

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 13
Issue 1 *Journal of Computer & Information Law*
- Fall 1994

Article 5

Fall 1994

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Recommended Citation

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BROWN v. IOWA LEGISLATIVE COUNCIL: STRUGGLING WITH THE APPLICATION OF THE FREEDOM OF INFORMATION ACT TO COMPUTERIZED GOVERNMENT RECORDS

INTRODUCTION

Congress passed the Freedom of Information Act¹ (FOIA) in 1966 in order to promote a policy of open government and to expand the public's access to government-held information.² The FOIA compels government agencies to disclose, upon request, any records not encompassed by one of nine specific exemptions.³ Although the FOIA applies only to federal records, all fifty states have also adopted statutes providing public access to state government-held records.⁴

1. 5 U.S.C. § 552 (1988 & Supp. II 1990).

2. See Leo T. Sorokin, *The Computerization of Government Information: Does it Circumvent Public Access Under the Freedom of Information Act and the Depository Library Program?*, 24 COLUM. J.L. & SOC. PROBS. 267 (1990); Stephen F. Hehl, *Reverse FOIA Suits After Chrysler: A New Direction*, 48 FORDHAM L. REV. 185 (1979); Jamie Grodsky, *The Freedom of Information Act in the Electronic Age: The Statute is Not User Friendly*, 31 JURIMETRICS J. 17 (1990); Eric M. Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 BROOK L. REV. 835 (1983).

3. 5 U.S.C. § 552(b)(1)-(9) (1988). For the full text of the nine exemptions, see *infra* note 68.

4. See generally ALA. CODE § 36-12-40 (1990); ALASKA STAT. § 09.25.110 et seq. (1990); ARIZ. REV. STAT. ANN. §39-121 et seq. (1989); ARK. CODE ANN. § 25-19-105 (1990); CAL. GOV'T. CODE § 6250 et seq. (1990); COLO. REV. STAT. § 24-72-201 et seq. (1988); CONN. GEN. STAT. ANN. § 1-17 (1988); DEL. CODE ANN. tit. 29, § 10001 et seq. (1988); GA. CODE ANN. § 50-18-70 et seq. (Harrison 1990); HAW. REV. STAT. § 92F-1 et seq. (1989); IDAHO CODE § 9-338 et seq. (1990); ILL. ANN. STAT. ch. 116 para. 43.4 et seq. (1988); IND. CODE ANN. § 5-14-3-1 et seq. (West 1990); IOWA CODE ANN. § 22.1 et seq. (West 1990); KAN. STAT. ANN. § 45-215 et seq. (1986); KY. REV. STAT. ANN. § 61.870 et seq. (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 44:1 et seq. (West 1990); ME. REV. STAT. ANN. tit. 1, § 401 et seq. (West 1989); MD. STATE GOV'T CODE ANN. § 10-613 et seq. (1989); MASS. GEN. LAWS ANN. ch. 66, § 1 et seq. (West 1990); MICH. COMP. LAWS ANN. § 15.231 et seq. (West 1990); MINN. STAT. ANN. § 13.03 et seq. (West 1990); MO. ANN. STAT. § 610.010 et seq. (Vernon 1990); MONT. CODE ANN. § 2-6-101 et seq. (1989); NEB. REV. STAT. § 84-712.01 (1987); NEV. REV. STAT. ANN. § 239.010 et seq. (Michie 1989); N.H. REV. STAT. ANN. § 91-A:1 et seq. (1989); N.J. STAT. ANN. § 47:1A-1 et seq. (West 1989); N.M. STAT. ANN. § 14-2-1 (Michie 1990); N.Y.

Like the federal FOIA, the individual state "freedom of information," "public records," or "sunshine" acts⁵ require that government bodies provide the public with access to information about deliberative processes as well as a wide range of documents and records on file with government agencies.⁶ The increasingly widespread use of electronic information technology, however, is proving to be problematic with respect to the dissemination of information under these statutes.⁷ Although the FOIA refers to government "records," because it was drafted in the 1960's, there is no indication of what a "record" could consist of in the computer age. Consequently, courts and government agencies have been struggling with the application of the FOIA to computerized government records. This has resulted in ambiguous, and often restrictive decisions regarding requests for information.

Within the range of information to which the public has access is information relating to legislative redistricting of the states.⁸ The U.S. Constitution requires the legislature of each state to redistrict the state for voting purposes every ten years, immediately subsequent to the United States decennial census.⁹ Redistricting is a process that affects thousands of state and local governments.¹⁰ In order to redistrict, the legislature must obtain census data and organize it into workable categories, from which the legislature then proposes appropriate voting dis-

PUB. OFF. LAW § 84 et seq. (McKinney 1990); N.C. GEN. STAT. § 132-1 et seq. (1989); N.D. CENT. CODE § 44-04-18 (1989); OHIO REV. CODE ANN. § 149.43 (Anderson 1990); OKLA. STAT. ANN. tit. 51, § 24A.1 et seq. (West 1991); OR. REV. STAT. § 192.410 et seq. (1990); PA. STAT. ANN. tit. 65, § 66.1 et seq. (1990); R.I. GEN. LAWS § 38-2-1 et seq. (1989); S.C. CODE ANN. § 30-4-30 et seq. (Law. Co-op. 1989); S.D. CODIFIED LAWS ANN. § 1-27-1 et seq. (1990); TENN. CODE ANN. § 10-7-301 et seq. (1990); TEX. GOV'T. CODE ANN. §552.225 (West 1990); UTAH CODE ANN. §63-2-201 (1990); VT. STAT. ANN. tit. 1, §315 (1984); VA. CODE ANN. § 2.1-340 et seq. (Michie 1990); WASH. REV. CODE ANN. § 42.17.250 et seq. (West 1990); W. VA. CODE § 29B-1-1 et seq. (1990); WISC. STAT. ANN. § 19.31 et seq. (West 1986); WYO. STAT. § 16-4-201 et seq. (1990).

5. Kimball Brace, Doug Chapin & Wayne Arden, *Whose Data is it Anyway?: Conflicts Between Freedom of Information and Trade Secret Protection in Legislative Redistricting*, 21 STETSON L. REV. 723, 727 (1992).

