., 1st Sess. § 6 (1995). Because of these delays that can last years, media correspondents, educators, and those who must work under strict time constraints, have been thwarted in using the FOIA to meet research goals. *Id.* See also 141 CONG. REC. at S10889. Indeed, the American taxpayer has paid for the collection and maintenance of this information and should get prompt access when requested. *Id.* Prompt access is the legal requirement, and that is the standard practice which government agencies should maintain. *Id.* Considerable delays in access can mean no access at all. *Id.*

The EFIIA addresses delay problems in several ways. First, the EFIIA doubles the ten day statutory time limit to twenty days so that agencies have a more reasonable time frame for honoring FOIA requests. S. 1090, 104th Cong., 1st Sess. § 6 (1995). Second, the EFIIA stimulates agencies to achieve a two part processing system; for simple electronic requests and complex electronic requests to assess the order of priority that requests will be honored. *Id.* Third, the EFIIA serves as an impetus to comply with statutory time limits by permitting agencies that are in compliance to retain half of their fees, rather than submitting those fees to the general Treasury. *Id.* The fees that agencies can retain will revert back to the agency's FOIA operations, providing an incentive, and ultimately resources to make these operations work more efficiently. *Id.*

149. S. 1090, 104th Cong., 1st Sess. §§ 3-4 (1995).

150. See 141 CONG. REC. at S10888.

tions,"¹⁵¹ and if not, the Federal Register must be available by other "electronic means," such as CD-ROM or on disk.¹⁵²

Another important section of the EFIIA, Section 8, amends some important definitions which currently cause confusion in the FOIA. The EFIIA would add definitions of "record" and "search" to the FOIA to address electronically stored information.¹⁵³ The definition of "record" in the EFIIA is an expanded version of the definition in the Federal Records Act.¹⁵⁴ Caselaw already determined that the FOIA covers all government records, regardless of the form in which they are stored by the agency.¹⁵⁵

Moreover, the changes proposed in the EFIIA are not just important for broader citizen access to government records, but also because government information is a valuable commodity and a national resource.¹⁵⁶ Indeed, the federal government is the largest single producer and collector of information in the United States.¹⁵⁷ Therefore, easy, fast access to that resource is essential for American competitiveness.¹⁵⁸

While the EFIIA improves the FOIA by clearing up confusion; this is not enough. Further improvements are necessary for public access to government information in light of the computer and information age.

151. S. 1090, 104th Cong., 1st Sess. § 3 (1995). The term "computer telecommunications" was used by Congress to describe the obligations of the EPA to make its Toxic Release Inventory publicly available pursuant to the Emergency Planning and Community Right-to-Know Act, title III of the Superfund Amendments Reauthorization Act of 1986, Public Law 99-499. S. REP. NO. 103-365, 103d Cong., 2nd Sess. (1994). Although neither that Act nor legislative history defines the term, the EPA has understood and implemented its duty in terms of providing public online access to its databases. *Id.*

152. S. 1090, 104th Cong., 1st Sess. § 3 (1995).

153. *Id.* § 8.

154. 44 U.S.C. § 3301 (1943).

155. *See Armstrong v. Executive Office of the President*, 724 F.2d 282, 293 (D.C. Cir. 1991) (defining "records," based upon the Federal Records Act, and holding that the Federal Records Act does not preclude judicial review).

156. *See Marke, supra* note 130, at 4.

157. *See Marke, supra* note 130, at 4. Due to voluminous amounts of information, agencies are increasingly dependent computers and electronic databases for internal use and efficiency, while issues are arising relative to the creation and dissemination of this information. *Id.* Although the FOIA has been influential in disclosing information on consumer health and safety, waste, fraud and abuse in the government, and on civil rights, among other issues, much has changed since 1966. *Id.* "As the government moves full force into the computer age," Senator Leahy said, "gone are the days of carbon paper and mimeograph machines, today; computers, fax machines and e-mail are commonplace." *Id.* Senator Leahy complained that although in this new technological context the FOIA should mean more access to government information and "faster, cheaper and more efficient communications . . . unfortunately, this is not necessarily happening when agencies often use computers to frustrate rather than to help requesters, while others simply do not use computers efficiently." *Id.*

158. *Marke, supra* note 130, at 4.

