Case Study

The Freedom of Information Act in the Information Age: The Electronic Challenge to the People's Right to Know

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Abstract: While the Freedom of Information Act (FOIA) guarantees the American people access to information in federal records, the legislation predates the proliferation of computers in federal agencies. While FOIA applies to information in electronic records, the full impact of FOIA on computerized records is not clear. This paper traces the case law on how FOIA relates to the records of the new technology, discusses the unanswered questions, and outlines three possible scenarios for the resolution of these public issues.

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AN INFORMED CITIZENRY is the basis of the U.S. form of government. To quote James Madison, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And people who mean to be their own Governors must arm themselves with the power which knowledge gives."[1] Or more recently, the Supreme Court affirmed, "[A]n informed citizenry [is] vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[2] Despite the importance of information to the body politic, the U.S. Constitution does not explicitly guarantee the right of the people to have access to information. One can argue, however, that such a right is implicit within the First Amendment of the Bill of Rights. A free press implies a freedom to read, and free speech implies a freedom to hear. Or as the Supreme Court described it in its discussion of "peripheral" rights, "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach."[3] And as these peripheral rights relate to governmental information, the key is the Freedom of Information Act (FOIA). According to the Department of Justice, "[T]he FOIA established for the first time an effective statutory right of access to government information."[4]

Enacted in 1966, the FOIA guarantees of access were predicated upon an ink-on-paper world since federal records were at that time primarily in paper form. But advancing technology has eroded paper's monopoly on federal information. Indeed, electronic materials may soon eclipse paper as the dominant storage media for government information. Yet FOIA itself does not mention computers or computer records. And the Department of Justice has described the FOIA case law on the subject of computers as "scant."[5] In this situation, many electronic records issues stand as largely unresolved questions of both policy and law. Furthermore, the avenues leading to resolutions of these issues are not clearly marked. This essay reviews the current status of electronic materials with respect to FOIA, discusses the unresolved questions, and outlines some proposed approaches to some of the outstanding problems. In such an essay dealing with open questions of public policy, the opinions and conclusions are personal observations and should not be taken as the official policy of the National Archives or of the federal government.

After 1966, the initial attempt at a Freedom of Information Act proved ineffective for a variety of reasons. So in 1974, during the aftermath of Watergate, P.L. 93-502 significantly strengthened the statute. Finally, the Freedom of Information Reform Act of 1986 (P.L. 99-570) made some minor adjustments that both expanded and restricted the law. Briefly, the Freedom of Information Act as it exists today guarantees any person the right to gain access to records unless the records contain information on "matters" specifically excluded under one or more of nine exemptions. If a portion of the record is exempt from disclosure, then "any reasonably segregable

[1]As quoted in *The Freedom of Information Act: A 25th Anniversary Retrospective* (Lynchburg, Va.: Access Reports 1991), 1.

[2]NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[3]Griswold v. Connecticut, 381 U.S. 482, 483.

[4]U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Case List: September 1989 Edition* (Washington, D.C.: U.S. Government Printing Office, 1989), 349.

[5]U.S. Department of Justice, Office of Information and Privacy, *FOIA Update* (Spring 1989), 2.

portion of the record shall be provided . . . after deletion of the portions which are exempt." These rights are enforceable in the federal courts.[6] In their interpretations of the statute, the courts have consistently ruled that agencies are not required to create records in order to respond positively to a FOIA request.[7]

FOIA and Electronic Records

Are electronic materials subject to the Freedom of Information Act? While called the Freedom of Information Act, the legislation allows for access to "records"—presumably for the information contained in the requested records. However, the legislation has never formally defined *records*. Thus the question of what is a "record," and so subject to release under FOIA, has been a matter of interpretation by the courts. Initially, the courts relied on the definition of *records* in the Records Disposition Act. This reliance abruptly ended in 1978, when the D.C. Court of Appeals ruled otherwise in *Goland and Skidmore* v. *Central Intelligence Agency et al.*[8] The pendulum swung back in 1980 when the Supreme Court declared in *Forsham* v. *Harris* that the definition of *records* in the Records Disposition Act "provided a threshold requirement" for *records* subject to FOIA. But then the Court qualified its statement: "[T]hese definitions are not dispositive of the proper interpretation of congressional use of the word [*records*] in the FOIA."[9]