6. See 5 U.S.C. § 552 (1988).

7. See Grodsky, *supra* note 2, at 18. ". . .FOIA's continued ability to fulfill its mission is threatened." *Id.*

8. See Brace, *supra* note 5, at 727 (explaining why public access to redistricting information is considered to be a right.) Because tax dollars are spent in compiling redistricting information and because of the political implications of the redistricting process, there are many who feel that access to this information is the public's undeniable right. *Id.* In suits under the FOIA, parties seeking access to information often cite fairness and the threat of unrepresentative government as reasons for disclosure of such information. *Id.* at 728.

9. U.S. CONST. art I, § 2, cl. 3.

10. See Brace, *supra* note 5, at 726 (for a discussion of the process and its purpose.)

tricts to the public.¹¹ Because this practice directly affects the voting process, which is an area of significant public concern, information regarding redistricting is matter clearly encompassed by public records laws.¹²

Nonetheless, private companies (referred to as vendors), hired by government bodies to organize the data used in the redistricting and myriad other processes, are challenging this apparently fundamental right to that information.¹³ These challenges prove to be successful in many instances simply because the components of computerized information are blurred and, frequently, neither the litigants, the attorneys, nor the judges deciding these cases have the technological literacy to fully and accurately separate the issues.¹⁴

In *Brown v. Iowa Legislative Council*,¹⁵ the Iowa Supreme Court denied Ralph R. Brown (Brown), a private citizen, access to legislative redistricting data. A private vendor prepared the redistricting information for the legislative council using its own computer program.¹⁶ The issue

11. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding that the Fourteenth Amendment requires that state legislative districts be "as nearly of equal population as is practicable.") See also *Brace*, *supra* note 5, at 727 (explaining how this simply worded requirement belies the complex nature of the process of assembling data and converting it for use in redistricting.) This process, called "database development" consists of compiling data in different forms from different sources, keeping abreast of redistricting law and policy, and finally converting data for practical use in redistricting. *Id.*

12. See, e.g., ILL. REV. STAT. ch. 116, para. 201 (1989); IND. CODE ANN. § 5-14-3-1 (Burns 1987) (emphasizing how public access to government information is tied to a democratic theory.) The statutes recognize that the right of access to government information is essential in order to enable the public to fulfill its duties of discussing public issues and making informed political decisions.

13. See Daniel Gorham Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587 (1977) (discussing reverse Freedom of Information Act suits as a vast area of litigation.) In reverse FOIA suits, parties who have provided information to government agencies file suits attempting to enjoin those government agencies from disclosing their allegedly confidential or proprietary information. *Id.* at 589. Reverse FOIA lawsuits raise several important issues about how agencies should handle business information submitted by private parties or businesses. *Id.* at 590. These issues include "the extent to which submitters have a right to compel agencies to maintain the confidentiality of this information and the sources of law available to submitters seeking to enjoin agencies from disclosing this information pursuant to FOIA requests; the limits of agency authority under the FOIA and other related information statutes and regulations to release this information; the role that submitters are legally entitled to play before agencies or courts considering FOIA disclosure requests; and, whether courts or agencies are better equipped to handle the growing burden of adjudicating these cases." *Id.*

14. See *Grodsky*, *supra* note 2, at 27.

15. *Brown v. Iowa Legislative Council*, 490 N.W.2d 551 (Iowa 1992).

16. See Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin and Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 569 (1993) (defining "computer

the court decided was whether the computer data, as developed by the vendor, was a trade secret¹⁷ and, therefore, exempt from disclosure under Iowa's public records law.¹⁸ The court concluded that the processed data, and the software that made it accessible, constituted a trade secret and would not order disclosure of the redistricting information.¹⁹

The decision in *Brown* is important because it extends beyond requests for access to redistricting information; it affects access to all public records held in computer data bases.²⁰ Approximately one-third of state public records laws contain exemptions for trade secrets.²¹ To interpret a statutory exemption (e.g., a trade secret exemption) as an absolute bar to the release of certain information "would be at war with the basic principles embodied in the FOIA."²² Most, if not all, government records will eventually be stored in computer databases.²³ If government bodies continue on this course, keeping government information from the public simply because vendors want to protect the programs

program" as a set of digital instructions that tells a computer how to sort and organize data.)

17. *Kendall/Hunt Publishing Co. v. Rowe*, 424 N.W.2d 235, 246 (Iowa 1988) (explaining that "[w]hile an exact definition of trade secret does not exist, certain factors may indicate whether information is a trade secret.") These factors include: "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken . . . to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended . . . in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Id.*

18. IOWA CODE ANN. § 22.7(3) (West 1991). The trade secret exemption reads "[t]he following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information: . . . (3) [t]rade secrets which are recognized and protected as such by law." *Id.*

19. *Brown*, 490 N.W.2d at 554.

20. *Bunker*, *supra* note 16, at 566 (explaining that the breadth of information accessible under the FOIA and its state equivalents is limited only by the specific exemptions and/or court decisions.) Courts should not allow agencies to deny the public access to data merely because the agencies utilize computers in organizing the data. *Id.*

21. Andrea G. Nadel, Annotation, *What Constitutes "Trade Secrets" Exempt from Disclosure Under State Freedom of Information Act*, 27 A.L.R.4th 773, 774 (1989).

22. *Pennzoil Co. v. Fed. Power Comm'n*, 534 F.2d 627, 630 (5th Cir. 1976).

23. *See Bunker*, *supra* note 16, at 559 (noting that in approximately the last ten years, the use of computers in government operations has increased substantially.) Considering the convenience and cost savings enjoyed by the government agencies using computers, the trend toward computerization of records and functions will undoubtedly continue. *Id.* The number of large computers, known as mainframes, used by federal agencies escalated from about 22,000 in 1986 to almost 48,000 in 1990. *Id.* The use of microcomputers, or personal computers, in federal agencies grew from about 490,000 in 1987 to more than one million in 1989. *Id.* (citing General Servs. Admin., *Federal Equipment Data Center, Automatic Data Processing Equipment in the U.S. Government* (Apr. 1990).)

they have written to organize that data, they will succeed in severely hindering the implementation and goals of the FOIA.²⁴ Vendors that write computer programs for the government will have free reign to invoke trade secret and other FOIA exemptions, and thereby prevent access to not only the programs but, as a consequence, to the public information.²⁵ This situation would seriously contradict the goals of the FOIA²⁶ and result in increased public distrust of the government.²⁷

This casenote will analyze the Iowa Supreme Court's decision in *Brown* and suggest possible solutions regarding the conflict between vendors' rights and the rights of citizens to unhindered access to public records.²⁸

II. SUMMARY OF FACTS AND BACKGROUND

Ralph R. Brown (Brown), in his capacity as a private citizen, made a request to the Iowa legislative service bureau (bureau) for access to re-

24. See generally Grodsky, *supra* note 2 (illustrating that agencies have only recently begun to examine the issue of whether agency-developed computer programs are public records and how to apply FOIA mandates to those records.)

