# The Foundations of United States Government Information Dissemination Policy

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## Introduction

The public and private market for information goods and services in the United States is as strong and dynamic as in any country in the world. Among the many influences are affirmative policies supporting access to and dissemination of federal government information. The four most important constitutional and statutory foundations for United States federal government information activities are the First Amendment to the U.S. Constitution, the Freedom of Information Act, the Paperwork Reduction Act, and the Copyright Act. These policies work together to minimize government controls and to maximize public access and use.

Limitations must be acknowledged at the outset. While American policies establish a clear basis for the disclosure of government information, occasional counter-pressures, conflicts, and inconsistencies lead in different directions. Bureaucratic secrecy imperatives and limited dissemination resources are constant influences. Finally, tensions exist between the government's obligation to provide information and the desire to limit government involvement in the commercial marketplace for information products and services. In any political environment, consistency in word and deed is difficult to achieve. Nevertheless, the basic harmony of American policy remains despite occasional divergent law or action.

## First Amendment

The inevitable starting place for American information policy is the First Amendment to the Constitution. The First Amendment provides in part that Congress shall make no law abridging freedom of speech or of the press. The words are few and appear deceptively simple. The case law about free speech and free press reveals a complex and extensive jurisprudence.

Little of this is directly relevant to government *dissemination* policy but some implications remain important. The First Amendment requires sensitivity whenever government activities involve information or the regulation of speech in any form. It recognizes the paramount importance of a free press and free speech. Finally, the First Amendment has been interpreted to provide the highest degree of constitutional protection to political speech. This is where the government must tread with extreme caution, if at all.

Nothing in the First Amendment defines the government's role in disseminating information. Development of constitutional principles for access to executive branch records has not occurred largely because a procedure for disclosure exists under the

Freedom of Information Act. Litigation has resulted in constitutional rulings mandating access to judicial proceedings and documents. The rulings are mostly limited to the judicial branch because it is not covered by the FOIA.[1]

Overall, the First Amendment provides an important backdrop to any discussion about the role of the government in the marketplace of speech, information, and ideas. Despite a lack of specific direction on access and dissemination, an appreciation of the First Amendment is vital to understanding any American information policy issue.

**Freedom of Information Act**

The second foundation for United States information policy is the Freedom of Information Act[2] (FOIA). Enacted in 1966, the FOIA permits any person to request any record in the possession of a federal agency. Of course, not all records must be disclosed in response to a request. Nine exemptions permit the withholding of records to protect legitimate government or private interests. Thus, national security information, trade secrets, law enforcement files, personal data, pre-decisional documents, and other categories of records can be withheld.

Several aspects of the FOIA are especially relevant. First, the Act established a culture of disclosure for government records. It took some years for this culture to take root, and bureaucrats still are not always happy to disclose what they often consider to be *their* information. However, the FOIA has become part of the standard toolkit for reporters, activists, citizens, and even elected officials. Agencies are aware of this, and the mere availability of the FOIA frequently results in disclosure of information without a request from the public.

Second, the FOIA makes government agencies accountable for disclosure decisions. Agencies must consider all requests received under the Act, and they must state a reason when denying access. Before enactment of the FOIA, disclosures were largely discretionary. An agency could withhold a record arbitrarily and without explanation. Today, a decision to withhold can be appealed to the head of the agency and ultimately to the courts. The courts have been crucial in enforcing fair implementation of the law.

Third, the FOIA supports public access to records, but until the 1996 Electronic FOIA Amendments, the law generally did not require agencies to disseminate records of public interest in the absence of a request.[3] The distinction between access and dissemination is a useful one. In this context, *access* refers to the process of making records available in response to a request. Without a request, no records are released. The FOIA is largely an access law, but it changed mildly in 1996 by adding more dissemination requirements.

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[1] See generally Robert Gellman, *Public Records – Access, Privacy, and Public Policy: A Discussion Paper*, 12 Government Information Quarterly 391, 398-99 (1995).

[2] 5 U.S.C. §552.

[3] The FOIA always required that agencies publish general information about administrative organization, procedures, rules, statements of general policy, and final decisions. See 5 U.S.C. §552(a)(1) & (2). The requirement is important, but it largely reflects previous law and practice.