2. *Additional Improvements to the EFIIA*

a. *Increase/Improve Remote Access Lines*

Burgeoning use of personal computers with modems opens up new possibilities for remote access to computer records. Some state and federal agencies have public records available online in public reference rooms and at remote locations.¹⁵⁹ Remote access to Federal information facilitates searches for requesters as well as agencies.¹⁶⁰ Increasing remote access would allow users to issue queries directly, reducing search time for agencies.¹⁶¹ If remote access increases delivery options for electronic FOIA records, the following areas would need to be addressed: "security, liability for errors, cost, requirements for user assistance, privacy protection, control of user levels, standards for hardware and data presentation, and competition with private online database vendors."¹⁶²

b. *Require More Data in FOIA Reports*

The FOIA currently requires each agency to supply annual FOIA reports to Congress.¹⁶³ The reports contain information on the number of rejected FOIA requests, the number of appeals and their results, determinations of improper withholding, agency rules relating to the report to Congress, and, FOIA fees collected by the agency.¹⁶⁴

Agencies should be required to include additional information in these reports in regard to requests for electronic information, such as, percentages of agency fiscal resources devoted to FOIA activities.¹⁶⁵

In an effort to make these performance results available for public scrutiny, the reports should be published in the Federal Register where the aim would be to provide incentives for agencies to complete FOIA requests on as timely a basis as possible.¹⁶⁶ Publishing these statistics also would show whether only those agencies with the most FOIA requests and the least relative resources have fallen behind, or whether some agencies do not take their FOIA responsibilities seriously.

159. FLORIDA STATE LEGISLATURE, JOINT COMMITTEE ON INFORMATION TECHNOLOGY RESOURCES, *Remote Computer Access to Public Records in Florida* (1985).

160. *Id.*

161. *Id.*

162. *Id.* at 14.

163. 5 U.S.C. § 552(d) (1988).

164. 5 U.S.C. § 552(d)(1)-(7) (1988).

165. See Jeremy Lewis, *New Technologies and FOIA Processing: Part II*, ACCESS REP., Aug. 4, 1993, at 4. Other additional information to be included in these reports should be: "total numbers of FOIA requests received, total numbers of requests completed, average time to complete requests, total numbers of pending requests, average time of pending requests and total agency fiscal resources devoted to FOIA processing." *Id.*

166. *Id.*

c. *Discern Data Interpretation & Manipulation*

Computer programs contain instructions that direct machines to store, retrieve, and manipulate data.¹⁶⁷ The status of computer programs under the current FOIA is uncertain. Computer Programs are sometimes considered records and sometimes tools used to read the records.¹⁶⁸ Regardless, some types of record data may require more effort to access without them.¹⁶⁹ Agencies must learn to discern between programs required to interpret records and programs that further create or manipulate data; the former may need to be released and the latter subject to agency discretion.¹⁷⁰ When computer programs incorporate instructions that reveal agency decision-making techniques or information gathering methods, they should constitute records in their own right.¹⁷¹

IV. CONCLUSION

Currently, the FOIA does not clearly require federal agencies to honor requests for information in electronic form. This is due, in part, to the ambiguity of key terms written into the Act. This is also due, in part, to the rapid advancement of computer technology. The government as well as the public rely on this technology. Moreover, clarification of FOIA terms must include electronic information to bring the FOIA into the computer and information age. At the same time, the primary purpose of the FOIA would be better served because citizens would have easier access to the workings of the federal government through the use of efficient electronic technology.

Moreover, the proposed Electronic Freedom of Information Improvement Act clearly specifies that electronic records must be disclosed to FOIA requesters. To further enhance the EFIIA: 1) remote access lines to governmental information should be improved and increased; 2) FOIA reports with more data should be required to keep the public in touch with agency adherence to FOIA activity and to serve as an incentive to agencies for rapid disclosure when possible; and, 3) data in computer programs needs to be examined to discern when it has been created or

167. Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview, H.R. REP. NO. 99-560, 99th Cong., 2nd Sess. 35 (1986).

168. See, e.g., *Yeager*, 678 F.2d at 326 stating that "[a]s agencies continue to keep more of their records in computerized form, the need to contour the provisions of FOIA to the computer will become increasingly necessary and more dramatic." *Id.*

169. *Id.*

170. See OFFICE OF MANAGEMENT AND BUDGET, MANAGEMENT OF FEDERAL INFORMATION RESOURCES, CIRCULAR NO. A-130, 50 FED. REG. 247 (Dec. 24, 1985).

171. See generally OFFICE OF MANAGEMENT AND BUDGET, THE FREEDOM OF INFORMATION REFORM ACT OF 1986; UNIFORM FREEDOM OF INFORMATION ACT FEE SCHEDULE AND GUIDELINES, PUB. L. NO. 99-570, 52 FED. REG. 59 (1987).

may simply be disclosed to the public. With the EFIIA and these supplemental enhancements, the FOIA will be brought into the information age.

JEFFREY NORGLÉ