25. Five states specifically exempt computer software from disclosure under their public records laws: Kansas - KAN. STAT. ANN. § 45.221(a)(16) (1991); Minnesota - MINN. STAT. ANN. § 13.03(5) (West 1992); Oklahoma - OKLA. STAT. tit. 51, § 24A.10(B)(3) (1991); Oregon - OR. REV. STAT. § 268.357(1) (1991); and, Virginia - VA. CODE ANN. § 2.1-342(A)(24) (Michie 1992).

26. See *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (declaring that the congressional objective of the FOIA was to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.") See also *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973) (stating that the thrust of the FOIA is "to permit access to official information long shielded unnecessarily from public view"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Pennzoil Company v. Federal Power Comm'n*, 534 F.2d 627, 630 (5th Cir. 1976) (noting that the goal of the FOIA is disclosure.) See also Clement, *supra* note 13, at 595.

The basic theory behind the FOIA is that full public disclosure of governmental information is essential to the survival of democracy since the strength of a democratic government depends directly upon the wisdom of the choices made by its voters. Furthermore, the task of maintaining an informed electorate has grown increasingly difficult because of the proliferation of federal administrative agencies that are not directly accountable to the electorate. *Id.*

27. *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242 (1978). "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Id.*

28. H.R. Rep. No. 99-560, 99th Cong., 2nd Sess. 11 (1986). "As technology permits an agency to upgrade its own ability to access, copy, and manipulate data, an agency should make reasonable attempts to allow public users of agency information to share the benefits of automation." *Id.* The U.S. House Committee on Government Operations in 1986 urged agencies to use modern technology to improve the range and quality of public access to agency records, not hinder public access. *Id.*

districting data.²⁹ The data had been prepared by Election Data Services (EDS) under contract with the Iowa legislative council (council).³⁰ Brown sought to examine and copy the redistricting software and data bases prepared by EDS as well as any enhancements performed by EDS.³¹ The council provided for public disclosure of some redistricting information but denied Brown access to EDS's software and data bases in machine-readable form.³² After making a final, informal request for the data, Brown brought suit against the council seeking access to the computerized information.³³

Brown asserted that he was entitled to examine the databases because they were public records,³⁴ and as such, they were encompassed by the Iowa public records law.³⁵ The data to which Brown sought access consisted of census and election figures that EDS organized for use in the redistricting process, a service for which the Iowa General Assembly paid EDS with public funds.³⁶

EDS intervened in the suit, contending that their programs and the information, as processed, was a trade secret³⁷ and should be exempt from disclosure based on the trade secret exemption in Iowa's public records law.³⁸ Although the raw data that EDS utilized was available to

29. *Brown*, 490 N.W.2d at 553.

30. *Id.*

31. *Id.*

32. *Id.* EDS provided the bureau with the ability to analyze and confirm the appropriateness of its redistricting proposals; the correlation in computer-readable format was made available to Brown but the original system was not. *Id.*

33. *Brown*, 490 N.W.2d at 553.

34. *Forsham v. Harris*, 445 U.S. 169, 183 (1980). This case defined public records as "all books, papers, maps, photographs, machine-readable materials or other documentary materials, regardless of physical form or characteristic, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business." See also IOWA CODE ANN. § 22.1(3) (West 1991), which defines public records "[a]s used in this chapter, 'public records' includes all records, documents, tape or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township. . . political subdivision. . . or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

35. IOWA CODE ANN. § 22.2 (West 1991) states "[e]very person shall have the right to examine and copy public records and to publish or otherwise disseminate public records or the information contained therein."

36. *Brown*, 490 N.W.2d at 552.

37. IOWA CODE ANN. § 550.2(4) (West 1989) (since amended). At the time of trial, the statutory definition of trade secret was as follows "information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is either of the following: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use. (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id.*

38. IOWA CODE ANN. § 22.7(3) (West 1991). For full text of trade secret exemption, see *supra* note 18.

the public, EDS claimed that the way it manipulated the data was protectable as a trade secret.³⁹ The process EDS referred to is called "data base development."⁴⁰ Database development entails compiling data in different forms from different sources (such as the Census Bureau and Board of Elections),⁴¹ purchasing and configuring computer hardware, and converting the data from all of its sources into uniform, workable categories.⁴² The programs prepared by EDS also reflect recent political and legal changes in the field of legislative redistricting.⁴³

The trial court determined that the data, as processed, was a trade secret and refused to order disclosure of the information.⁴⁴ On appeal, the Iowa Supreme Court affirmed the trial court's decision and refused to order disclosure of the redistricting information.⁴⁵

III. ISSUES AND CONCLUSIONS

The threshold issue that the Iowa Supreme Court addressed in *Brown* was whether the information that Brown sought to obtain was a trade secret, and therefore, exempt from disclosure under the Iowa public records law.⁴⁶ The court held that the data was a trade secret because EDS exerted reasonable efforts to preserve the secrecy of the processed information.⁴⁷ Thus, the court determined that the legislative council was not required by public records law to allow public access to the information.⁴⁸

39. *Brown*, 490 N.W.2d at 553. The court stated "[w]e emphasize that the information composing the data base itself comes from public sources and is entirely available to plaintiff. It is the process by which the information is correlated that defendant alleges is proprietary and protected from disclosure." *Id.*

40. Kimball Brace, Doug Chapin & Wayne Arden, *Whose Data is it Anyway?: Conflicts Between Freedom of Information and Trade Secret Protection in Legislative Redistricting*, 21 STETSON L. REV. 723, 726 (1992).

41. *Id.*

42. *Id.* The difficulty in correlating census data with election returns is that these different types of data are linked to units of geography and many of the sources from which EDS retrieves data attach their figures to different units of geography. *Id.*

43. *Id.*

44. *Brown*, 490 N.W.2d at 552.