*Dissemination* refers to the active distribution of information through publication on paper, magnetic tape, CD-ROM, or through a computer network. For complex databases commonly maintained throughout government, digital availability is essential. The 1996 FOIA amendments required agencies to affirmatively publish more information through electronic reading rooms. For example, if an agency receives three or more requests for the same records, the agency is supposed to put those records on its website.[4] One consequence of active dissemination is a significant reduction in the number of FOIA requests at some agencies. A good example comes from the Federal Bureau of Investigation.[5] Some records released under previous requests that are the subject of significant public interest can be read online. Subjects of available files include Leon Trotsky, Pablo Picasso, Rudolph Nureyev, and Elvis Presley.

Fourth, the FOIA permits agencies to charge fees for responding to a request. However, the law is not intended to recover all costs of processing, and fee waivers are supposed to be liberally granted. The fee structure is complex, but fees for most users are limited to the cost of searching and copying.[6] In other words, fees cannot exceed the direct cost of providing the records and cannot be based on the market value of the information. The pricing of FOIA records at the cost of providing the records is a crucially important policy.

The FOIA is a useful mechanism for making government records available to the public. However, the law is insufficient to meet all public needs for government information, and it is sometimes administered indifferently by the agencies. The Internet and the affirmative publication of government information that it supports have reduced the importance of the FOIA, but the law remains an important feature of U.S. dissemination policy. It remains the only formal mechanism that can force federal agencies to disclose information that requesters want.

**Copyright Act**

The third foundation for U.S. information policy is the Copyright Act. Copyright protection is not available in the United States for any work of the United States Government.[7] This is a major difference between the United States and many other countries.

The purpose of the U.S. copyright prohibition is to place federal government information in the public domain. The public interest is served by keeping governmentally created works as free as possible of potential restrictions on dissemination. Although printing is used less frequently as a means for dissemination in the Internet era, the policy supporting unrestricted redissemination of government

[4] 5 U.S.C. §552(a)(2)(D).
[5] See <www.fbi.gov>.
[6] Fees for representatives of the news media and for educational or noncommercial scientific institutions are limited to copying costs only. Fees for commercial requesters include search, copy, and review costs. All others pay only search and copy costs. All fees can be waived if disclosure of information is in the public interest. 5 U.S.C. §552(a)(4)(A)(ii) & (iii) (1988).
[7] 17 U.S.C. §105.

information is illustrated by the long-standing statutory requirement that the Government Printing Office must sell copies of printing plates used to print government publications.[8] Anyone may reprint a government document in any way and at any price. It has always been common for government publications to be privately reprinted.

The prohibition against government copyright is complementary to the First Amendment's policy against government interference in the marketplace for ideas. The U.S. government is the largest single producer, collector, consumer, and disseminator of information in the United States.[9] Much of the information produced by the government is routine or of little general interest. Nevertheless, there can be a political content to even the most ordinary government document or economic statistic.

An incident in Britain illustrates the power of government copyright. In 1993, the Queen of England sought damages for copyright infringement from a British newspaper that published the text of her annual Christmas message two days before it was broadcast.[10] In reporting on this incident, the New York Times stated that it came at a time when the royal family was said to be incensed over press reporting about the Queen's children.[11] The lawsuit was quickly settled when the newspaper agreed to print a front-page apology and to donate 200,000 pounds to charity.[12] The incident shows that government copyright can be used to control or affect the flow of official information, punish those who infringe on a copyright, and accomplish or justify other objectives – political or otherwise – that may be unrelated to a specific use of information.[13]

The President of the United States could not use the copyright laws to do what the Queen of England did. For the United States, this certainly is the proper result. It is far better to allow all such government information to be unrestricted than to attempt to separate out data with political content. Political control over information is impermissible because it will likely be used someday for a political purpose.

Since all federal information is in the public domain, and since most information is accessible under the FOIA, federal agencies should not be able to exercise any type of monopoly control over federal information. Consider, for example, the National Technical Information Service (NTIS), a Department of Commerce clearinghouse for the collection and dissemination of scientific, technical, and engineering information.