Thus the question of whether the FOIA applies to electronic materials is really whether the courts have concluded that such computerized materials are records under the FOIA. In 1979, the Ninth Circuit Court of Appeals rendered an opinion in a lengthy litigation, *Long* v. *Internal Revenue Service*. The appellate court overturned a lower district court ruling and concluded that computer tapes were records under the FOIA. Writing for the majority, then–appellate-court Judge Arthur Kennedy concluded that the "FOIA applies to computer tapes to the same extent it applies to any other documents."[10]

Such an interpretation would have been strengthened by the *Forsham* decision, which used the Records Disposition Act for guidance. For in its definition, this statute specifically includes "machine-readable materials," as a result of amendments in 1978. Finally, in 1982, the D.C. Court of Appeals in *Yeager* v. *Drug Enforcement Administration* ruled that the FOIA applied not only to computer tapes but also to online electronic systems. "[C]omputer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still records for the purposes of the FOIA."[11]

This case law affirming that electronic materials may be records under the FOIA has developed into governmentwide practice. The Office of Information and Privacy of the Department of Justice has the responsibility to advise federal agencies on questions arising from the FOIA. In late 1989, this office surveyed federal agencies on their policies and procedures regarding electronic records and the FOIA. In the survey letter, the codirectors of that office, citing the *Yaeger* decision, wrote, "Records in computer databases . . . are 'agency

[6]5 U.S.C. sec. 552.

[7]National Labor Relations Board v. Sears Roebuck, 421 U.S. 132 (1975).

[8]Trudy Huskamp Peterson, "After Five Years: An Assessment of the Amended U.S. Freedom of Information Act," *American Archivist* 43 (Spring 1980): 165–66.

[9]Forsham v. Harris, 445 U.S. 169 (1980).

[10]As quoted in U.S. Congress, Office of Technology Assessment, *Informing the Nation: Federal Information Dissemination in an Electronic Age* (Washington, D.C.: U.S. Government Printing Office, October 1988), 210.

[11]As quoted in *Freedom of Information Case List*, 359.

records' under FOIA. If you are aware of any recent instance in which your agency has not followed this fundamental principle please so indicate in your response.'' In the responses, no agency reported that this concept had not been followed.[12]

Yet this certainty is facing a challenge from electronic messaging systems. Such systems allow information to be created, transmitted, processed, analyzed, saved, and erased without paper printouts. As a result, more and more important agency actions and decisions are resulting from electronic messaging systems. For the purpose of the FOIA, the question is whether messages in an electronic system should be treated like agency records or like personal communications, such as telephone conversations or personal meetings.[13]

Other questions about the FOIA and electronic materials remain unresolved. In 1984, as a result of an FOIA request, the National Wildlife Federation received from the Office of Surface Mining computer printouts containing information on strip-mining ownership, applications, and violations. Finding such human-readable materials too voluminous to analyze, the National Wildlife Federation filed another FOIA request specifically asking for computer tapes since ''it is impossible to work with such volumes of data without having it in computer form.''[14] Before this could be resolved, the Court of Appeals of the District of Columbia rendered in 1984 its decision in *Dismukes* v. *Department of Interior*. This case centered on a request to the Bureau of Land Management for a list of participants in oil and gas leasing lotteries in California. The request specified that the information be provided in ''9 track, 1600 bpi, DOS or unlabeled, IBM compatible formats, with file dumps and file layouts.'' In this case, the court ruled, ''It is clear from the record that the computer printout was fully responsive to the . . . request.'' And so, according to the Office of Information and Privacy of the Department of Justice, ''It has been held without contradiction that the agency, not the requester, has the right to choose the format of disclosure, so long as the agency chooses reasonably.''[15]

This rationale was subsequently confirmed in 1988 in a District of Columbia District Court decision. The National Security Archive had requested an index of previously released documents from the Central Intelligence Agency (CIA). In response, the CIA provided a 3.5-foot stack of 5,000 sheets of computer printouts, arranged by the item's date of release. The National Security Archive appealed, asking that the information be made available on tape or disk. The court ruled that the information was in ''reasonably accessible form,'' and the agency was not obligated to provide in electronic format records that it had already provided in paper copy.[16] Thus, while the earlier decisions about the applicability to the FOIA were great strides forward in gaining access to information in electronic form, the *Dismukes* decision was a disastrous denial of the computer age.