45. *Id.*

46. IOWA CODE ANN. § 22.7(3) (West 1991). "The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information. . . (3) trade secrets which are recognized and protected as such by law." *Id.*

47. *Brown*, 490 N.W.2d at 554. The court conferred EDS's information with trade secret status because it satisfied the second element set forth in Iowa Code section 550.2(4), in the definition of trade secret, "information . . . program . . . or process that . . . (b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." IOWA CODE § 550.2(4) (1989).

48. *Brown*, 490 N.W.2d at 554.

The significance of *Brown* lies in its broader issue and implications. The true issue goes to how agencies and the courts should distinguish raw data, clearly obtainable under the FOIA, from computer generated pools of information and the software which reorganizes that data into readable form.⁴⁹ The broader policy issue such a case presents is whether information submitted to the government by private entities, and paid for with public funds, should be kept from the public merely because the private entities wish to keep that information, in its computer-generated form, proprietary.

IV. COURT'S ANALYSIS

The Iowa Supreme Court's reasoning reflected the idea that once a court determines that information is encompassed by an exemption to the public records law, the inquiry is at an end; under no circumstances can that information be released.⁵⁰ This rationale gives no deference to the goals of public records laws.⁵¹ The *Brown* court relied exclusively on statutory interpretation to reach its decision.⁵² Specifically, the court interpreted Iowa's public records law, as well as the statutory definition of trade secret.⁵³ The court first set forth an exemption within the Iowa freedom of information, or public records statute, stating that the custodian of public information is required to deny access to such information if it is a trade secret recognized and protected by law.⁵⁴ The court then examined the statutory definition of "trade secret" and determined that EDS's process of arranging redistricting data fell within the definition of a trade secret.⁵⁵

At the time of trial, there were two elements contained within the statute. The existence of either of these elements would accord information trade secret status: (1) if there is economic value inherent in the information only as long as it is unknown to others who might gain economic value from it; or (2) if the holder of the alleged trade secret has

49. See Grodsky, *supra* note 2, at 39. Databases have come to resemble "pools" of information rather than discrete documents. *Id.* For example, relational database systems, developed in the 1970's, allow discrete data items to be linked to constitute a synthesis of information retrieved from several different files. *Id.* "In some cases, then, several pieces of data can or must be connected to make a record . . . A collection of data is called a "relation" instead of a file." *Id.* "A record is, in effect, a series of relations rather than a single file." *Id.*

50. See Grodsky, *supra* note 2, at 39.

51. For a discussion regarding the equivalent goals of the federal FOIA, see *Pennzoil*, 534 F.2d at 630.

52. *Brown*, 490 N.W.2d at 553-54.

53. Iowa's public records law: IOWA CODE ANN. § 22.1 et seq. (West 1991). Statutory definition of trade secret: IOWA CODE ANN. § 550.2(4) (West 1989) (since amended).

54. *Brown*, 490 N.W.2d at 553. See IOWA CODE ANN. § 22.7(3) (West 1991).

55. *Brown*, 490 N.W.2d at 554. See IOWA CODE ANN. § 550.2(4) (West 1989).

made reasonable efforts to maintain its secrecy.⁵⁶ The court concluded that the redistricting program was a trade secret because EDS had made reasonable efforts to maintain its secrecy.⁵⁷ The court acknowledged, however, that the statute defining a "trade secret" had been amended since the trial court rendered its decision requiring, in the future, the existence of both of the elements set forth above.⁵⁸ This change will make it significantly more difficult for future litigants to establish the trade secret status of their information.⁵⁹

In determining that EDS's information qualified as a trade secret, the court examined prior contracts between EDS and other public bodies.⁶⁰ Specifically, the court examined clauses in those contracts wherein EDS asserted that its services and information were trade secrets.⁶¹

The court allowed the admission of prior EDS contracts so that EDS could establish that it had made efforts to preserve the confidentiality of its services and information.⁶² The mere fact that EDS had declared in its contracts that its services and information were trade secrets proved to be a substantial factor in the court's determination that such information was indeed a trade secret.⁶³

The court also determined that, because parts of EDS's program

56. IOWA CODE ANN. § 550.2(4) (West 1989) (since amended).

57. *Brown*, 490 N.W.2d at 554.

58. *Id.*

59. IOWA CODE ANN. § 550.2(4) amended by Acts 1991 (74 G.A.) ch. 35, § 1, eff. April 23, 1991. See 1991 IOWA Legis. Serv. 179 § 2 (West), which states "[t]he 1991 amendment, . . . defining 'trade secret,' substituted 'both' for 'either.'" The Act also sets forth "[t]his Act, being deemed of immediate importance, takes effect upon enactment." *Id.* The *Brown* court only reached the conclusion that EDS's information satisfied one of the elements. *Brown* at 554. The court did not require EDS to show any threat of economic or competitive harm in order to establish trade secret status. *Id.* If the statute had required proof of both elements, that would have seriously weakened EDS's case.

60. *Brown*, 490 N.W.2d at 553.

61. *Id.* at 554. The following is an excerpt from a typical EDS contract:

TRADE SECRETS: It is expressly understood by the parties of this Agreement that the services and information provided by EDS, Inc. under this Agreement are considered a "trade secret", because the services and information are considered proprietary and disclosure of such services and information may cause competitive harm to EDS, Inc.

62. *Id.* *Brown* raised the objection that admission of EDS' prior contracts was hearsay. *Id.* *Brown* claimed that the clauses in the contracts were being used to prove that EDS' data bases were trade secrets and that EDS was acting to preserve their secrecy. *Id.* The court held that the contracts were admissible, not to prove that the data bases were trade secrets, but as verbal acts offered to show that the statements were made in EDS contracts. *Id.* The court held that the contracts were admissible because, as verbal acts, they had independent legal significance. *Id.*; see 6 WIGMORE ON EVIDENCE § 1770 (Chadbourn rev. 1976); *J. Weinstein and M. Berger, EVIDENCE*, 801(c)[01] (1991).