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[8] 44 U.S.C. §505 (1988). The price for duplicate plates may not exceed "the cost of composition, the metal, and making to the Government, plus 10 per centum".

[9] See OMB Circular A-130 on the Management of Information Resources at §7a (Nov. 28, 2000) <http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html>.

[10] William E. Schmidt, *Queen Seeks Damages from Paper Over a Speech*, New York Times, Feb. 3, 1993, at A3. The Queen's speech was recorded in advance for broadcast, and copies were sent out to radio and television stations with the understanding that the contents would remain secret until Christmas day.

[11] Id.

[12] Richard Perez-Pena, *Chronicle*, New York Times, Feb. 16, 1993, at B7. The newspaper also agreed to pay the Queen's legal costs. Suzanne O'Shea, *The Queen Accepts the Sun's Pounds Sterling 200,000 Apology*, Daily Mail (London), Feb. 16, 1993.

[13] Immediately following publication of the speech by The Sun, the paper's press accreditation to photograph the royal family attending church on Christmas day was withdrawn. Alan Hamilton, *Editor Links BBC Worker to Leak of Royal Speech*, The Times (London), Dec. 24, 1992.

Even through NTIS must by law finance its activities entirely through the sale of publications, NTIS is unable to copyright those publications. Anyone who acquires an NTIS publication can reprint it as they please.[14]

NTIS offers a case study in the difficulty of sustaining a fully self-supporting government dissemination service in the absence of copyright. Sales of its information products continue to decline, and the agency faces significant financial difficulties. The Secretary of Commerce proposed to close the agency in 1999, but Congress did not act on the proposal.[15] It is unclear how long the agency can survive its financial problems and the continuing inroads of the Internet in its business. The recovery of overhead expenses through the sale of publications is inconsistent with the principle of marginal cost pricing for information products and with the policy against the copyrighting of federal government works.

Despite the fundamental importance of the prohibition against government copyright, there are countervailing forces. First, state governments may copyright data. The statutory prohibition extends only to the federal government. Some states use copyright to restrict access to state records and to set high prices for information. One state even copyrights its statutes.[16] This may violate basic public policy principles by restricting the ability of citizens to find out what the law is or by requiring them to pay high prices for copies.

Whether freedom of information laws conflict with copyright laws is a difficult question.[17] A federal appeals court recently decided that there is no conflict.[18] The State of New York has an open records law. A New York county sued a commercial information company for violating the county's copyright in its official tax maps. The company republished the maps without permission. In a controversial decision, the court found that the county's copyright was valid despite the state law that required disclosure of the maps. The court decided open records law only addressed disclosure and does not prohibit a state agency from placing restrictions on how a copyrighted record could be subsequently distributed.

What will happen as a result of this decision will be interesting to watch. Copyright law does not prohibit all subsequent uses of copyrighted information. However, if a newspaper or website obtained a state record under a freedom of information law or through a leak and reproduced the record, the state could conceivably sue for violating its copyright. Some state records have a high degree of political content (e.g., a draft budget). Other records may be more commercial in nature (e.g., a textbook produced by a school district). Whether these or other possible distinctions will make a difference to

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[14] An attempt was made in 1976 to give NTIS the authority to copyright information, but the proposal was ultimately defeated in the Congress. See House of Representatives Report No. 94-1476, reprinted at 17 U.S.C. §105 note.

[15] See General Accounting Office, *Information Policy: NTIS' Financial Position Provides an Opportunity to Reassess Its Mission* (2000) (GAO/GGD-00-147).

[16] See West's Colorado Revised Statutes Annotated §§2-5-115, 2-5-118(b)(II).

[17] For an interesting discussion of the interplay between state freedom of information law and copyright, see John A. Kidwell, *Open Records Laws and Copyright*, 1989 Wisconsin Law Review 1021-1031.

[18] *County of Suffolk v. Experian Information* (2nd Cir. July 25, 2001) <http://laws.findlaw.com/2nd/009011.html>.

the application of copyright laws to government remains to be seen. At the federal level, none of these problems can arise because the federal government cannot copyright any of its works.