The *Dismukes* decision seems to have been predicated on a basic premise underpinning many FOIA cases. In the same spirit that specifies that agencies are not required to create records to respond to an FOIA request, so agencies are not expected to be private research firms for every re-

[12]Richard L. Huff and Daniel J. Metcalfe, Codirectors, Office of Information and Privacy, to Principal FOIA Legal and Administrative Contacts at All Federal Agencies, 1 May 1989, U.S. Department of Justice, '''Electronic Record' Survey Synopsis of Results,'' 30 November 1989.

[13]As quoted in U.S. Congress, Office of Technology Assessment, *Informing the Nation: Federal Information Dissemination in an Electronic Age* (Washington, D.C.: U.S. Government Printing Office, October 1988), 234.

[14]*Washington Post*, 27 June 1984, A13.

[15]*Freedom of Information Case List*, 359.

[16]*New York Times*, 18 June 1989, A6.

quester or subject to every beck and call of a requester. Conversely, agencies must make a reasonable effort to provide access to records that have been created or maintained in the course of ongoing agency business. Thus the implication is that the court felt that the request for information in "9 track, 1600 bpi, DOS or unlabeled, IBM compatible formats" was unreasonable. To indulge in pure speculation, we might assume the court's decision resulted from one of two sources. First, the court may have been technologically naive and unaware that the requested format was the standard format in the early 1980s for data interchange between mainframe systems. In support of this speculation, an Office of Technology Assessment report commented that "a lack of technological literacy among lawyers, judges and litigants" is "a problem that recurs in legal questions involving new technologies."[17] Second, if the court was aware that the request was for a standard interchange format, it may have been leery about agreeing to such a request. This could have opened up the proverbial Pandora's box and resulted in agencies having to meet any technical specification requested by any requester. For, two years earlier in *Yaeger* v. *DEA*, the D.C. Court of Appeals had concluded that the FOIA "in no way contemplates that agencies, in providing information to the public, should invest in the most sophisticated and expensive form of technology."[18] If this were the case, and we can only speculate whether it was, the cause of access to information in electronic format would have been far better served a decade ago if the request had not specified a technical format but had asked for the records to be compatible with standard interchange formats such as those specified by the Federal Interchange Processing Standards (FIPS) Publication 20 *Guidelines for Describing Information Interchange Formats* and the FIPS Publication 53 *Transmittal Form for Describing Computer Magnetic Tape File Properties*. But no such specification was made, and the limited case law now dictates that the agency, not the requester, specifies the format of the delivered information. So at the present time, a requester has a right to access information stored in electronic records but has no right to a copy of that information in electronic format.

The *Dismukes* dictum is currently being challenged, as is the principle established in case law that the FOIA is applicable to electronic material. The *Dismukes* decision rested on the Supreme Court's decision in the *FBI* v. *Abramson*, which accepted the argument that FOIA is really about "information" and not "records." This distinction formed the basis for the *Dismukes* conclusion that the agency could choose the format of information if the informational content was the same. In 1989, the Supreme Court retreated from the *Abramson* decision in its *United States Department of Justice* v. *Tax Analysts* decision. The Court ruled that records, not information, are the basis for FOIA requests. At least one knowledgeable attorney has used the *Tax Analysts* decision to suggest that the *Dismukes* decision is clearly wrong. According to this commentator, an agency must provide nonexempt records. If a computer tape is nonexempt, then the agency must release the computer tape.[19] Along this same line, the Administrative Conference of the United States was, until October 1995, the government agency with the responsibility to study and recommend improvements in administrative procedures to

[17]U.S. Congress, *Informing the Nation*, 218.

[18]U.S. Department of Justice, *Freedom of Information Case List*, 359.

[19]Harry A. Hammitt, "Creating a Record: Is It Reasonable?" *Access Reports* 16, no. 13 (27 June 1990): 5.

executive branch agencies. The conference has adopted a recommendation, "In responding to FOIA requests, agencies should provide electronic information in the form in which it is maintained or, if so requested, in such other form as can be generated directly and with reasonable effort."[20] Similarly, the Office of Technology Assessment has urged agencies to consider providing alternative electronic formats because printouts of electronic information might not allow the effective analysis of large amounts of raw data.[21]

The FOIA and the Creation of Records

The next significant question concerns the content of that output from an automated system. Because the information is stored in an electronic format, some sort of a computer program is needed to transfer it from the electronic storage media to the output media. And it is this software program that will specify the content of the output—whether all information from every record, all information from selected records, some information from every record, or some information from some records. Yet the FOIA does not require agencies to create records, but merely to provide access to records that the agency created and retained in fulfillment of its legal responsibilities. Thus, the question emerges: "Does writing a program to retrieve from an on-line information system output for an FOIA requester equate to creating a new record?" This question applies to either the software program or the output as being the new record. If either the program or the output is a new record, then the FOIA does not require an agency to do that.