63. *Brown*, 490 N.W.2d at 554 (determining that "the [contract] clauses serve to establish the fact of reasonable efforts to preserve secrecy.")

were encrypted,⁶⁴ or coded, EDS impliedly expected confidential treatment of its information.⁶⁵ Based on these two factors, the court concluded that EDS had made reasonable efforts to protect the secrecy of its information and held that the databases were trade secrets.⁶⁶

In dicta, the court finally addressed the most troublesome and significant issue of the case. "[T]his case is troubling because the rights of the vendor to its trade secret come into conflict with the rights of citizens to information purchased for the government at public expense. The conflict is heightened because voting, a fundamental right, underlies the dispute."⁶⁷ The court went on to say that the trial court did have the option to propose an alternative remedy that would have allowed a citizen to examine the materials while protecting the trade secret, but that it did not elect to do so.⁶⁸

The court also stated that the trial court could have ordered disclosure of the information notwithstanding its trade secret status.⁶⁹ However, the court concluded that Brown, by not suggesting an alternative form of disclosure, did not raise the issue on appeal in a manner that would require the Iowa Supreme Court to entertain such alternative remedies.⁷⁰

64. Encrypted from the word "cryptic" meaning hidden, concealed, or secret. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 319 (1981). Cryptography is a mathematical science of "secret writing" used to ensure communications are only understandable to the intended recipient. *Id.* Cryptoanalysis is the mathematical science of deciphering or "breaking" the code of the enciphered information. See Handelman, *Special Report: Cryptographic Research and the National Security*, SIAM NEWS, June, 1981, at 1, col. 3.

65. *Brown*, 490 N.W.2d at 554. The court stated that "[t]here is other evidence [of efforts to preserve secrecy]. The source codes are encrypted." *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The court conceded that "[t]he trial court is not helpless, in an appropriate case, to fashion a tentative remedy, one that would allow an exploration of the materials while protecting the trade secret." *Id.*

69. *Id.* The court explained that "[i]f the data bases are found to be exempt from disclosure under IOWA CODE section 22.7 they must be kept confidential 'unless otherwise ordered by a court'. Under this provision, even if the data bases are exempt from disclosure under section 22.7, a court could order their disclosure notwithstanding the exemption." *Id.*; see also Clement, *supra* note 13, at 597. "Nothing in the language of the FOIA directly supports the proposition that the exemptions mandate agency withholding of exempt information. The Act simply states that it 'does not apply to matters that are' exempt. Congress could have made the exemptions mandatory. . . the wording of the FOIA, however, contains no hint that Congress intended to enact a restrictive statute." *Id.*

70. *Brown*, 490 N.W.2d at 554.

V. AUTHOR'S ANALYSIS

The court's decision in *Brown* is disquieting because it prohibits access to information, which should be available to the public, under the theory of trade secret protection. The court's decision in *Brown* was inappropriate for several reasons. First, the court did not delineate exactly what it was labeling as a trade secret. The court avoided drawing distinctions between the raw data, the data as it was organized by EDS's program, and the software which made that information accessible. The court merely accepted EDS's assertion that the information and software were part of a package "trade secret", the benefits of which the company provided to government bodies.

In accepting EDS's assertions, the court not only failed to separate the different characteristics of the information and deal with them accordingly, it also granted the entire package of information overly broad trade secret protection, thereby contradicting the goal of the public records law. In addition, the court's decision contradicted a provision within Iowa's public records law that prohibits government bodies from hiring independent contractors to perform activities which government bodies could not legally perform themselves.⁷¹

Finally, the court's decision was inadequate because the court could have provided several alternative remedies which would have satisfied the goals of the public records law without causing competitive harm to EDS.⁷² For these reasons, the Iowa Supreme Court should have ordered disclosure of the redistricting information requested by Brown.

A. ANALYZING REQUESTS FOR COMPUTERIZED GOVERNMENT INFORMATION

It is becoming increasingly clear that the FOIA, as originally drafted, is not well suited to treat the vast body of computerized government records.⁷³ Nevertheless, courts have still been able to analogize many aspects of requests for computerized records to requests for paper information and apply the FOIA successfully.⁷⁴ At issue in *Brown* was

71. IOWA CODE ANN. § 42.2(5)(b) (West 1991). For full text of the provision see *infra* note 121.

72. See note 123, *infra* for examples of computerized public access systems which provide access to information while compensating the private companies that developed the systems.

73. See Grodsky, *supra* note 2, at 26.

74. Yeager v. Drug Enforcement Admn., 678 F.2d 315, 321 (D.C. Cir. 1982).

Although it is clear that Congress was aware of problems that could arise in the application of the FOIA to computer-stored records, the Act itself makes no distinction between records maintained in manual and computer storage systems. . . it is thus clear that computer-stored records, whether stored in the central processing unit, or magnetic tape or in some other form, are still 'records' for the purposes of the FOIA. Although accessing information from computers may in-

not necessarily whether the legislative council would release the information Brown requested, but rather, how that information would be organized and in what medium Brown would receive it. Based on the few cases courts have decided on this issue, it appears that thus far, although an agency finds that a FOIA request for computerized information is reasonable, the agency is not legally bound to offer the information in any specified format.⁷⁵ This is troublesome because a requester's ability to analyze large quantities of raw data may be dependent on the specific program or software used by the agency.⁷⁶ Since courts may have little technical knowledge about how computerized information is processed, and cannot determine exactly what types of computer operations are necessary to retrieve and effectively use an agency's data, it will be difficult to determine in future cases whether requester's rights under the FOIA are being arbitrarily denied based on convincing, yet faulty, arguments against trade secret revelation.⁷⁷

B. THE GOAL OF PUBLIC RECORDS LAW

The court's decision in *Brown* was inappropriate because it accorded EDS overly broad trade secret protection, thereby contradicting the goals of the public records law. The federal Freedom of Information Act, which nearly every state has adopted with slight modifications, compels the release, on request, of all agency records not covered by one of nine exemptions.⁷⁸ These nine exemptions have been the source of most freedom of

volve 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.

75. See Grodsky, *supra* note 2, at 32.

76. *Id.* at 34.

77. *Id.* at 36.

78. 5 U.S.C. § 552(b)(1)-(9) (1988). The following are the nine FOIA exemptions: This section does not apply to matters that are - (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to dis-

information litigation.⁷⁹

A majority of commentators have observed that, rather than providing courts with objective guidelines, the statutory language of freedom of information acts is highly ambiguous.⁸⁰ Thus, courts have virtually disregarded the "plain meaning" of the exemptions and have typically chosen to rule in favor of full disclosure.⁸¹ Consequently, the predominant practice is for courts to narrowly construe all exemptions.⁸²

In contrast to the majority of courts, the court in *Brown* broadly construed the trade secret exemption, thereby shielding public information from disclosure. The court afforded EDS with overly broad trade secret protection by viewing the trade secret exemption as an absolute bar to disclosure of such information, thereby contradicting the goals of public records laws.⁸³

In *Environmental Protection Agency v. Mink*,⁸⁴ the U.S. Supreme Court advanced the rule that courts should read the exemptions to the FOIA not as absolute barriers to disclosure, but as categories of information over which agencies and courts may have discretion regarding requests for disclosure.⁸⁵ The court held that the exemption portion of the FOIA "represents the congressional determination of the types of information that the Executive Branch must have the option to keep confiden-

close the identity of a confidential source . . . and, in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps concerning wells.