Second, at least some federal agencies have found ways to exercise copyright-like controls over data.[19] An example is the National Library of Medicine (NLM), an agency that for years restricted access to and charged royalties for use of a database containing abstracts of medical research articles. NLM justified its controls on the grounds that the database could be misused, but the argument was a pretext. There was no evidence of misuse.

How was NLM able to control an uncopyrighted database that should have been available under the FOIA? The answer is that a poorly-decided[20] FOIA case from 1976 allowed NLM to deny FOIA requests.[21] The decision effectively gave NLM the ability to restrict the database. The case illustrates the interplay between the FOIA and the Copyright Act. These two laws both support unrestricted use of government information. When the FOIA failed in the case of NLM, the agency was able to evade the policy in the copyright law. The 1996 Electronic FOIA Amendments effectively overturned the decision that NLM used to deny access to its database.[22]

Despite NLM's restrictions and royalties, a private sector market for NLM data still developed. The private sector had about half the market despite a higher price than NLM charged. Why would anyone pay more? The private sector offered superior software, better service, and more interconnections to other databases. People will pay more for a better product. The private sector added more value to the database than the agency. When NLM finally changed its policy and made its services available on the Internet for free, the marketplace dynamic shifted again. The NLM website quickly became one of the most heavily used on the Internet, and NLM began to respond aggressively to public demands. However, private services for the database still exist because NLM does not meet everyone's needs.[23]

The NLM example illustrates another point about government information activities. Federal agencies usually do a poor job of marketing and responding to market demands. They are often unable or unwilling to adapt quickly to the marketplace in the way that many private firms do in a competitive environment. When government data is available to redistributors outside the government, it increases the likelihood that public needs will be met. However, the private sector should not be viewed as the only alternate provider. Libraries and other non-profit institutions redisseminate government

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[19] See also Robert Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information*, 45 Syracuse Law Review 999 (1995).
[20] See Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, House of Representatives Report No. 99-560 at 35 (1986).
[21] *SDC v. Mathews*, 542 F.2d 1116 (9th Cir. 1976).
[22] Id. at 20.
[23] For a discussion of alternative suppliers for the Medline database, including fee-based and advertising supported services, see *Medline Interfaces and Related Resources* <http://www.ashburypress.com/resources.html>.

data to users whose needs are not satisfied by government services or by the private sector.[24]

**Paperwork Reduction Act**

The final foundation for federal dissemination policy comes from the 1995 amendments to the Paperwork Reduction Act.[25] The amendments added several general requirements for agency information dissemination activities. The amendments also demonstrate a legislative determination to prevent bureaucratic control of information that, despite laws to the contrary, remained a feature at some agencies.

The requirements are set out in four short paragraphs of the law. The first paragraph directs agencies to ensure that the public has timely and equitable access to the agency's public information. Agencies are supposed to accomplish this objective by encouraging a diversity of public and private sources for government public information and by providing timely and equitable access to data maintained in electronic formats. While the language is mostly symbolic, it is noteworthy that the law mentions both public and private sources equally.

The second paragraph tells agencies regularly to solicit and consider public input on agency information dissemination activities. The third paragraph requires agencies to provide adequate notice when starting, substantially changing, or ending significant information dissemination products. One purpose of these requirements is to make sure that government information users know when an agency plans to drop an information product or service in favor of a private sector equivalent. Similarly, private information companies will know if an agency decides to start a new, competitive product or service. The notification requirement assures that everyone can be heard and that a fair fight involving all interests can occur.

The fourth paragraph of the 1995 Paperwork Reduction Act Amendments prohibits agencies from engaging in four separate restrictive dissemination practices. I believe that this paragraph is the major information policy contribution of the law. General statutory encouragement to disseminate data is a useful idea. Over the years, however, federal agencies have found ways to circumvent existing laws and policies in order to maintain control over their information and its users. The amendments were expressly designed to prevent agencies from avoiding and evading openness policies for government information. The intellectual origin of the policies was a 1986 report from the House Subcommittee on Government Information.[26]

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[24] A good example of a non-profit information service is the Right-to-Know Network. RTK NET <http://www.rtk.net/> is a free service designed to empower citizen involvement in community and government decision making. It provides access to government and other databases, technical support, and training.