In *Public Citizen* v. *Occupational Safety and Health Administration*, the plaintiffs challenged the concept that computer programming is an equivalent to the creation of a new record—either the program or the output. The FOIA requires agencies to search for records that contain information responsive to a request. In this case, the plaintiffs argued that programming for retrieval purposes was analogous to searching extant records and not to creating new records. Before the court ruled on the assertion, the agency had augmented its computer capabilities to the point that additional programming was no longer needed to answer the request. As a result, the agency and plaintiff settled the case.

However, the District Court for the Eastern District of Pennsylvania did rule in a similar case. Citing precedents that the FOIA does not require agencies to create records, the court ruled that a new computer program would be needed to extract the information requested. Thus, according to the district court, the FOIA does not require agencies to write new computer programs to search for data not already compiled for agency purposes.[22] In the survey by the Office of Information and Privacy, a large majority of federal agencies, more than three-quarters of them, responded that the FOIA did not *require* agencies to create or to modify existing computer programs for search purposes. However, many agencies did indicate a willingness to do so under some circumstances as a matter of agency discretion. Thus, the question about writing programs to respond to an FOIA request remains unresolved.

A closely related issue concerns writing programs to retrieve all information that may be released from records containing information exempt from disclosure. As

[20]Administrative Conference of the United States, *Federal Agency Use of Computers in Acquiring and Releasing Information,* 8–9 December 1988.

[21]U.S. Department of Justice, *Informing the Nation*, 208, 234.

[22]U.S. Department of Justice, *Informing the Nation*, 218–19.

stated earlier, the FOIA requires agencies to provide "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt." Does FOIA thus require agencies to produce a public-use extract from a file of electronic records that contain information exempt from disclosure? In response to this issue, the Ninth Circuit Court of Appeals in the *Long* v. *IRS* case overturned in 1979 the lower court's ruling that deleting personal information from a record involved the creation of a new record: "We do not believe . . . that the mere deletion of names, addresses, and social security numbers results in the agency's creating a whole new record. . . . [T]he editing required here is not considered an unreasonable burden to place on an agency."[23] Eight years later, the same court heard another appeal in the *Long* case. After examining the specific proposals for the release of the information, the Appeals Court noted that "all three of the Longs' partial disclosure plans would involve editing so extensive as to amount to the creation of new records. . . . We conclude that the editing required for partial disclosure of . . . records is so extensive that the remaining information is not reasonably segregable, and that all three of the Longs' proposals would require the IRS to create new records."[24]

In *Yeager* v. *DEA*, the requester asked for the agency to create microaggregations of microlevel data records in order to "collapse" or "compact" the information. The Appeals Court determined that the FOIA dictum to release reasonably segregable portions does not require creation of a low-level summary file because it is not functionally analogous to manual searches.[25] In its survey, the Office of Information and Privacy asked federal agencies, "Does the FOIA require agencies to create new computer programs . . . in order to segregate disclosable from nondisclosable electronic record portions?" Half of the responding agencies took no position. Clearly, the extent to which the FOIA obligates agencies to create disclosure-free files has not yet been determined.

Recurring Themes and Issues

These issues represent a recurring theme: although the agency determines the format to be provided to the researcher, it must do so reasonably. The writing or rewriting of programs to search and retrieve requested information must entail a reasonable effort. Excising personal identifiers is reasonable, but the creation of special tabulations is not. Yet "reasonableness" is admittedly a vague and poorly defined concept.

Another question related to computer programs but not to reasonableness criteria is whether computer software is an "agency record" under the FOIA. Or phrased another way: is software a tool or a vessel for information? If it is a tool, it is not subject to the FOIA. If it is a vessel for information, it should be subject to the FOIA. When the Office of Information and Privacy of the Department of Justice surveyed executive branch agencies on this question, the responses reflected a wide divergence of opinion. Thirty percent responded that software is a record; 20 percent said software was not a record, and 50 percent took no position. This scattershot response is due in part to the survey's attempt to reduce a complex issue into a simple declarative question—does the question refer to software developed by the agency for its own purposes or to software purchased by the agency under some licensing agreement with a vendor? The second possible influence on responses concerns the reason why a requester might want a copy of the software. One requester

[23]U.S. Dept. of Justice, *Informing the Nation*, 216–17.