79. John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1160 (1985).

80. See, e.g., *Nationwide Mutual Insurance Co. v. Friedman*, 451 F. Supp. 736, 745 (D.Md. 1978). "Statutory prohibition against disclosure of trade secret. . . unless otherwise authorized by law is too broad in scope to qualify as exemption statute within the FOIA providing that statutory disclosure requirements do not apply to matters specifically exempted from disclosure by statute." See also Victor H. Kramer & David B. Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49, 52 (1974) (describing the act as hardly "the apogee of legislative draftsmanship"); Moon, *supra* note 79.

81. See, e.g., *Department of State v. Washington Post Co.*, 456 U.S. 595, 599-603 (1982); *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1288-90 (D.C. Cir. 1983).

82. See, e.g., *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1975); *EPA v. Mink*, 410 U.S. 73, 79 (1973); *Bristol-Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935, 938 (D.C. Cir. 1970); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

83. *Brown*, 490 N.W.2d at 554.

84. 410 U.S. 73 (1973).

85. *Id.* at 80.

tial, if it so chooses."⁸⁶ Nevertheless, the Court reiterated the point that the fullest possible disclosure is the goal of the FOIA and its exemptions.⁸⁷ Courts throughout the country recognize the policy that "FOIA exemptions provide categories of information which the government is not required to disclose, but the Act does not in its terms bar voluntary disclosure by the government of information in those categories."⁸⁸

In *Department of the Air Force v. Rose*,⁸⁹ the U.S. Supreme Court again addressed the issue of whether, assuming that the requested information fell within a FOIA exemption, the exemption was a complete bar to disclosure. In *Rose*, law review editors sought access to case summaries of honor and ethics hearings at an Air Force academy.⁹⁰ The Air Force argued that because such information fell within an exemption to the FOIA relating to internal personnel rules and practices of an agency, it was therefore exempt from disclosure.⁹¹ The Court held that even if such information fell within the exemption, such an exemption from disclosure cannot be invoked when the "matters addressed are of genuine and significant public interest as the substantial and public role of the Air Force and its academy."⁹²

The Court stated that, given the public interest in disclosure of such documents, the Air Force could not withhold them on the basis of the exemption because "nothing in the wording of [the exemption] or its legislative history [would] support the Agency's claim that Congress created a blanket exemption for personnel files."⁹³ The Court held that the exemptions are limited⁹⁴ and that the statutory goal of the exemptions

86. *Id.* The Court then quoted from Senate committee hearings on the exemptions "[i]t was not 'an easy task to balance the opposing interests, but it is not an impossible one either. . . [s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure.'" *Id.* See also S.Rep.No. 93-854, 93rd Cong., 2d Sess. 6 (1974) (Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate - as well as that the intent of the exemption relied on allows - that the information should be withheld).

87. *EPA v. Mink*, 410 U.S. at 80.

88. *Rose*, 425 U.S. 352 (1976); *Pennzoil*, 534 F.2d 627 (5th Cir. 1976); *Sears, Roebuck & Co. v. General Services Admn.*, 384 F. Supp. 996 (D.D.C., 1974).

89. 425 U.S. 352 (1976).

90. *Id.*

91. 5 U.S.C. § 552(b)(2) provides "[t]his section does not apply to matters that are . . . related solely to the internal personnel rules and practices of an agency."

92. *Rose*, 425 U.S. at 367.

93. *Id.* at 371.

94. *Id.* at 353 (emphasizing that "[t]he limited statutory exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the FOIA.")

under the FOIA was to reach a compromise between individual rights and the preservation of public rights to government information.⁹⁵

Although the Court in *Rose* discussed a different exemption than the one at issue in *Brown*, the rule set forth by the Court is one that courts can apply when construing any of the exemptions.⁹⁶ The Court stated that, by providing specific statutory exemptions from mandatory disclosure under the FOIA (or equivalent state public records laws), Congress vested in courts the duty to determine *de novo* any question as to whether an exemption has been properly invoked and whether the public information requested will be withheld by virtue of the exemption.⁹⁷

The court in *Brown* should have applied the balancing test set forth by the U.S. Supreme Court in *Rose*. The *Brown* court noted that it was aware of the significance of the competing interests in the case, but erred when it did not employ a balancing test of those interests as the Court did in *Rose*.⁹⁸ Public interest in the redistricting process, a process which directly affects election results, is arguably much stronger than public interest in honor and ethics hearings at an Air Force academy. Given the substantial interest that the public has in the voting and redistricting processes, if the court had employed the *Rose* balancing test, the public interest would surely have outweighed the interests of EDS. Thus, use of the *Rose* test would have necessitated a ruling in favor of disclosure of the requested information.

In *Bristol-Myers Co. v. Federal Trade Comm'n*,⁹⁹ the U.S. Court of Appeals stated that, in attempting to establish trade secret protection for government records, "a bare claim of confidentiality [will not] immunize agency files from scrutiny."¹⁰⁰ In *Brown*, however, the court did "immunize files. . .from scrutiny" primarily based on EDS's "bare claim of confidentiality."¹⁰¹

The *Brown* court held that EDS had established the trade secret status of its information because it had made reasonable efforts to preserve its secrecy.¹⁰² However, the efforts the court referred to were essentially no more than bare claims of confidentiality. The court relied heavily on a

95. *Id.* at 373.

96. *Id.* at 353 (indicating that "[w]ith respect to such files and 'similar files' Congress enunciated a policy, to be judicially enforced, involving a balancing of public and private interests.")

97. *Id.* at 379.

98. *Id.*

99. 424 F.2d 935 (D.C. Cir. 1970).

100. *Id.* at 938.

101. *Id.* *Brown* 490 N.W.2d at 554.