[25] 44 U.S.C. §3506(d)(1)-(4). The title of the Act has nothing to do with its information policy provisions. It was a legislatively convenient place to add the language.

[26] See Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, House of Representatives Report No. 99-560 (1986). This report was the first look at the information dissemination policy issues raised by computers and networks.

The first restriction prevents an agency from establishing an exclusive, restrictive, or other distribution arrangement that interferes with timely and equitable availability of public information to the public. This means no government monopolies, whether operated by an agency or by a private vendor acting on behalf of an agency. An agency can release data directly or through a vendor, but it cannot become a monopolist under either method.

The second restriction prevents an agency from restricting or regulating the use, resale, or redissemination of information. The ability to control secondary use is an important right of a copyright holder. Despite the inability to copyright data, some government agencies licensed government data users and kept them from redistributing the data to others. The practice flies in the face of the no-copyright policy for federal information, and Congress decided to stop it.

The third restriction prohibits fees or royalties for resale or redissemination of public information. As with the second restriction, the goal is to ban downstream controls of any sort.

The final restriction prevents an agency from establishing a user fee that exceeds the cost of dissemination. The policy of the FOIA is that a requester is charged no more than the cost of responding to a request. Some agencies established separate dissemination methods and charged higher fees. If there were no other sources, users had to pay what the agencies asked. These agencies behaved like a copyright holder, but they cannot do this anymore.

These provisions of the Paperwork Reduction Act stop agencies from engaging in information control practices that might otherwise be used for electronic information. Each provision was directly inspired by actions that agencies had engaged in despite other provisions of law that appeared to require open access and unregulated use. Only some agencies sought to control their information resources, and many agencies deserve considerable credit for positive dissemination efforts.

**Countervailing Pressures**

Nothing of a political nature moves in a straight line forever. Despite the legal structures and strong consensus supporting unrestricted use and dissemination of federal information, some development head in other directions. Here are some examples.

Database protection. Proposals for non-copyright protections for databases have been controversial in the United States for several years. A lack of consensus stalled any legislation. Some objections include fears that government databases and government generated facts might be subject to new types of protections and downstream restrictions.

Privacy. Government records contain a wealth of information about individuals. Most federal administrative records are protected against public disclosure by privacy laws. However, judicial records and state records often have less protection. The United States, along with many other countries, is struggling with the conflicts that arise when

personal information in court records and public registers can be made available over the Internet for unrestricted use.[27]

Electronic Records Preservation. The problems of the long-term preservation of electronic government records (including websites) uses remain unresolved. The National Archives and Records Administration (NARA) has been struggling with electronic preservation issues for years. NARA policies have generated a surprising amount of litigation by public interest groups.[28] No administrative, technological, or political responses appear on the immediate horizon.

FirstGov. Despite the clear statutory framework, government political and budgetary pressures sometimes create ownership issues. In 1999, President William Clinton announced that the federal government would establish a search engine for government websites within 90 days. The goal was to promote public access to federal Internet resources. Because of a lack of funds, the government accepted an offer from a private company for a free service offered through a public-private partnership.[29] Inexplicably, the agreement provided that the database, which is maintained in a proprietary format, will belong to the company within a few years.[30] The final resolution of the FirstGov search service is uncertain.

Contracting Out. Two decades ago, the private sector supported higher prices for government information so it could compete more easily. Industry eventually recognized that low prices for government data benefited the industry and that industry could compete by adding more value. However, industry has not lost interest in profiting from government information. A new approach increasingly supported involves the contracting out of entire information functions to the private sector. The private sector sells the information products and services to the government and then to other users using standard intellectual property controls. Examples include including satellite remote sensing, meteorology, and some state-sponsored geographic information systems. Cooperative research and development agreements between the federal government and the private sector often leave government-sponsored data or research under private ownership. A fundamental issue is identifying core government functions and services and then preserving public access.