[24]Harry A. Hammitt, *Access Reports*, 6.

[25]U.S. Dept. of Justice, *Informing the Nation*, 216.

may want the computer programs for his or her own data manipulation purposes. For example, one federal agency that makes loans has developed a debt-collection system that private bill collectors want to use with their own accounts. Some requesters may want the software to massage a particular set of data. At a conference on electronic records issues on 30 November 1989 sponsored by the Office of Information and Privacy, an agency official asked why anyone would want software without the related database. In response, someone reversed the question: Why would anyone buy the database without the related software?

Finally, requesters may wish the software for its own sake. In the previously cited *Long* v. *IRS* case, the request included a copy of the Taxpayer Compliance Measurement Program software, which determines which tax returns will be audited. A more recent request was for the Federal Reserve Board software that monitors the nation's money supply so as to trigger infusions of money into the economy.[26] Clearly, understanding the internal logic of either of these software programs would result in significant financial benefits.

In addressing the question about whether computer software is an FOIA "record," one commentator recently labeled the issue "bitterly unresolved" and stated, "[T]here are no decisions to date that explicitly resolve this question."[27] One possible approach may be in the *United States Department of Justice* v. *Tax Analysts*. In this case, the U.S. Supreme Court established two thresholds for a record. The agency must be both in possession and in control.[28] In some cases commercial software licensing or contractual agreements limit agency use of the software, and therefore also limit agency control. Thus, software covered by such agreements does not meet the control criteria for an agency record. Software produced in-house, however, would reach the control threshold, and thus it would be an FOIA record.

So how are these questions about access to information in electronic media to be resolved? One commentator has suggested that the major disagreement is whether definitive criteria will be developed through litigation or through legislation.[29] In my view, three possible avenues exist, and they mirror the three branches of government—additional case law by the judicial branch, legislation by the legislative branch, or administrative policy by the executive branch.

In the first option, issues could continue to be decided on a case-by-case basis. The Administrative Conference of the United States arranged for a detailed study of questions involved.[30] Based on this study, the conference urged, "Differences in technologies and database structures used by individual agencies make it necessary, for the near term, to define FOIA obligations on a case-by-case basis."[31] Thus the Administrative Conference has opted for litigation.

The second option calls for congressional action, the conclusion that Congress' Office of Technology Assessment reached after studying this problem. A chapter in the report is entitled "New Technologies and the Need for Amending FOIA," and it concludes, "If Congress wishes to main-

[26]*New York Times*, 18 June 1989, A6.

[27]Henry H. Perritt, Jr., *Electronic Acquisition and Release of Federal Agency Information. A Report to the Administrative Conference of the United States*, 1 October 1988, 107.

[28]United States Department of Justice v. Tax Analysts, 109 S. Ct. (1989).

[29]"OIP Releases Results of Electronic Records Survey," *Access Reports*, 13 November 1990, 1.

[30]Perritt, *Electronic Acquisition and Release of Federal Agency Information*, passim.

[31]Administrative Conference of the United States, *Federal Agency Use of Computers*, 5.

tain the integrity of the FOIA in an electronic environment, the goals of the statute should be reassessed, and statutory amendment pursued."[32] Congressman Bob Wise, the former chairman of the House of Representatives subcommittee with oversight for the FOIA, has written, "I support the idea of an Electronic Freedom of Information Act." Then he added, "[B]ut it is not at all clear what this new Act should provide."[33]

The third option is action by the executive branch. The Office of Management and Budget and the Office of Information and Privacy have the authority to develop a consistent and uniform position for executive branch agencies. This might quiet the concern over the diversity and inconsistency in applying the FOIA to electronic materials. Indeed, this was the primary reason for the Office of Information and Privacy's survey. It was an attempt to identify the common ground among federal agencies.[34] But as discussed earlier, the responses indicated a wide divergence of approaches within the executive branch.