102. *Bristol-Myers Co.* 424 F.2d at 938. See IOWA CODE ANN. § 550.2(4) (West 1989), which requires one of two elements in the definition of trade secret, the second being information that "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

clause appearing in EDS contracts¹⁰³ when it decided that EDS had tried to maintain the secrecy of its programs and information.¹⁰⁴ The clause was merely statement made by EDS declaring that "the services and information provided by EDS, Inc. . . . are considered a 'trade secret,' because the services and information are considered proprietary. . . ." ¹⁰⁵ The circular wording of this clause does not amount to anything more than a bare claim of confidentiality, and the court was wrong to afford it substantial weight. The *Bristol-Myers* court further explained that the purpose of the FOIA trade secret exemption is to protect the competitive positions of private parties who provide government policy makers with information.¹⁰⁶ Although EDS was not required by statute to establish any threat of competitive harm,¹⁰⁷ its contract clauses indicated that protection of its competitive position was the reason it required trade secret protection.¹⁰⁸ Significantly, however, the court's opinion never indicated how permitting Brown access to the data would cause EDS any competitive harm.

The burden of proof in a dispute over disclosure of public information is upon the party seeking to invoke an exemption from mandatory disclosure.¹⁰⁹ In *U.S. West Communications, Inc. v. Office of Consumer Advocate*,¹¹⁰ the Iowa Supreme Court ruled on the degree of proof of economic harm that is necessary to warrant the operation of a trade secret

103. See *supra* note 61 for full text of EDS clause.

104. *Brown*, 490 N.W.2d at 554.

105. *Id.*

106. *Bristol-Myers Co.* at 938. See also IOWA CODE ANN. § 550.2(4)(a) (West 1989) (since amended) (listing as the first element of a trade secret the existence of a threat to the competitive position of the party asserting trade secret status.)

107. IOWA CODE ANN. § 550.2(4) was amended in 1991 to require the existence of both elements set forth in the statutory definition of trade secret. (74 G.A.) ch. 35, § 1, eff. April 23, 1991. Pursuant to IOWA CODE § 3.7, the court applied the statute as it existed at the time the trial court rendered its decision. *Brown*, 490 N.W.2d at 554. If the Iowa Supreme Court had applied the statute as it existed when it rendered its decision, and as it continues to exist, EDS's information may not have qualified as a trade secret because EDS did not prove a threat of competitive harm. *Id.* For a discussion of the application of amended statutes see *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840 (Scalia, A. concurring) (1990) (discussing the existing conflict regarding retroactivity of laws created by previous U.S. Supreme Court decisions). See also *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) (holding that "an appellate court must apply the law in effect at the time it renders its decision."); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969) (holding that if the law changes between the decision of a lower court and the decision of the appellate court, the appellate court must apply the law as it exists when it renders its decision.)

108. *Brown*, 490 N.W.2d at 554. EDS's contracts state that EDS's services and information are a trade secret because "disclosure of such services and information may cause competitive harm to EDS, Inc." *Id.* (citing a typical EDS contract clause.)

109. *Cochran v. U.S.*, 770 F.2d 949, 954 (11th Cir. 1985).

110. 498 N.W.2d 711 (Iowa 1993).

exemption.¹¹¹ The court determined that employee affidavits concerning the negative effects disclosure would have on the company invoking trade secret protection were “self-serving and did not contain hard facts” concerning the extent of competitive harm that would result from disclosure of the requested information.¹¹² Accordingly, the court held that since disclosure would serve a public purpose, and there was little evidence of a significant countervailing interest, the information was not exempt under Iowa’s public records law.¹¹³

In *Brown*, although EDS asserted its interest in protecting its competitive position, the only evidence EDS offered in this regard was the language of its own contracts, discussed above. The court acknowledged that Brown was acting in his capacity as a citizen who had been involved in the redistricting process since 1963.¹¹⁴ EDS never contended that it considered Brown a competitor nor someone who would gain economic value from the information he sought.¹¹⁵ Because EDS did not present evidence of actual or potential competitive harm, it did not meet its burden of proof in invoking the trade secret protection exemption.

C. THE CONFLICT BETWEEN THE COURT’S DECISION AND A PROVISION IN THE IOWA CODE

The court’s decision was improper because it allowed the legislative council to prevent examination of a public record by contracting with a

111. *Id.* at 714.

112. *Id.* at 715 (noting that “[w]hile reference is made to competitors, the record is vague concerning the extent of the advantage the . . . information will provide competitors.”)

113. *Id.* at 715.

114. *Brown*, 490 N.W.2d at 553. The court acknowledged that Brown’s interest in the information was purely inquisitive; he wanted the information so that he could participate in the upcoming public hearings regarding the redistricting proposals. *Id.*

115. EDS was probably not concerned with Brown accessing the information in order to participate in the public hearings. EDS most likely feared that Brown or a third party would employ a process known as “reverse engineering.” See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974). Reverse engineering involves starting with a known product and working backwards to uncover the process which aided in its development. *Id.* The Court in *Kewanee* held that the protection accorded a trade secret holder is against disclosure or unauthorized use by those to whom the secret has been confided under express restriction of nondisclosure or by one who has gained knowledge by “improper means,” but that trade secret status does not offer protection against discovery by fair and honest means, such as reverse engineering. *Id.* Reverse engineering is a legitimate means of discovering trade secrets. *Id.* In essence, therefore, EDS was attempting to prevent citizens from gaining access to information even though they would be acquiring the information through “fair and honest means.” *Id.* See also *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 226 (Iowa 1977). The elements of a claim based on misappropriation of a trade secret are: “(1) existence of a trade secret; (2) acquisition of the secret as a result of a confidential relationship; and, (3) unauthorized use of the secret.” *Id.* The court also held that the plaintiff in a suit alleging misappropriation has the burden of proving each of these elements by a preponderance of the evidence. *Id.*

nongovernment body to perform one of its duties. Iowa Code section 22.2(2) mandates that "[a] government body shall not prevent the examination or copying of a public record by contracting with a nongovernment body to perform any of its duties or functions."¹¹⁶ Redistricting is a legislative function¹¹⁷ which was contracted out by Iowa's legislature to a private corporation. The law does not prohibit the legislature from hiring a private company to process redistricting information. However, by invoking trade secret protection, EDS and the legislative council prevented the examination of those public records generated by EDS.¹¹⁸

Furthermore, although the legislature could not use any political criteria in drafting its redistricting plan,¹¹⁹ EDS agreed to generate a political data base, based on prior election returns, which allowed the legislature to analyze the political ramifications of alternative redistricting plans.¹²⁰ Iowa Code section 42.4(5)(b) forbids this practice and is arguably a primary reason why the legislature did not want EDS's data to be accessible to the public.¹²¹ The court acknowledged this statute but made no comment on the impropriety of the legislature in contracting with EDS to compile a database containing this political criteria.¹²² Thus, the legislature was allowed to analyze the political effects various district proposals would have and the court allowed the legislative council to hide this practice from the public by disregarding the statute which expressly forbids such action.