State Activities. Unencumbered by the policies that limit federal information activities, at least a dozen states have established agreements with private companies to operate state websites and provide public information. An example is the Information Network of Kansas.[31.] It is managed by the Kansas Information Consortium, a private, for-profit

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[27] For a review of how personal data from government sources are used in the United States, see Robert Gellman, *Public Record Usage in the United States*, Paper presented at the 23rd International Conference of Data Protection Commissioners (Sep. 25, 2001), <http://www.personaldataconference.com/eng/contribution/gellman_contrib.html>.

[28] Websites that track preservation litigation and activities include the National Archives and Records Administration <http://www.nara.gov/records/grs20> and Public Citizen Litigation Group <http://www.citizen.org/litigation/briefs/articles.cfm?ID=543>.

[29] <http://firstgov.gov>.

[30] See Dipka Bhambani, *Who's Owner of FirstGov Database? Not Uncle Sam*, Government Computer News, Aug. 20, 2001 <http://www.gcn.com/20_24/news/16885-1.html>.

[31] <http://www.ink.org>.

organization. While 80 percent of the information is free, the remainder is accessible by paying a $50 annual fee plus a transaction fee. The state receives revenues that exceed operating expenses.[32]

Terrorism. The terrorism events of September 11, 2001, resulted in the removal of some previously public government information from websites and reading rooms.[33] Whether this is a temporary reaction or becomes a permanent restriction on access remains to be seen. The effect has been to reduce the amount and type of information made readily available, but basic policies remain unchanged.

Quality Controls. At the direction of Congress, the Office of Management and Budget recently issued guidance for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal agencies. The motivation behind the law was a heavy-handed attempt to create a new basis for challenging government regulatory actions. How it will affect the dissemination of information by agencies remains to be seen.[34]

**Conclusion**

The basic American policy of broad access, no government copyright, marginal cost pricing, and unrestricted use and disclosure for most federal records was fully in place just as the Internet became a mainstream tool for information access and dissemination in the mid 1990s. Without the option to control downstream uses or to charge for federal information, bureaucrats focused instead on releasing useful data to public users, companies, non-profit organizations, and others. The statutes set the framework, but many agencies aggressively jumped on the opportunity presented by the Internet to share their data freely with the public. Agencies learned that building broad constituencies of information users was more helpful than controlling information and trying to earn revenues.

By the late 1990s, the Internet had overwhelmed nearly everything in the information policy world. When the Library of Congress established the THOMAS Internet service[35] that provides free public access to a database of legislative materials, a few industry objections about unfair competition were ignored because of the robust public demand and support. When Internet access to Government Printing Office documents became a practical reality, GPO decided to ignore a 1993 law suggesting that it recover the cost of dissemination from users.[36] Any attempt to charge public users would have been uneconomic and politically unsustainable. The GPO Access service remains free to all.[37] Other agencies also rushed on their own to provide Internet access to their records. Longstanding information policies, together with the legislative changes in the

[32] See also Rebecca Fairley Raney, *Eclipsing the Sunshine of E-Government*, Online Journalism Review, Nov. 7, 2001 < http://ojr.usc.edu/content/story.cfm?request=661>.
[33] OMB Watch, a public interest group, maintains a list of removed materials. <http://ombwatch.org/info/2001/access.html>
[34] <http://www.whitehouse.gov/omb/fedreg/text/final_information_quality_guidelines.html>.
[35] <http://thomas.loc.gov>. The service is named for Thomas Jefferson, third President of the United States.
[36] 44 U.S.C. §4102.
[37] <http://www.access.gpo.gov/su_docs/index.html>

mid-1990s, partially set the stage for an explosion of government dissemination activity, and the Internet provided the spark and the mechanism.

A widely supported constitutional, legal, and administrative basis exists for the disclosure of U.S. government information. Information now pours out of federal agencies and into the hands of users and resellers alike. However, federal government activities do not always form a seamless web. As is always the case with the law, information policy laws lag behind technology. Also, pressures for restrictions on data and for revenues are not far below the surface. Nevertheless, the American public is well served by the policies that make federal government information available to all without copyright, without high prices, and without restrictions. These policies have contributed to the vibrant American information marketplace.