During 1994, efforts were made to resolve these complex questions using each of the three avenues for change—litigation, legislation, and executive branch policy. In the area of litigation, the case receiving the greatest attention has been *Armstrong et al.* v. *Executive Office of the President et al.* While the case initially concerned the FOIA, the litigation has since focused on the Federal Records Act and the federal agencies' statutory obligations to manage electronic records. When the Court of Appeals sustained for the most part the District Court's ruling, the *New York Times* commented, "[I]t remains unclear how the Government will accommodate requests for computer files from those who are unsatisfied with a printout."[35]

In the legislative arena, Senator Patrick Leahy, a champion of including electronic records in FOIA's purview, on 22 November 1993 introduced S. 1782 to amend the FOIA. Although including various changes, the sections regarding electronic formats had two major proposals. First, the FOIA would include an extremely broad definition of *records*, which specifically embraced "data, computer programs, machine-readable materials, and computerized, digitized, and electronic information." Second, to honor format requests, the legislation proposed to require agencies to "provide records in any form in which such records are maintained by that agency as requested . . .[and to] make reasonable efforts to provide records in an electronic form requested . . . even where such records are not usually maintained in such form." On 8 August 1994, Representative Maria Cantwell introduced in the House of Representatives H.R. 4917, which proposed to amend the FOIA but to do so less drastically than S. 1782. Its definition of *record* did not include "computer program" and parodied the Federal Records Act definition by referencing only "machine-readable materials." Regarding electronic formats, H.R. 4917 would require agencies to "make reasonable efforts to provide records in the form or format requested by any person, including an electronic form or format, even where such records are not usually maintained but are available in such

[32]U.S. Dept. of Justice, *Informing the Nation*, 226, 236.

[33]Bob Wise, "Electronic Information and Freedom of Information—Moving Toward Policy," *Government Publications Review* 16 (September-October): 428.

[34]U.S. Dept. of Justice, *FOIA Update* (Spring 1989), 2.

[35]Armstrong v. Executive Office of the President no. 93-5002 (D.C. Cir. 13 August 1993); Neil A. Lewis, "Panel Tells U.S. It Must Preserve Electronic Mail," (*New York Times*, 14 August 1993), 6. The other FOIA case concerning electronic materials is Cleary, Gottlieb, Steen, & Hamilton v. HHS, 884 F. Supp. 770 (D.D.C. 1993) in which the District Court held that a computer software program created by an agency employee was a "record."

form or format.'' On 25 August 1994, the Senate—without debate and by unanimous consent—substituted the full text of S. 1782 with the more moderate language of H.R. 4917 and passed the bill as amended. With the 103rd Congress drawing to a close and the Clinton administration opposing some of the amended legislation's ''technical provisions,'' the House of Representatives never voted on the Senate-passed version.[36] With the new Republican majorities in both houses of the 104th Congress, the Contract with America set the legislative agenda. Thus prospects for congressional action on FOIA are dim.

To develop a coordinated policy for executive branch agencies, the Clinton administration established in April 1994 an Electronic Record FOIA Legislation Group within its much broader Information Infrastructure Task Force initiative. Its charge was to develop possible consensus positions among agencies on electronic record FOIA issues. After sixteen weeks, the group forwarded on 17 August 1994 a review draft outlining sixty-six principles. The major features of the proposed principles were that software would be treated as a ''record'' while excluding commercially available software, that agencies would be required to go beyond the bounds of extending programming for data-retrieval purposes subject to objective limitations on the expenditure of staff and personnel resources, and that agencies would be required to afford requested choices among existing formats and to expend efforts to create new electronic formats within fixed limits. Certainly, these proposed principles formed part of the background for the legislative actions that occurred simultaneously. And as the Electronic Record FOIA Legislation Group was at times apparently working toward proposed legislation, these efforts of the Clinton administration seemingly were merging with the legislative initiatives for a solution. Yet the Republican victories in the midterm elections in 1994 will only hamper future efforts at the convergence of the legislative and executive branch paths.[37]

Thus for the present, access to electronic records raises a variety of complex questions with the three possible means of finding answers. We have yet to identify the vehicle for the solutions, let alone the solutions themselves. Nevertheless, we need to find solutions to guarantee the right to information in the electronic age. Only in this way can we ensure an informed citizenry, which is vital to a democratic society.

[36]S. 1782, 103rd Cong., lst sess., 22 November 1993; H.R. 4917, 103rd Cong., 2nd sess., 8 August 1994; *Congressional Record*, 103rd Cong., 2nd sess., 25 August 1994, vol. 140, no. 124, S12646-47; Bruce McConnell, ''Administration Policy on Public Access'' (Paper delivered at 1994 American Society of Access Professionals [ASAP] Annual Symposium, Rockville, Md., 30 August 1994.)

[37]Memorandum for Sally Katzen and Bruce McConnell, from Daniel J. Metcalfe, ''Consensus Electronic Record Principles,'' 17 August 1994, available from Thomas E. Brown.