116. IOWA CODE ANN. § 22.2(2) (West 1991).

117. IOWA CONST., art. III, § 35.

118. Act of Jan. 8, 1988, Pub.L.No. 100-235, 101 § 1724 (1988). The Computer Security Act of 1987 prohibits agencies from withholding computerized records from the public if the records would be available to the public under the FOIA as paper documents. *See also* Long v. Internal Revenue Service, 596 F.2d 362, 365 (9th Cir. 1979) (advocating a rule similar to that created by the Computer Security Act.) "In 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." *Id.*

119. IOWA CODE ANN. § 42.4(1) (West 1991). Legislative and congressional districts are to be established on the basis of population. *Id.* The Code goes to great lengths with respect to creating geographical and population divisions, but says nothing permitting districting according to political effect. *Id.* EDS's program performs analytical functions by manipulating three basic forms of data: geographical, population and political. *Brown*, 490 N.W.2d at 553.

120. *Brown*, at 553.

121. "No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group. In establishing districts, no use shall be made of any of the following data: . . . b.) political affiliations of registered voters." IOWA CODE ANN. § 42.2(5)(b) (West 1991).

122. *Id.*

The *Brown* court's decision allowed the legislative council to deny access to public records and to perform a prohibited redistricting practice, all by virtue of the fact that the council contracted with a nongovernment body to perform one of its duties with the aid of computers. This is a trend which must not be followed.

VI. CONCLUSION AND RECOMMENDATIONS

Computers are extremely powerful and versatile information sources. The government and the public should exploit the capabilities of computer programs to the fullest, thereby creating a better informed, more active populace.¹²³ However, courts must begin to formulate more effective resolutions of the new issues created by the sophistication of computer technology.

With the prevalent use of computers in all areas of government operations,¹²⁴ vast amounts of information are processed using secret mathematical configurations written by private entities. If cases like *Brown* are interpreted broadly, it could mean that any information processed in this manner automatically becomes protected as a trade secret. If categorized as a trade secret, the information can be deemed an exception to freedom of information acts and the public will be denied access. This is an unacceptable result.

The decision in *Brown* serves to perpetuate overly broad protections afforded to private vendors that supply the government with information. Most, if not all, public records will inevitably be totally computerized. Once this is the case, will all of this public information be considered trade secret simply because private entities write the programs which organize that data?

There are several ways to avoid this result, but this will require progressive, innovative programs and laws which the government and the

123. *Bunker, supra* note 14, at 562 (discussing a possible solution to the issue of public access to government software.) "The first large federal electronic information system designed for public access was the Security Exchange Commission's (SEC) \$35 million Electronic Data Gathering and Retrieval System (EDGAR)." *Id.* A private vendor operates EDGAR for the SEC. "Because the information is public, neither the SEC nor the contractor is allowed to exert any form of copyright or ownership over the data kept in EDGAR. The contractor generates revenue by charging a fee to users who access EDGAR to examine or retrieve public documents or information." *Id.* In addition, the Environmental Protection Agency has devised an innovative public, computerized access system. *Id.* The Agency maintains a data base consisting of a list of companies that emit one or more of three hundred and fifty toxic pollutants. *Id.* This information is available through an electronic data base, the Toxic Release Inventory. *Id.* This inventory is available, for an hourly fee, to anyone with a microcomputer and a telephone modem. *Id.* at 563.

124. *Id.*

judiciary must initiate and promote.¹²⁵ First, federal, state, and local governments must consider the goals of open government and freedom of information when they develop and implement new computerized information systems. Although this may result in additional steps that the agencies would not have to take if not for the FOIA, this initial effort will prove to be minimal compared to the effort and resources necessary to defend the agencies in potentially frequent litigation regarding denied requests for information.

Second, government agencies and courts must learn to differentiate the various formats and components of computerized information. Decisions and policies must clearly indicate whether computer programs themselves and the pools of information they create—distinct from the raw information stored and processed by the computers—are considered public records.

Third, government agencies could successfully implement programs that would allow complete disclosure of government records, while protecting the interests of private vendors. One alternative is for agencies to establish services whereby citizens can access information using computer software, but require payment of hourly fees in order to subsidize the development and maintenance of sophisticated computer systems. Another option is that agency information be available to the public via “network servers.” These are computers that store “shared” information, which is accessible to individuals by the use of personal computers. Network servers allow individuals access to much larger databases and much more powerful processing capacity than that to which they would have access using their personal computers alone, or by physically visiting each agency from which they were requesting information.

A final option is for Congress to amend, or supplement the FOIA to specifically address access to electronic information. Such an addition to the Act would outline guidelines and procedures for agencies to follow when presented with requests for computerized information. The Act would define broadly what types of searches would be deemed “reasonable” under the FOIA and would provide for modifications of the reasonableness standard as technology advances.

125. See Bunker, *supra* note 16, at 563, 564 (reciting seven factors that are significant obstacles to the development of efficient systems of public access to computerized government records.) “(1) State laws that do not place a priority on access; (2) vulnerability of systems to security breaches from either loss of electronic data as a result of technological problems or unauthorized access to the data; (3) threats to the confidentiality of some information kept on computer; (4) cost of hardware and software needed to provide access; (5) ability of available software to provide requested information; (6) lack of citizen awareness and interest; and, (7) varied technology making it difficult to standardize computer systems and access programs.” *Id.*

The federal government must set a uniform standard for agencies and courts to apply when evaluating requests for electronic information. As exemplified by the decision in *Brown v. Iowa Legislative Council*, a piecemeal approach to interpreting the application of public records laws to electronic information will be adverse to the goals of the FOIA and will result in inconsistent results across the country. Only government action will prevent unpredictable results, and give industry and agencies the consistency necessary to participate in the market.

Elizabeth M. Dillon

